

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

In the Matter of the Surety Fund Claim of:	)	
	)	
DARLENE L. LARSEN,	)	
	)	
Claimant,	)	
	)	
v.	)	
	)	
GARY B. GREEN, <sup>1</sup>	)	
	)	
Respondent.	)	
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	)	OAH No. 05-0430-RES
	)	Commission No. S-25-010

**DECISION AND ORDER**

**I. Introduction**

This claim arises from a sale of residential property in Eagle River. The seller, Darlene Larsen, seeks \$6,116.95 in restitution from the Real Estate Surety Fund. Her primary claim is that licensed real estate salesperson Gary B. Green, who represented both parties to the transaction, engaged in fraud, deceit, wrongful misrepresentation, or conversion when he had work performed which she had not authorized or which exceeded the maximum she had agreed to pay, and then required her to cover these amounts at closing.

The licensed broker for this transaction was Joseph P. Shaw. Ms. Larsen is not alleging that Mr. Shaw engaged in any wrongdoing.

Attorney John C. Wendlant represented the seller, Ms. Larsen. Mr. Shaw represented himself. Mr. Green failed to appear or otherwise participate at the hearing. Administrative Law Judge David Stebing conducted and tape-recorded the hearing prior to his resignation from this office. Ms. Larsen, Mr. Shaw, and Mr. Crawford testified. Ms. Larsen offered thirteen exhibits

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<sup>1</sup> The claim originally identified Gary B. Green and James M. Crawford as licensees “involve[ed]” in the transaction, but alleged no misconduct by Crawford. It was later determined that Joseph Patrick Shaw was the responsible broker for this transaction, but Ms. Larsen likewise makes no claim against Mr. Shaw, naming him only as an involved person as required by 12 AAC 64.310(c). At times during this proceeding the caption has erroneously listed Mr. Shaw as a respondent. At the hearing, no allegations were made against Mr. Shaw and the claim caption has been reformed to reflect this fact.

and admitted into evidence without objection.<sup>2</sup> Three exhibits were offered by Mr. Shaw and likewise admitted without objection.<sup>3</sup>

## **II. Facts**

All facts presented below are drawn from the recorded oral testimony received at hearing, unless another source is given. The testimony received and the documents entered into evidence were in harmony and without contradiction.

In 2000, Ms. Larsen left Alaska and moved to Texas to accommodate her son's health needs. She had good, reliable renters who took care of her Eagle River house. The house was paying for itself.

In December 2002, Ms. Larsen was awakened late one night by a phone call from Mr. Green. He started talking about selling her house. Ms. Larsen told him to call back when she was not sleeping. Mr. Green called back during the day and introduced himself. He worked for Crawford Realty and had potential purchasers for her house. He thought he could sell the house for \$255,000.00. If she was interested, he would send her a listing agreement.

Mr. Green sent Ms. Larsen a listing agreement dated January 3, 2003. Ms. Larsen revised the listing agreement, limiting Mr. Green's exclusive listing privilege to three months, to expire on March 31, 2003.

Mr. Green neither initialed nor signed the revised listing agreement. However, he continued to move the transaction forward. On January 21, 2003, an agreement to purchase was signed and earnest money received from Charles R. Langrell. For this transaction, Mr. Green and the broker were considered agents of "BOTH THE BUYER AND SELLER UNDER DUAL AGENCY."<sup>4</sup>

Early in February, Mr. Green had several conversations with Ms. Larsen reminding her that she would need to pay for the appraisal "up front." Ms. Larsen provided Mr. Green with the requested money. He received a check for \$750.00, dated February 17, 2003, payable to Century 21 Crawford Real Estate. Ms. Larsen provided the check to cover the cost of the property appraisal (\$500.00) and the well permit (\$250.00).<sup>5</sup> On March 3, 2003, the check was converted into a cashier's check payable to and negotiated by Century 21 Crawford Real Estate.

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<sup>2</sup> Exhibit 1 – 13.

<sup>3</sup> Exhibit A – C.

<sup>4</sup> Exhibit 2 at 3 (emphasis in original).

<sup>5</sup> Exhibit 4.

In the meantime, a home inspection was conducted. Based on the inspector's recommendation Mr. Green drafted an addendum to the agreement to purchase. As he prepared it, Mr. Green's addendum had Ms. Larsen agreeing to pay for a septic system not to exceed \$8,500.00, drilling of a new well at \$29.00 per foot, and painting and trim work for \$1,750.00. Ms. Larsen authorized the well and septic but specifically changed the addendum to state that she did not authorize Mr. Green to arrange for the painting or to accept the paint bid he presented. Rather she would arrange for her own painting.<sup>6</sup> Ms. Larsen understood from Mr. Green that the quotes he presented were "firm;" that she could end up paying less than the quotes, but not more.

