

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY REAL ESTATE COMMISSION**

In the Matter of the Surety Fund Claim of:)	
)	
JOHN AND CATHERINE ROBERTS,)	
)	
Claimants,)	
)	
v.)	
)	
TRISTIANA GUNAWAN,)	
)	
Respondent.)	OAH No. 04-0267-RES
_____)	[S-24-006]

Proposed Decision

I. Introduction

This real estate surety fund case involves a claim by John and Catherine Roberts alleging conversion of trust funds against real estate salesperson Tristi Gunawan arising from the Roberts' unsuccessful sale of their residence in Anchorage. The case is brought under provisions of Alaska's Real Estate Surety Fund mechanism at AS 08.88.450 – .495. After being served with the Notice of Claim, Ms. Gunawan requested a hearing. An evidentiary hearing was held in accordance with the Administrative Procedure Act.¹ Based on the evidence from the hearing, it is recommended that the Roberts' claim be denied.

II. Facts

A. Findings of Fact

The APA and the surety fund mechanism require that a decision after a hearing be in writing and contain findings of fact and conclusions of law.² The following witnesses testified at the hearing in the sequence indicated: John Roberts and Tristi Gunawan. Claimants' Exhibits 1 through 12 and Respondent's Exhibits "A" through "G" were admitted as evidence. References are made in the findings to the audiocassette tape of the hearing record, which is not transcribed at this time. Evidence in this case established the following findings of fact.

¹ See AS 44.62.330-.640.

² See AS 44.62.510(a); 12 AAC 64.325.

1. John and Catherine Roberts are husband and wife, and they owned a residence located at 8615 Bell Place in Anchorage, Alaska. Their log home was built in 1954 on .8 acres. It was described as follows: "Great Alaskan 'Homestead' with room to grow! Nice mother-in-law apartment downstairs. Greenhouse, detached garage w/work area." On June 18, 2003, they listed their property for sale with Re/Max Properties through Vivian Brecheisen. Using the Multiple Listing Service, the property was offered for the price of \$275,000 with a minimum of \$2,500 earnest money required. Daniel and Emily Brooks sought to buy a residence in Anchorage. On July 11, 2003, they were approved for financing a \$265,000 residential property through a 90 % letter from their lender. The same day, they made an offer to buy the Roberts' property for \$269,000 through real estate salesperson Tristi Gunawan employed at Frontier Properties. \$1,000 was offered as earnest money. Included as part of the purchase contract was a Right and Duty of Inspection Addendum that the Brooks also signed on July 11, 2003. The addendum set a July 21, 2003 deadline for conducting the inspection, and it required written notice of defects to be brought to sellers' attention no later than July 25, 2003. The agreed Recording / Possession date after closing was September 15, 2003. (Direct and cross-exam of Roberts, tape 1A; Direct and cross-exam of Gunawan, tape 1A; Exhs. 5, A, B)

2. On July 19, 2003, the Roberts rejected the Brooks' original offer through making a counteroffer to sell for \$274,000 with a closing date of August 15, 2003, and requiring \$2,500 as earnest money to be held "in trust by selling broker." The home inspection term was changed from the original offer, and made the buyers responsible for that expense. On July 21, 2003, the Brooks rejected the \$274,000 counteroffer through making their own counteroffer to purchase the property for \$270,000 with all other terms of the 7/16/03 agreement to remain the same. The Roberts were given until 4:00 p.m. on July 23, 2003 to accept the counteroffer and convey a signed addendum to Gunawan. They accepted the \$270,000 counteroffer on July 23, signing the addendum at 12:25 p.m. that day. The counteroffer with the Roberts' signatures was faxed to Gunawan that evening. The Brooks added the final signatures to the counteroffer, acknowledging receipt of acceptance on July 24, 2003. (Direct exam of Roberts, tape 1A; Exhs. 5, 8, A, B, C)

