

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

In the Matter of the Surety Fund Claim of:)
)
SHEILA M. REED,)
Claimant,)
)
v.)
)
JANICE REDNALL and)
JACKIE DANNER,)
Respondents.) OAH No. 05-0056-RES
_____) Div. of Corp., Bus. & Prof. Lic. No. S-25-004

DECISION

I. Introduction

Sheila M. Reed filed a claim for damages on behalf of herself and her husband, Lee Reed,¹ from the Real Estate Surety Fund, naming Janice Rednall as the respondent. Ms. Rednall and her supervising broker, Jackie Danner, submitted responses to the claim.² The case was referred to the Office of Administrative Hearings.³

Ms. Reed's claim was denied in a decision on summary judgment, with the exception of a claim for \$10,050 in damages alleged to have resulted from the application of 3% of the sale price to the buyer's closing costs. The administrative law judge conducted a hearing on that aspect of Ms. Reed's claim on April 11, 2006. Based on the testimony at the hearing and the evidence in the record, the remaining claim for damages is denied.

II. Facts

Jackie Rednall, who had been working as a real estate agent since 2001, was acquainted with Sheila and Lee Reed. The Reeds located a house in downtown Anchorage that they were interested in buying, and Ms. Rednall agreed to assist them in purchasing the property as a consultant, but not as their agent. The sale closed in July, 2003, and the Reeds paid Ms. Rednall 1% of the purchase price in exchange for her assistance.⁴

¹ According to the Statement of Claim, Ms. Reed filed the claim on behalf of herself and her husband, Lee Reed. Mr. Reed filed an "Entry of Appearance" and is considered a co-claimant for all purposes.

² Ms. Rednall is the named respondent. Ms. Danner is an involved licensee, by virtue of her status as Ms. Rednall's supervising broker. As an involved licensee, Ms. Danner is a named party. See 12 AAC 64.310(a).

³ The referral occurred prior to July 1, 2005, and the case is therefore not governed by AS 44.64.060(e).

⁴ The Reeds asserted a claim against the surety fund based on Ms. Rednall's actions in connection with this transaction. The claim was denied in its entirety in a decision on summary judgment prior to the hearing.

At the same time, the Reeds were planning on selling a duplex they owned, located at 4521 Arctic Boulevard in Anchorage. Ms. Rednall agreed to assist them in that transaction as well, again without acting as their agent, for a fee of 2% of the sales price. Ms. Rednall provided information on comparable sales, gave her clients advice on an open house, and helped them set the sale price of \$335,000. The Reeds marketed the property for several weeks, but were unsuccessful in obtaining a buyer. The Reeds and Ms. Rednall met on August 2, 2003, and the Reeds agreed to retain Ms. Rednall as their agent for the sale of the Arctic Boulevard property. At that meeting, Ms. Rednall told the Reeds that if the buyer was not represented by an agent, she would charge a 3% commission.

Around the same time, Donald Lankard and Louresta Dodson approached Ms. Rednall and told her they were looking for a multi-family investment property as well as a single family residence. Before executing an agreement to act as their agent, Ms. Reed showed them the Reeds' property on Arctic Boulevard and they expressed interest, but indicated they felt the property was overpriced.⁵

On August 6, 2003, Ms. Rednall met with the Reeds and informed them that she had a prospective buyer, but that the buyer did not intend to make a full price offer. At that meeting, the Reeds and Ms. Rednall executed an exclusive sales agency agreement for the duplex, with a sale price of \$335,000 and a 6% commission to the agency.⁶ Ms. Rednall provided the Reeds a dual agency disclosure form along with the agency agreement.⁷ She suggested using 3% of the 6% total commission to negotiate with the buyers, a common tactic in the real estate business where only one agent is involved. The Reeds authorized Ms. Rednall to negotiate with the buyer, using 3% of sales price for that purpose.