Ms. Larsen learned from Mr. Green shortly before closing that he had work performed that she had not authorized or which exceeded the maximum she had agreed to pay. Specifically:

Item	Authorized Amount	Actual Amount	Amount Not Authorized
Septic	\$8,500.00	\$9,512.00	\$1,012.00
Well	\$29.00 per ft.	\$29.00 per foot	
New Pump	\$000.00	\$2,604.95	\$2,604.95
Painting	\$000.00	\$3,075.00	\$3,075.00 <sup>7</sup>
Permit Rush Fee	\$000.00	\$150.00	\$150.00

The final septic invoice totaled \$9,512.00, \$1,012.00 more than the authorized \$8,500.00. Ms. Larsen testified that Mr. Green did not have the authority to exceed the bid price. There was no contrary testimony.

Regarding the new pump, Ms. Larsen testified that had Mr. Green sought authorization it would have been denied. The existing pump was less than six months old and there was no justification to install a new pump. The addendum faxed to Ms. Larsen identifies Hefty Drilling as the selected contractor having bid a price of \$29.00 per foot.<sup>8</sup> There is no authorization of a pump. Only the price per foot is confirmed in the fax cover sheet.

As to painting the house, Ms. Larsen specifically declined to authorize Mr. Green to accept any bid on painting the house. When she found he had incurred \$3,075.00 for painting which she had not authorized, she was surprised. For reasons not apparent in the record, in June

<sup>6</sup> Exhibit 3, 4. The record does not contain an addendum executed by Mr. Langrell. However, for issues presented it is not relevant whether or not he agreed to the addendum as modified by Ms. Larsen.

<sup>7</sup> At the time of settlement this is the amount presented to Ms. Larsen. This amount was later reduced to \$1,850.00.

<sup>8</sup> Exhibit 3.

of 2003, Ms. Larsen received a partial payment for painting from an unknown source in the amount of \$1,225.00, leaving \$1,850.00<sup>9</sup> in unauthorized expenses for painting the house.

In addition to the septic, pump, and painting expenses, Ms. Larsen testified that the escrow instructions were wrong and overstated the amount due to Mr. Green by \$650.00. The escrow instructions stated that \$1,390.00 would be taken from the proceeds of the sale to “cover expenses paid by [Mr. Green].” This was incorrect. The escrow instructions failed to account for \$500.00 of the \$750.00 check delivered to Mr. Green in February to cover permit and inspection fees.

Further, the escrow instructions included a \$150.00 permit rush. The evidence showed that Ms. Larsen provided the permit fees in a timely manner. Any rush fee incurred is attributable to Mr. Green’s delay in seeking the permit.

Ms. Larsen was not aware of these expenses until Mr. Green presented them to her shortly before closing. Faced with these new costs, Ms. Larsen explained she considered not going through with the sale, but Mr. Green informed her that if she did not go through with the sale, she would be personally responsible for the costs. This was only partly true. Mr. Green failed to inform Ms. Larsen of his own legal responsibility for the additional expenses because he exceeded his authority as an agent. Ms. Larsen believed she had to go forward with the sale. If not, the additional costs for the septic, well, painting and reimbursement to Mr. Green would come out of her pocket. If she proceeded with the sale the money could at least be taken from her proceeds of the sale.

The settlement date was April 16, 2003. Mr. Green’s real estate license lapsed three days earlier on April 13, 2003.<sup>10</sup>

Mr. Shaw and Mr. Crawford agree that Ms. Larsen should be reimbursed from the fund. Mr. Shaw has made several unsuccessful attempts to locate Mr. Green. Ms. Larsen was harmed by Mr. Green and “it needs to be made right”, according to Mr. Shaw.

### **III. Discussion**

To recover from the fund, Ms. Larsen must show a loss in a real estate transaction that resulted from a licensee’s fraud, misrepresentation, deceit, or conversion of trust funds while acting in his professional capacity as real estate licensee.<sup>11</sup> Ms. Larsen must prove her claim by a preponderance of the evidence. No party has alleged that Mr. Green was unlicensed when he

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<sup>9</sup> \$3,075.00 - \$1,225.00 = \$1,850.00.

<sup>10</sup> Testimony of Mr. Shaw and Mr. Crawford.

<sup>11</sup> AS 08.88.460(a).

committed the actions which give rise to his breach of duty. Accordingly, if Mr. Green engaged in fraud, wrongful misrepresentation, deceit, or conversion of trust funds in a way that caused loss to Ms. Larsen, then she should recover from the fund.

When Mr. Green incurred expenses on behalf of Ms. Larsen that were beyond his authority, he himself became liable for those expenses. One of the most basic principles of agency is:

An agent is not personally liable to a third party for a contract the agent has entered into as a representative of the principal so long as the agent acted within the scope of her or his authority and signed the contract as agent for the principal. If the agent exceeded her or his authority by entering into the contract, however, the agent is financially responsible to the principal for violating her or his fiduciary duty.<sup>12</sup>

As a professional agent, Mr. Green either knew or certainly should have known that he himself had legal responsibility for his ventures beyond his authority on behalf of his client.