3. The Brooks did not pay the earnest money to Gunawan until July 25, 2003. On that date, they issued a check in the amount of \$2,500 payable to Frontier Properties with a memo notation for "8615 Bell Place." Gunawan deposited the \$2,500 check in the Frontier Properties trust account at First National Bank of Anchorage (account # 30195044) on the date she received the check. According to Mr. Roberts, Brecheisen told him that Frontier Properties was supposed to maintain the

trust money. (Direct exam of Roberts, tape 1A; Direct and cross-exam of Gunawan, tapes 1A, 1B; Exhs. B, F)

4. The Roberts obtained a home inspection from Housemaster (Report No. 0306071). However, the purchase contract included a Right and Duty of Inspection Addendum allowing buyers to secure their own inspection. The addendum was signed by the Brooks on July 16 and signed by the Roberts on July 19. It originally gave buyers until July 25, 2003, to obtain their own inspection. Because the price was not fully negotiated until July 24, the parties re-negotiated the inspection addendum and set a deadline of August 5 for buyers to obtain their own inspection. Under paragraph 5 of the addendum, the buyers then had 3 days until August 8 to provide sellers with a written report of defects, and sellers had 3 days after receipt of the notice of defects to give written notice that they would proceed with the transaction in accordance with contractually identified options addressing the repairs. Representatives of both parties initialed the date changes for the addendum. All contract negotiations up to this point were made through the real estate licensees. (Direct exam of Roberts, tape 1A; Direct exam of Gunawan, tape 1A; Exhs. 6, B, C)

5. The Brooks obtained an inspection of the property at 8615 Bell Place through Quality Home Inspection Service on August 4, 2003. The inspection report dated the same day identified a number of Safety Hazards, Other Deficiencies and Recommended Upgrades. With regard to the attic and insulation in the roof system a comment from the report states: "Fiberglass batt and vermiculite insulation is present in the attic. Vermiculite insulation is known to contain asbestos fibers and may pose health risks. Contact a [sic] environmental company for testing and final determination of content. They will also be able to determine if mediation is warranted." (Direct exam of Roberts, tape 1A; Direct exam of Gunawan, tape 1A; Exh. D)

6. Ms. Gunawan communicated to Brecheisen the results of the August 4 inspection and proposed repairs. According to Gunawan, the contract was null and void after the parties failed to reach an understanding about repairs. Mr. Roberts testified at the hearing that the deal "fell apart" later. He did not establish by evidence that he acquired a possessory interest in the \$2,500 trust account monies given to Gunawan. Mr. and Mrs. Brooks later purchased a different house in Anchorage using Ms. Gunawan as their agent and utilizing the previously deposited trust money. (Direct exam of Gunawan, tape 1A; Exh. F)

7. Through a Rescission of Agreement to Purchase signed by Mr. and Mrs. Roberts on August 20, 2003, they sought to get the Brooks to turn over to them the earnest money. The agreement references the "Complete earnest money deposit of \$2,500, currently held in the selling

brokers escrow account.” The rescission proposal was on an MLS form with Re/Max identified but without the signature of anyone at Re/Max. The Brooks never signed the rescission, and Gunawan did not release \$2,500 to the Roberts. (Direct exam of Gunawan, tape 1A; Exh. 10)

8. By Addendum to Agreement to Purchase dated August 21, 2003, a day after the proposed rescission and “at the recommendation of [Brecheisen], the Roberts proposed an extension of time for closing until September 10, 2003. The proposed addendum includes: “Due to the conflicting inspection reports, repairs required for ‘Health & Safety’ and/or issues of building codes (not ‘grandfathered’ acceptable due to the construction date of the home in 1954) will be negotiated and an agreement/addendum to this contract acceptable to all parties written and signed by no later than Monday, August 25, 2003 at 10:00pm, Alaska Time.” [sic] The Brooks did not sign the proposed addendum. (Direct exam of Roberts, tape 1A; Direct exam of Gunawan, tape 1A; Exh. 11)

9. Mr. Roberts pursued a claim against Gunawan before the Anchorage Board of Realtors. The executive officer of that body informed Roberts that “there was no agreement so there is nothing to mediate,” effectively denying his claim. The Roberts then filed this surety fund claim against Gunawan alleging conversion of trust funds by Gunawan arising from their attempted sale of the property at 8615 Bell Place. (Direct exam of Gunawan, tape 1A; Exh. 12)

