

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

In the Matter of the Surety Fund Claim of:)
)
 ROGELIO F. SAN JUAN, JR.,)
)
 Claimant,)
)
 v.)
)
 KEVIN VAN ZANDT AND)
 RICHARD A. FULLER)
)
 Respondents.)

OAH No. 05-0911-RES
Commission No. S-26-005

**DECISION BASED ON GRANTING OF
MOTION FOR JUDGMENT**

I. Background

In this real estate surety fund case under AS 08.88.450 – .495, an evidentiary hearing was held on March 9, 2006. The case involves Rogelio San Juan’s purchase of an Anchorage residence located at 2370 Yorktown Circle through the efforts of real estate salesperson Kevin Van Zandt, an employee of Prudential Jack White / Vista Real Estate. Mr. San Juan alleges fraud, deceit and intentional misrepresentation and seeks damages of \$15,000, the statutorily allowed maximum. He represented himself throughout the proceeding. Mr. Van Zandt was represented by counsel. Prior to taking evidence, Mr. San Juan stipulated to the dismissal of real estate brokers who may have been involved in the transaction.

The presentation of Mr. San Juan’s case included the admission of exhibits 1 – 5¹ and his own testimony. In attempting to prove fraud, deceit and intentional misrepresentation by Mr. Van Zandt, San Juan alleged that transaction documents were altered (one a Department of Housing and Urban Development / FHA form), some were altered after the closing, conflicting contract addenda were prepared, and that the written disclosure statement was not given to him until after the closing. Some transaction documents were incomplete. San Juan also alleged that the home inspection report for the property was not part of the closing documents and that some

¹ Respondent’s Exhibit “E” was also admitted.
OAH No. 05-0911-RES

documents were changed for the closing without his consent to represent that there was no inspection.² He additionally alleged that a listing agreement was not prepared relating to sale of the property.

After the close of Mr. San Juan's case, Van Zandt's counsel made a motion for a directed verdict, arguing that San Juan had not made a requisite showing of damages necessary to support his claims. This case is governed by provisions of the Administrative Procedure Act (APA). The Rules of Civil Procedure, applicable in a court proceeding, do not strictly apply in an APA case. Civil Rule 50 (Motion for a Directed Verdict and for Judgment) nonetheless provides guidance in this case, although a verdict is rendered by a jury.³ After the motion was made, Mr. San Juan orally responded to it. The administrative law judge granted the motion. Before the proceeding went off record, the parties were advised that a written order would follow the ruling. This order provides the basis for the dismissal ruling.

II. Analysis

A. Fraud, Deceit and Intentional Misrepresentation

Fraud, deceit and intentional misrepresentation under AS 08.88.460(a) are related claims. They all include the element of damages. Under Alaska law, damages for fraud, deceit and intentional misrepresentation will only be allowed for pecuniary (monetary) loss.⁴ In addition, the law requires that such damages be proven as "reasonable and certain."⁵ The surety fund mechanism provides monetary damages as its only remedy.⁶ Based on these considerations, no recovery from the surety fund is allowed without a claimant proving the element of damages in a monetary amount with reasonable certainty.

² Attached documents from the hearing reflect some of these discrepancies. San Juan testified that he was not timely provided transaction documents from Van Zandt or the brokerage and that different documents were provided to him at different times. According to San Juan, some documents were divulged to him two months after the closing and some were never divulged. There was some confusion in the hearing proceeding concerning who was responsible to supervise Van Zandt as broker and who was involved in transactions involving 2370 Yorktown Circle. One broker sought his dismissal expressing disagreement "with the policy decision of the Real Estate Commission [in regulation] that the broker is an involved party who should always be named" as a party in a surety fund claim. San Juan testified that Van Zandt's broker was "looking for" the Right and Duty of Inspection Waiver (Exhibit 1) on July 7, 2005, after closing. Van Zandt faxed it to San Juan that day. San Juan signed it without dating it. Van Zandt reportedly added a backdated May 11, 2005, date for the signature. The sellers's signature on two documents (Exhibits 2, H) look suspiciously dissimilar.

³ State of Alaska v. Thompson, 612 P.2d 1015, 1017 (Alaska 1980).

⁴ The Alaska Supreme Court has made a limited exception for emotional distress damages in the context of fraud. Nelson v. Progressive Corp., 976 P.2d at 867-68. Mr. San Juan does not allege emotional distress damages.

⁵ Orsini v. Bratten, 713 P.2d 791, 794 (Alaska 1986).

⁶ AS 08.88.470.

B. Claimant Did Not Present a Prima Facie Case.

The claimant, Mr. San Juan, did not establish a prima facie case for fraud, deceit or intentional misrepresentation because the damages element is lacking. During the course of his case presentation, he presented no evidence of damages he suffered. When asked to respond to the motion, he stated that he suffered "moral damages." Mr. San Juan mentioned that the foundation of the house is not level. However, he did not provide reasonably certain damages for the cost of having to remedy that alleged problem.

Evidence at the hearing established that San Juan purchased the house in 2005 for \$218,500, and that he currently is selling the property with the house under contract for \$249,900 and closing is scheduled for April 21, 2006.⁷ According to San Juan, Mr. Van Zandt received more money than he was entitled to when San Juan bought the house. No trust account documents were introduced in the case.

III. Conclusion

Because of the dispositive nature of the ruling on Van Zandt's motion and the fact that the motion was orally made mid-hearing, the Real Estate Commission should make the final determination in this case. It is recommended that the Real Estate Commission deny Mr. San Juan's claim.

DATED this 12th day of March, 2006.

By: _____
David G. Stebing
Administrative Law Judge

⁷ The second sale of the house was handled by the same brokerage.
OAH No. 05-0911-RES

Adoption

This Order is issued under the authority of AS 08.88.470. The undersigned, on behalf of the Real Estate Commission and in accordance with AS 44.64.060, adopts this Decision Based on Granting of Motion for Directed Verdict as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance within 30 days after the date of this decision.

DATED this 26th day of April, 2006.

By: _____

Signature

Name

Chairperson
Title