This claim arose prior to January 1, 2005 and the common law of agency applies to the relationship between Mr. Green and Ms. Larsen.<sup>13</sup> Under the common law of agency, Mr. Green had a fiduciary duty to Ms. Larsen.<sup>14</sup> As a fiduciary, his obligation was to exercise the utmost good faith and fidelity toward Ms. Larsen, to fully disclose information which might affect her rights and influence her actions in all matters falling within the scope of his representation.<sup>15</sup>

When he failed to disclose to Ms. Larsen *his own* obligation to reimburse her for the wrongly-incurred costs—instead leading her to believe that she would be stuck with these expenses with no recourse if she failed to close—he violated his fiduciary duty “to fully disclose information which might affect the other person's rights.”<sup>16</sup>

The Surety Fund statute does not specifically authorize recovery for breaches of fiduciary duty, but it allows recovery for “fraud.” The relationship between these two categories of wrongdoing has been explained as follows by the Alaska Supreme Court:

The concepts of fraud and breach of fiduciary duty are closely related. This court has held that “[f]raud can be established by silence or non-disclosure when a fiduciary relationship exists between parties . . . . The fiduciary has a duty to fully disclose information which might affect the other person's rights and influence his action.” Carter v. Hoblit, 755 P.2d

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<sup>12</sup> *West's Encyclopedia of American Law*, “Agency” (2007); *See also Austin v. Fulton Ins. Co.* 498 P.2d 702, 705 (Alaska 1972) (quoting *Restatement of the Law, Agency (Second)*, § 401, comment d, at 239-40).

<sup>13</sup> Effective January 1, 2005, the common law of agency no longer applies to real estate licensee relationships. AS 08.88.675.

<sup>14</sup> *Black v. Dahl*, 625 P.2d 876, 880-81 (Alaska 1981).

<sup>15</sup> *Id.*; *Carter v. Hoblit*, 755 P.2d 1084, 1086 (Alaska 1988).

<sup>16</sup> *Carter*, 755 P.2d at 1086.

1084, 1086 (Alaska 1988) (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 106, at 738-39 (5th ed.1984); *Wilkinson v. Smith*, 31 Wash.App. 1, 639 P.2d 768, 771-72 (1982)). The existence of a fiduciary duty allows a finding of fraud even where the fraud is committed by silence or non-disclosure, while the absence of a fiduciary duty precludes a finding of fraud unless the offender makes remarks which are either half true or which omit material information.<sup>17</sup>

In short, when Green withheld material information and thereby induced Ms. Larsen to cover debts for which he himself was responsible, the fact that he was a fiduciary establishes beyond question that his behavior constituted fraud. It may be that such behavior would be fraudulent even without a fiduciary relationship,<sup>18</sup> but the existence of the fiduciary relationship makes it unnecessary to resolve that closer question in this case.

When Mr. Green failed to tell his client of his own liability for work and charges that exceeded his authority, he committed fraud. This fraud caused Ms. Larsen to acquiesce in paying the following charges that were Mr. Green’s responsibility:

Septic	\$1,012.00
Pump	2,604.95
Painting	1,850.00
Rush fee	150.00
Previously paid fees not accounted for	<u>500.00</u>
TOTAL	\$6,116.95

For this loss she is entitled to recover from the fund.<sup>19</sup>

#### IV. Conclusion

Because Ms. Larsen incurred \$6,116.95 in damages directly attributable to Mr. Green’s fraudulent actions, Surety Fund claim S-25-010 is approved.

DATED this 9<sup>th</sup> day of February 2007.

By: Signed  
 Christopher Kennedy  
 Administrative Law Judge

<sup>17</sup> *Ben Lomond, Inc. v. Schwartz*, 915 P.2d 632, 634 (Alaska 1996).

<sup>18</sup> Even in the absence of a fiduciary relationship, fraud, misrepresentation, or deceit can be found on the basis of nondisclosure in some circumstances, such as where conduct is induced through a “literally true statement [that] omits additional qualifying information likely to affect the listener's conduct.” *Carter*, 755 P.2d at 1086; *see also*, *e.g.*, *Spence v. Griffin*, 372 S.E.2d 595, 599 (Va. 1988).

<sup>19</sup> Because the fraud justifies recovery from the fund for the full amount claimed, it is not necessary to reach Ms. Larsen’s other arguments for recovery. These allegations—that Mr. Green failed to properly account for trust monies, and that he failed to act in her best interest when he sold her home—were less fully developed at the hearing.

## Adoption

On behalf of the Alaska Real Estate Commission, the undersigned adopts the above decision in Case No. S-25-010 as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 15<sup>th</sup> day of March, 2007.

By: Signed  
Signature  
Vincent Gene DuVal  
Name  
Chairman, Real Estate Commission  
Title

[This document has been modified to conform to the technical standards for publication.]