⁵ Ms. Reed asserts, based on a post-closing conversation with Mr. Lankard, that Ms. Rednall told the buyers that the Reeds were selling because they were leaving town. (This information could suggest that the seller will accept a lower offer, in order to close in a timely manner.) However, Ms. Rednall testified, credibly, that she told the buyers that the Reeds were in Seattle (which they were at the time), not that that was the reason for the sale. She denied stating that they were selling because they were moving and pointed out that she had no reason to make such a statement. In light of the hearsay nature of Ms. Reed's assertion, the lack of any indication that Ms. Rednall would have had any reason to make such a statement, and the possibility that the buyers were mistaken about what they heard, the preponderance of the evidence does not support Ms. Reed's assertion.

⁶ Rednall Exhibits [hereinafter, RE] at 127. The written agreement failed to incorporate the prior verbal agreement regarding a reduction in the commission in the event the buyer did not have an agent.

⁷ RE 140-145. That Ms. Rednall had the Reeds sign a dual agency disclosure form does not necessarily mean that by that date she anticipated entering into an agency agreement with a buyer. By its terms, the dual agency disclosure form is conditional: it allows the selling agent to act as the buyer's agent "if a buyer client becomes interested in a seller client's property." RE 141 (emphasis added).

After the Reeds signed the agency agreement on August 6, 2003, Ms. Rednall returned to the buyers, who agreed to make a full price offer, if 3% of the 6% total commission was applied to their closing costs.⁸ Before presenting the Reeds with Mr. Lankard and Ms. Dodson's written offer to purchase on the morning of August 11, 2003, Ms. Rednall had Mr. Lankard and Ms. Dodson sign the dual agency form.⁹ Later that day, the Reeds accepted the offer and executed an earnest money agreement to sell the duplex to Mr. Lankard and Ms. Dodson at the listed price, with a 3% real estate commission (of the total 6% commission) to be applied to the buyers' closing costs.¹⁰ The property was appraised at the listed sales price¹¹ and was scheduled for closing on October 5, 2003.

About ten days before the scheduled closing, both Ms. Reed and Ms. Dodson had second thoughts about the deal. Ms. Reed called Ms. Rednall and expressed dissatisfaction with the provision for paying the buyer's closing costs.¹² Ms. Rednall explained that because the purchase money agreement called for that arrangement, it would have to be honored. The next day, Ms. Dodson called Ms. Rednall and said that she and Mr. Lankford wanted out of the deal. Ms. Dodson instructed Ms. Rednall to inform the Reeds that the buyers had lost some contracts and that they could not afford the property and wished to rescind the agreement.

Ms. Rednall contacted Mr. Reed.¹³ She explained to him that the buyers wanted to rescind the purchase money agreement because they were having financial difficulties. She told Mr. Reed that his wife had expressed misgivings about the deal, and that this was an opportunity for the Reeds to back out if they were dissatisfied. Mr. Reed insisted that the sale go through. Ms. Rednall informed the buyers of the Reeds' position. Believing that the buyers had the financial ability to perform, Ms. Rednall advised them to go forward. Mr. Lankard elected to proceed without Ms. Dodson, and the deal was closed in Mr. Lankard's name alone. The

⁸ Ms. Rednall did not recall the specifics of her conversation with the buyer. The Reeds argue that Ms. Rednall offered to apply the 3% to the buyer's closing costs before obtaining a counteroffer, and that this was inappropriate. However, Ms. Rednall already knew that the buyer would not make a full price offer, and she had authorization to negotiate price. The allocation of closing costs, and the method of paying for them, was a legitimate topic for discussion even in the absence of a counteroffer.

⁹ RE 140-145.

¹⁰ RE 133-138.

¹¹ RE 195.

¹² Ms. Reed testified that she questioned the necessity of such a provision, in light of the buyer's apparent financial ability to pay for the costs (she testified she had learned they were buying another property at the same time). Ms. Rednall testified that Ms. Reed objected to the dual agency and to paying the buyer's closing costs.