B. Procedure

The following considerations apply to the commission with regard to factual and legal conclusions in this case. The commission is acting in an adjudicative (quasi-judicial) capacity when reviewing a proposed decision by the administrative law judge. Because the APA applies, the commission is restricted in its deliberations to the evidentiary record created in the proceeding.³ Under AS 44.62.630, commission members may not engage in interviews with, or receive evidence or argument from a party or representative of a party, directly or indirectly, except upon opportunity for all other parties to be present. This prohibition does not preclude the administrative law judge from attending a closed executive session of the commission upon request, and it does not deprive the commission of discretion to receive assistance from the judge in its deliberations.⁴

If a commission member is contacted by a party or their representative, or otherwise exposed to information regarding this case which is not in the record, the individual should disclose the communication or conflict without tainting the deliberations of other commission members, and consider whether disqualification or withdrawal from this case is appropriate in accordance with

³ See Stein v. Kelso, 846 P.2d 123, 126 (Alaska 1993).

⁴ See AS 44.62.500; Storrs v. State Medical Board, 664 P.2d 547, 553 (Alaska 1983); Rosi v. State Medical Board, 665 P.2d 28, 29 (Alaska 1983).

AS 44.62.450(c) and AS 44.62.630. Finally, at this stage of the proceeding, the APA does not provide for briefing, argument, or other communications from parties to the commission until after a decision is made in accordance with AS 44.62.500.

Under the governing APA statute, the commission may act on this recommended decision by accepting it or rejecting it.⁵ If the commission accepts this decision, the document reflecting that action constitutes the final administrative order from which an appeal by right is allowed to superior court.⁶ If the commission considers evidence beyond the record from the hearing, it must reject the recommended decision in accordance with AS 44.62.500(c). Additionally under the statute, if the commission provides an opportunity for argument by a party during its consideration of this case, then it must allow the opportunity equally to all parties in a public forum. However, there is no necessity for the commission to take any additional evidence or argument.⁷ The commission may accept the decision in its entirety, thereby avoiding the need to review transcripts or other evidence.⁸

III. Discussion

A. Applicable Law

The central issue in this case is whether Ms. Gunawan committed conversion of trust funds. The following statutes provide for this claim:

Sec. 08.88.460. Claim for payment. (a) Subject to (e) of this section, a person seeking reimbursement for a loss suffered in a real estate transaction as a result of fraud, misrepresentation, deceit, or the conversion of trust funds or the conversion of community association accounts under the control of a community association manager on the part of a licensee licensed under this chapter shall make a claim to the commission for reimbursement on a form furnished by the commission. In order to be eligible for reimbursement by the commission, the claim form must be filed within two years after the occurrence of the fraud, misrepresentation, deceit, or conversion of trust funds or the conversion of community association accounts under the control of a community association manager claimed as the basis for the reimbursement. The form shall be executed under penalty of unsworn falsification and must include the following:

- (1) the name and address of each real estate licensee involved;
- (2) the amount of the alleged loss;
- (3) the date or period of time during which the alleged loss occurred;
- (4) the date upon which the alleged loss was discovered;
- (5) the name and address of the claimant; and
- (6) a general statement of facts relative to the claim.

(b) A copy of a claim filed with the commission under (a) of this section shall be sent to each real estate licensee alleged to have committed the misconduct resulting

⁵ See AS 44.62.500; *State of Alaska v. Schnell*, 8 P.3d 351, 356 (Alaska 2000).

⁶ See AS 44.62.560; Alaska R. App. Proc. 602(a)(2).

⁷ See *Wendte v. State of Alaska*, 70 P.3d 1089, 1095 (Alaska 2003).

⁸ See *Kimble v. State of Alaska*, 928 P.2d 1201, 1202 (Alaska 1996).

in losses, to the principal real estate broker employing a licensee alleged to have committed the conduct resulting in losses, and to any other real estate licensee involved in the transaction at least 20 days before any hearing held on the claim by the commission.

