

Procedure Act (APA)¹ and Real Estate Commission (the “commission”) regulations located at 12 AAC 64.280 – .325. Based upon the record assembled in this case, evidence from the hearing, and the applicable law, the Papes’ claims fall short of the standard for approving surety fund claims.

II. Facts

The following witnesses testified at the hearing:

1. Jerome Pape
2. Lorraine Pape
3. Joseph Miller
4. Lucinda Eckert
5. Elizabeth Guillory
6. John Weber
7. Mark Korting

Claimants’ Exhibits 1 through 21 and Respondents’ Exhibits A through V were admitted into evidence.² The record in this case consists of the testimony from the seven witnesses and the exhibits admitted into evidence. References are made in the findings to the audiocassette tapes of the hearing record, which are not transcribed at this time. Evidence in this case supports the findings of fact which follow.

Claimants filed two motions for summary judgment on March 20, 2006. The first of the two motions alleged that Re/Max Properties improperly released earnest money being held in its trust account, and the second motion alleged that Miller improperly released the same earnest money while temporarily acting as associate broker. On March 28, 2006, Miller filed his combined opposition to both motions; on the same day, claimants filed their response to Miller’s opposition. At the commencement of the hearing on April 6, 2006, ALJ Stebing denied both motions finding that genuine issues of material facts remained and the relief requested by the claimants could not be granted by way of summary judgment.³

¹ AS 44.62.330 – .640.

² Exhibit V, trust account documents at Re/Max, was filed after the hearing.

³ Applicable rule and law provide that motions for summary adjudication cannot be granted if there exist genuine disputes between the parties on issues of material fact

Jerome and Lorraine Pape owned at all pertinent times a residential 4-plex at 135 Lee Drive in Homer, Alaska. They listed the property for sale with broker Karen Berg-Forrester of Neal & Company, Inc., of Homer; the proposed selling (listing) price was \$250,000 with minimum earnest money of \$1,000. Joseph Miller, an associate broker at Re/Max Properties Inc., of Anchorage, Alaska sought to purchase the property as his own investment. On July 14, 2005, in his individual capacity, Miller delivered an offer to purchase the 4-plex for \$255,000 specifying an earnest money deposit of \$2,500; other than the earnest money which would be a credit at closing, no additional down payment was specified in the offer to purchase. Miller disclosed to the Papes that he was a real estate licensee and proposed that, as selling agent, no commission would be paid to him. The purchase and sale agreement was a standard Alaska Multiple Listing form.

Mr. and Mrs. Pape accepted the Miller offer on July 19, 2005. Earnest money in the amount of \$2500 was deposited by Miller in a Re/Max trust account. The obligation of buyer to close was contingent upon Miller obtaining an appraisal and financing for a loan. The original date to close the transaction was set for September 15, 2005. An appraisal of the property was issued on September 16, 2005.⁴ By addendum to the purchase contract, the closing date was extended until October 7, 2005. Miller's lender, working through Alaska State Mortgage, rejected the appraisal because of discrepancies and ordered a "field review." Miller then attempted to obtain other financing that would not require a new appraisal. The Papes granted a further extension of closing until October 21, 2005.⁵

Despite a good faith effort, Miller was unable to secure adequate financing through Alaska State Mortgage Company. Buyer and seller understood that the last day upon which this transaction could close was October 21, 2005. Because Miller was running out of time to secure financing, he directed Alaska State Mortgage on October 7, 2005 to transfer his loan application file to Advantage Mortgage.⁶ This second loan application was also unsuccessful in that it would require a twenty per cent down payment. Miller was seeking a zero down payment loan. By letter dated October 20, 2005 to seller's broker, Miller advised Mr. and Mrs. Pape that he was

⁴ Exhibit F.

⁵ Exhibit I.

⁶ Exhibit 6.

canceling the agreement⁷ to purchase; the letter was accompanied by a rescission agreement.⁸ Miller obtained a refund of the \$2500 earnest money from the Re/Max trust account on October 25, 2005.⁹ Mr. and Mrs. Pape filed a surety fund claim on December 2, 2005, against Miller and his broker, Mark Korting,¹⁰ seeking an award of damages from the real estate surety fund based on fraud and conversion of trust funds.

III. Discussion

A. Applicable Law

The central issues in this case are whether Mr. Miller and Mr. Korting engaged in fraud or conversion of trust funds in this real estate transaction. Under AS 08.88.460(a), a person seeking reimbursement for a loss suffered in a real estate transaction as a result of fraud or conversion may make a claim to the commission for reimbursement on a form furnished by the commission. After considering the claim, the commission will make written findings and conclusions on the evidence. If the commission finds that the claimant has suffered a loss in a real estate transaction as a result of fraud, misrepresentation, deceit, the commission may award a claimant reimbursement from the real estate surety fund for the claimant's loss up to \$15,000.¹¹ A real estate license issued under AS 08.88 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). When a real estate licensee is engaged in activities not requiring a real estate license, i.e. as buyer or seller, the surety fund is not intended to cover losses suffered by a party to the transaction; the surety fund exists to protect the public from wrongdoing by real estate licensees acting in their capacity as a real estate licensee.¹²

⁷ Miller's offer had been accepted; accordingly, as a matter of law, Miller could not revoke his offer after it had been accepted. The point of Miller's October 20, 2005 communication is that because he was unable to obtain satisfactory financing, he was released from a contractual obligation to close.