¹³ Ms. Rednall testified that she attempted to contact Ms. Reed but was unable to reach her. Throughout the transaction, Ms. Rednall considered either of the Reeds fully authorized to make decisions for both. The Reeds did not at any time indicate to the contrary.

settlement statement reflects that the amount due to the seller was reduced by 3% of the sale price, and that a like amount was credited to the buyer's closing costs.¹⁴

III. Discussion

Alaska law provides that the commission may award reimbursement from the surety fund for a loss resulting from fraud, misrepresentation or deceit by a licensee in connection with a real estate transaction.¹⁵ A misrepresentation is a false or misleading statement of a material fact, or the omission of a material fact. To be eligible for an award, the claimant must show an intentional misrepresentation, that is, a misrepresentation made with the intent of inducing reliance contrary to the other party's interest.¹⁶

In this case, Ms. Rednall promised the Reeds she would take only a 3% commission if the buyer was not represented by an agent. The Reeds argue that in obtaining their consent to apply an additional 3% of the sale price to the buyers' closing costs, Ms. Rednall misrepresented the buyer's willingness and ability to purchase the property at the listed price.

A. Ms. Rednall Did Not Misrepresent the Buyers Willingness to Pay the Listed Price

Ms. Rednall testified that before she obtained their consent to apply 3% of the sales price to the buyers' closing costs, she informed the Reeds that the prospective buyer was unlikely to make a full price offer. The Reeds contend that she did not, and that the omission of this information was a material misrepresentation.

Ms. Rednall's testimony on this point was consistent and clear. Although both the Reeds disputed it, their testimony was not persuasive: Ms. Reed recalled that the buyers had expressed concern about the rental history of the units, which indicates that she was aware that they considered the price too high, and Ms. Reed also testified that she understood that the 3% would only be used if the buyer specifically asked for it, which indicates that the buyer's willingness to offer the listed price had been discussed.

For the foregoing reasons, the preponderance of the evidence is that Ms. Rednall informed the Reeds of the buyers' disinclination to make a full price offer, before obtaining their consent to apply 3% of the sales price to the buyers' closing costs.¹⁷

¹⁴ RE 217, line 207.

¹⁵ AS 08.08.470.

¹⁶ State, Real Estate Commission v. Johnson, 682 P.2d 383 (Alaska 1984).

¹⁷ Even if she failed to disclose the buyers' unwillingness to pay the listed price, the Reeds were not thereby injured. To the contrary: failing to disclose that information would make it less likely that the Reeds would agree to apply a portion of the selling price to the buyers' closing costs.

B. Ms. Rednall Misrepresented the Buyers' Ability to Pay

Ms. Rednall's affidavit and testimony establish that at the time the earnest money contract was signed, Ms. Rednall had confirmed that the buyers were well qualified. Shortly before closing, however, Ms. Dodson informed Ms. Rednall that due to the loss of some contracts the couple could no longer afford the property, and instructed her to pass on this information to the Reeds. Ms. Rednall does not dispute that she did as instructed. Thus, unless the buyers actually had some financial problems, or Ms. Rednall informed the Reeds that she was merely conveying Ms. Dodson's assertions to that effect, Ms. Rednall's statements to the Reeds misrepresented the buyers' ability to pay.

Ms. Rednall did not establish that she specifically informed the Reeds that Ms. Dodson had asserted the couple was having financial problems but that she had no knowledge whether any such problems existed. The preponderance of the evidence is that no such financial problems existed. First, Mr. Lankard closed without Ms. Dodson's participation; plainly, her participation would have substantially improved the buyers' financial profile. Second, Ms. Rednall's own testimony and actions indicate that she doubted Ms. Dodson's claims: Ms. Rednall testified that from the first time she spoke with the couple, they had expressed the opinion that it was overpriced. She had several conversations with their lender, and she believed that price was the primary reason for their reluctance; indeed, she advised them to close precisely because she did not believe they had grounds for walking away from the deal. Third, Ms. Reed testified that Mr. Lankard denied, after closing, that the couple had any financial problems.

For these reasons, the preponderance of the evidence is that when Ms. Rednall informed the Reeds that the buyers were having financial difficulties and did not want to close for that reason, she misrepresented their ability to pay.