(c) Within seven days after receipt of notice of a claim under (b) of this section, each real estate licensee against whom the claim is made may elect to defend the claim as a small claims action in district court under District Court Civil Rules 8 – 22 if the claim does not exceed the small claims jurisdictional limit. An election to defend a claim in district court under the small claims rules may not be revoked by the real estate licensee without the consent of the claimant. Upon receipt of a valid written election under this subsection, the commission shall dismiss the claim filed with the commission and notify the claimant that the claim must be brought as a small claims action in the appropriate state court.

(d) A claimant under this section shall pay a filing fee of \$250 to the commission at the time the claim is filed. The filing fee shall be refunded only if

(1) the commission makes an award to the claimant from the real estate surety fund;

(2) the claim is dismissed under (c) of this section; or

(3) the claim is withdrawn by the claimant before the commission holds a hearing on the claim.

(e) If the claim is for a loss incurred as a result of acts or omissions occurring in the course of the licensee's practice of community association management, only the owners' association for which the real estate licensee practices community association management may file a claim under this section.

Sec. 08.88.470. Findings and payment. At the conclusion of the commission's consideration of a claim made under AS 08.88.460, it shall make written findings and conclusions on the evidence. If the commission finds that the claimant has suffered a loss in real estate transaction as a result of fraud, misrepresentation, deceit, or the conversion of trust funds or the conversion of community association accounts under the control of a community association manager on the part of a real estate licensee, the commission may award a claimant reimbursement from the real estate surety fund for the claimant's loss up to \$15,000. Not more than \$15,000 may be paid for each transaction regardless of the number of persons injured or the number of parcels of real estate involved in the transaction.

The tort of conversion consists of the intentional exercise of dominion or control over a chattel (personal property) which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.⁹ Chattel may consist of money or a negotiable instrument.¹⁰ In order to prevail on this cause of action, the aggrieved party must establish that he had a certain possessory interest in the chattel at the time of the wrongful

⁹ See Alaska Continental, Inc. v. Trickey, 933 P.2d 528, 536 (Alaska 1997).

¹⁰ See Dressel v. Weeks, 779 P.2d 324, 328 (Alaska 1989); Restatement (Second) of Torts §231 (1965).

act.¹¹ The following factors are considered in determining whether an actor converted another's chattel: the actor's intent to assert a right in fact inconsistent with the other's right of control, the actor's good faith, and the inconvenience and expense caused to the other party.¹²

The statutory maximum recovery from AS 08.88.470 includes applicable interest. See 12 AAC 64.325(c). Under AS 08.88.472, the commission has the right to charge the surety fund for costs of a hearing. Hearing costs also are subject to reimbursement by the commission from the licensee. However, neither the surety fund laws nor the APA give the commission authority to award costs or attorney's fees to a party in a surety fund case.¹³ Upon paying a claim, the commission is subrogated to a claimant's rights against the licensee under AS 08.88.490, and it may seek reimbursement from a licensee who is liable. A license may be suspended along with a surety fund award, and it may remain suspended pending repayment of the award or hearing costs to the commission in accordance with AS 08.88.071(b).

A claimant in a surety fund case has the burden to establish the essential elements of a claim by a preponderance of the evidence.¹⁴ In general, a preponderance of the evidence means something is more likely than not true. That is, there is a greater than 50 percent chance that it is true.¹⁵

B. No Enforceable Contract

The \$2,500 earnest money at issue was never physically possessed by the Roberts. They claim a right to the money through the trust account deposit made by Brooks with Ms. Gunawan. However, there is no enforceable purchase contract in this case. The deal fell through because there was no agreement between the parties about repairs. The Roberts therefore did not have a possessory interest in the \$2,500 earnest money.