C. Ms. Rednall Did Not Intend to Induce Reliance Contrary to the Reeds' Interest

Although the preponderance of the evidence is that Ms. Rednall doubted Ms. Dodson's claim of financial difficulties, this does not mean that Ms. Rednall knew it to be false, or that she intended to induce the Reeds to rely on it to their detriment. In this case, while Ms. Rednall may have doubted Ms. Dodson's claim of financial problems, it is apparent that Ms. Rednall did not intend the Reeds to rely on that claim to their detriment: to the contrary, by informing Mr. Reed that the buyers were claiming to have financial problems and were looking to back out of that deal, Ms. Rednall gave the Reeds an opportunity to avoid the aspect of the sale that they are now objecting to.

Mr. Reed asserts that Ms. Rednall did not inform him, in their conversation about the buyers' alleged financial difficulties, that the Reeds could have walked away from the deal based on that request. That Ms. Rednall would have failed to mention that possibility, given the fact that both Ms. Dodson and Ms. Reed had expressed misgivings, is unlikely. Mr. Reed's denial that Ms. Rednall informed him that the Reeds could back out of the deal was not persuasive.¹⁸ The preponderance of the evidence is that Ms. Rednall informed Mr. Reed that the transaction could be cancelled at no cost to the Reeds.

D. Ms. Rednall Did Not Engage in Intentional Wrongdoing

This case revolves around several conversations the Reeds and Ms. Rednall had during the time period from August 2-11, 2003. It appears that there were two crucial conversations, on August 2 and 6, 2003. All three participated in the both conversations.¹⁹

The testimony indicates that during the first of these conversations, on August 2, 2003, Mr. and Ms. Reed reached an agreement with Ms. Rednall that if the property sold to a buyer not represented by an agent, she would charge a 3% commission. A reasonable person in the Reeds' position would have understood that commitment to mean that if the buyer was not represented by an agent other than herself, Ms. Rednall would charge a 3% commission.

It is unclear whether Ms. Rednall was contacted by Mr. Lankard and Ms. Dodson before or after the August 2, 2003. The testimony suggests, however, that after that conversation, and before August 6, 2003, Ms. Rednall showed Mr. Lankard and Ms. Dodson the property and determined that they were unwilling to make a full price offer. If that is so, then when on August 6, 2003, Ms. Rednall induced the Reeds to sign the standard agency agreement calling for a 6% commission in the event of a sale to Ms. Dodson and Mr. Lankard, Ms. Rednall was changing the terms of what the Reeds reasonably understood to have been her own prior promise. Ms.

¹⁸ Mr. Reed testified that Ms. Rednall's testimony to this effect was the first time he had heard that they could have backed out of the deal. However, Ms. Rednall's affidavit, dated January 17, 2006, clearly stated that she told Mr. Reed during this conversation that "if he and his wife were unhappy with the contract they could get out of it now and put the house back on the market, either with me, someone else, or sell it themselves." Mr. Reed's failure to acknowledge Ms. Rednall's affidavit, filed in the case only months previously, casts doubt on the accuracy of his recollection of a conversation more than two and a half years earlier.

Mr. Reed testified that he never heard his wife say that she wanted out of the deal, but he did not deny Ms. Rednall's testimony that during the course of this conversation, Ms. Rednall told Mr. Reed that his wife had expressed misgivings, nor did he deny insisting that the deal close.

¹⁹ A third conversation occurred on August 11, 2003, in conjunction with the delivery of the offer. That conversation, according to Ms. Reed, was a cell phone call from Ms. Rednall, in Anchorage, to Ms. Reed, who at the time was in a car in Seattle with her husband. Mr. Reed was not a party to that conversation. It appears that in that conversation, Ms. Rednall informed Ms. Reed that the prospective buyers had submitted a full price offer. Whether Ms. Rednall informed Ms. Reed in the call that the offer included applying 3% of the sales price to the buyer's closing costs is unknown, but the offer itself, faxed to the Reeds later that day, expressly included such a provision.