Inspection of the property was a material term of the purchase contract. The parties' actions indicate that an inspection was contemplated after the \$270,000 counteroffer was accepted by the Roberts on July 23, 2003. The Brooks conducted their own inspection, as was their right under the contract. The Right and Duty of Inspection Addendum, as modified by the parties, gave the Brooks until August 5, 2003, to have an inspector of their choosing review the property for defects, code compliance and needed repairs. They obtained an inspection on August 4, 2003. (FF 4, 5)

¹¹ See McKibben v. Mohawk Oil Company, Ltd., 667 P.2d 1223, 1228 (Alaska 1983).

¹² See Alaska Continental, Inc. v. Trickey, 933 P.2d at 536 (citing Restatement Second of Torts § 222A(2)(b), (c) and (f)).

¹³ See Stepanov v. Homer Electric Ass'n, 814 P.2d 731, 737 (Alaska 1991); State v. Smith, 593 P.2d 625, 630-31 (Alaska 1979). Cf. Municipality of Anchorage v. Coffey, 893 P.2d 722, 731 (Alaska 1995)(attorney's fees in administrative appeal allowed on appeal per Appellate Rule 508(e), not Civil Rule 82).

¹⁴ See AS 08.88.465; AS 44.62.460(e).

¹⁵ See Dairy Queen of Fairbanks, Inc. v. Travelers Indemnity Co. of America, 748 P.2d 1169, 1170-72 (Alaska 1988).

The August 4 inspection report identified a number of safety hazards and other deficiencies, including a concern about vermiculite attic insulation, which "is known to contain asbestos fibers and may pose health risks." Despite overtures by the Roberts to make some of the repairs, the Brooks had reservations about buying the property. Communications between the real estate licensees apparently were breaking down. Most importantly, the Right and Duty of Inspection Addendum expressly acknowledges the condition that if seller and buyer have not come to an agreement concerning repairs by August 5, 2003, "this sale will be null and void and earnest money returned to Buyer without need for a rescission agreement." (emphasis added)

Even as late as August 21, 2003, through their proposed Addendum to Purchase Agreement, the Roberts acknowledged:

#2) Due to the conflicting inspection reports, repairs required for "Health & Safety" and/or issues of building codes (not "grandfathered" acceptable due to the construction date of the home in 1954) will be negotiated and an agreement/addendum to this contract acceptable to all parties written and signed by no later than Monday, August 25, 2003 at 10:00pm, Alaska Time. [sic]

(emphasis added) (FF 8) The Brooks never signed this proposed addendum, nor did a Re/Max representative.

In summary, once the transaction failed due to inspection and repair issues, the Roberts did not have a possessory interest of any type in the earnest money. The fact that the Brooks' money may have continued to be held in trust by Frontier Properties did not change this fact. Additionally, the fact that the Brooks may have used the \$2,500 held in trust after the Roberts deal failed in order to purchase another property does not change the outcome in this case.

IV. Conclusion

The buyers in this real estate transaction had a right to inspect the property. They obtained their own home inspection and conveyed to the sellers their concerns about needed repairs. The parties thereafter did not reach an agreement on repair issues. As a consequence, there is no enforceable contract in this case. Claimants John and Catherine Roberts lacked a possessory interest in the trust funds, and they did not meet the burden of proof to establish that Tristi Gunawan engaged in conversion under AS 08.88.460(a). It is recommended that the Real Estate Commission deny the Roberts' claim.

DATED this 20th day of January, 2005

David G. Stebing
Administrative Law Judge

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[S-24-006]

COMMISSION ACTION ON RECOMMENDED DECISION

Having reviewed the Recommended Decision in surety fund OAH Case No. 04-0267-RES, Roberts v. Gunawan, the Real Estate Commission hereby:

Option 1: adopts the Proposed Decision in its entirety under AS 44.62.500(b).

Date 3/14 By: _____
Chairperson U

Option 2: rejects the Proposed Decision under AS 44.62.500(c).

Date _____ By: _____
Chairperson

Option 3: rejects the Proposed Decision under AS 44.62.500(c), and orders that the entire record be prepared for commission review and that oral or written argument be scheduled before the commission prior to the final consideration of the decision in this case.

Date _____ By: _____
Chairperson