Rednall, however, understood her own prior promise to have been that she would charge a 3% commission only if the Reeds themselves procured a buyer.²⁰ Because she had procured Mr. Dodson and Mr. Lankard, Ms. Rednall believed that the agency agreement, calling for a full 6% commission in the event of a sale to Ms. Dodson and Mr. Lankard, was entirely consistent with her prior promise. In short, from the Reeds' perspective, the "sacrificial lamb" (3% of the sale price) that Ms. Rednall offered up in payment of the closing costs had previously been promised to Mr. and Ms. Reed; from Ms. Rednall's perspective, it was hers to dispose of as she pleased.

In this light, it appears that core of the dispute is a misunderstanding over the nature of Ms. Rednall's initial commitment to the Reeds. Indeed, the Reeds themselves characterized their claim as fundamentally arising from a failure to communicate, not from intentional misrepresentation or wrongdoing. The Reeds were hard pressed to identify any specific misrepresentations or omissions that they relied on to their detriment, and their central point is that Ms. Rednall failed to adequately explain why she believed that the 3% of the sale price that was applied to closing costs would not have been paid to them even if it had not been applied to closing costs. But failing to adequately explain information that is provided is quite different from failing to provide information, or providing false information. The evidence indicates that Ms. Rednall's failure to adequately explain matters may have been negligent, or a breach of her obligations as the Reeds' agent, but that it was not intentional.

In any event, even if the Reeds' decision to allow 3% of the sale price to be applied to the buyers' closing costs could be attributed to intentional wrongdoing on Ms. Rednall's part, the claimed damages would not be attributable to her, because the Reeds declined to walk away from the deal when they had a chance to do so. That failure is attributable to their own conduct: first, Ms. Reed apparently did not communicate to her husband, as she did to Ms. Rednall, her concerns about the 3% going to the buyer's closing costs; second, Mr. Reed did not communicate to Ms. Reed the fact that they had the opportunity to back out of the deal. Because they elected to proceed to closing with knowledge that, in addition to a 3% commission, 3% of the sale price was being applied to the buyers' closing costs, the Reeds may not now object to the terms of the deal.

²⁰ Ms. Rednall testified her intent was to reduce her commission from the normal 6% to 3% only if the Reeds procured the buyer. However, her testimony indicated that her statement to the Reeds was that she would reduce her commission if the buyer was not represented by "an agent," and the Reeds would reasonably be expected this to mean that Ms. Rednall was promising to forego a commission even if she herself procured the buyer. That Ms. Rednall sought the Reeds' consent to apply the 3% to the closing costs is a strong indication Ms. Rednall believed that she had waived her right to a full commission.

IV. Conclusion

The claim for reimbursement of the portion of the sale price that was applied to the buyer's closing costs should be denied. The remaining items of damages claimed should be denied for the reasons set forth in the decision on dispositive motions.

DATED August 21, 2006

By: _____
Andrew M. Hemenway
Administrative Law Judge

REAL ESTATE COMMISSION ACTION

The Real Estate Commission, having reviewed the hearing officer's proposed decision In the Matter of Sheila Reed (OAH No. 05-0056-RES) hereby:

Option 1: adopts the proposed decision in its entirety pursuant to AS 44.62.500(b).

Date: 9/20/06 By: _____
Chairperson

Option 2: does not adopt the proposed decision, and pursuant to AS 44.62.500(c) remands this case to the same/different hearing officer to receive additional evidence on the following issues:

Date: _____ By: _____
Chairperson

Option 3: does not adopt the proposed decision, and pursuant to AS 44.62.500(c) orders that the entire record be prepared for board review and that oral/written argument be scheduled before the Commission prior to consideration of the proposed decision in this case.

Date: _____ By: _____
Chairperson

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:
Sheila Reed
A. Giralamo-Welp
Karen Lemay, Esq.
Sharon Walsh, AK Real Est. Comm.
Signature _____ Date 10-03-06