⁸ Exhibit 9.

⁹ Upon receiving notice of the surety fund claim, Miller then redeposited the \$2500 earnest money into the Re/Max trust account.

¹⁰ Despite the Papes' claim alleging fraud and conversion of trust funds by Korting in his capacity as the broker, the division of occupational licensing's Notice of Claim and Application to Submit Additional Evidence, apparently a form letter, states "the claimant in this matter sets forth no claim against you.

¹¹ AS 08.88.470.

¹² The evidence in this case supports a finding of fact that Miller acted in his individual capacity and not as a real estate licensee. However, the situation is blurred because the MLS purchase and sale agreement identifies Miller as the selling licensee and asserts that selling licensee represents the buyer (Miller). Further, Miller's earnest money was deposited into the trust account at Re/Max Properties. Monies in a trust account are not to be commingled with a broker's personal funds. 12 AAC 64.250.

The claimant in a surety fund case has the burden to establish the essential elements of a claim by a preponderance of the evidence in accordance with AS 08.88.465(d). Under the surety fund laws, a broker may not be found vicariously liable for the acts of a salesperson.¹³

B. The Fraud Claim

A claim based on intentional or fraudulent misrepresentation requires a showing that the licensee (1) made a false representation of fact, (2) knew or believed that the representation was false, did not have confidence in the representation, or knew that the basis for the representation was not as stated or implied, (3) intended that the claimant rely on the representation; and, that the claimant justifiably relied on the representation and was damaged as a result.¹⁴

Recovery is allowed for fraud if a knowing false representation, justifiable reliance and damage are established.¹⁵ The representation must involve a material fact, one “which could reasonably be expected to influence someone’s judgment or conduct concerning a transaction.”¹⁶ Fraud, misrepresentation or deceit may 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.”¹⁷ To support a recovery from the Surety Fund, a misstatement or nondisclosure must be “wrongful”; an innocent misrepresentation or innocent nondisclosure is insufficient to support a Surety Fund claim.¹⁸

Pape’s claim hinges on whether Miller or Korting knowingly made a false representation. The Papes argued that they were misled about Miller’s loan, e.g. his ability to obtain financing. The Papes may not have known about the kind of financing sought by Miller, but the Papes’ claim of being misled is an overstatement. Considering that it is the buyer’s task to find financing, so that the seller can be paid according to the terms of the transaction, the seller does not ordinarily control the type of financing to be obtained by the buyer.¹⁹ The buyer’s contractual obligation is to seek financing in a timely manner, in good faith, and to comply with

¹³ Rosenberg v. Moore, 3AN-99-08555 CI, 7/27/99 Decision and Order (Occupational Licensing case Moore v. Yoon, et al., No. S97-009).

¹⁴ Jarvis v. Ensminger, 134 P.3d 353, 363 (Alaska 2006).

¹⁵ Palmer v. Borg-Warner Corp., 838 P.2d 1243, 1248 (Alaska 1992) (citing W. Keeton, Prosser and Keeton on the Law of Torts §.105 at 728, 733-34 (5th ed. 1984)).

¹⁶ Cousineau v. Walker, 613 P.2d 608, 613 (Alaska 1980); Restatement (Second) of Torts § 538 (1977).

¹⁷ Carter v. Hoblit, 755 P.2d 1084, 1086 (Alaska 1988).

¹⁸ Alaska Real Estate Commission v. Johnston, 682 P.2d 383, 386-87 (Alaska 1984).

¹⁹ A seller could have some control over buyer’s financing, if the contract between buyer and seller so provided. The Pape-Miller contract did not give the Papes control over Miller’s choice of financing. In fact, Papes stated in their Claimant’s Response to Mr. Cahill’s Opposition to Summary Judgement that “Our agent may have prodded him (Miller) to get his financing in order, but it was **no concern to us** how that was done.” (emphasis added)

lender's reasonable requests. Miller did just that at Alaska State Mortgage, and later at Advantage Mortgage, but could not obtain the loan on the terms and conditions that he desired.

The inability of Miller to obtain an acceptable loan means that Miller was unable to remove a contingency of his obligation to close the transaction. If the Papes did not want Miller's obligation to close to be contingent upon Miller obtaining financing, then Papes needed to remove the financing contingency from the contract; the contract terms and conditions could not be changed after it had been fully executed, except by agreement of the parties. Miller's failure to timely obtain a loan with terms and conditions acceptable to him after a good faith effort does not translate into a misrepresentation. Korting had no involvement in Miller's efforts to obtain acceptable financing.

C. The Conversion Claim

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.²⁰ Chattel may consist of money or a negotiable instrument.²¹ In order to prevail on a conversion cause of action, the aggrieved party must establish that he had a present or future possessory interest in the chattel at the time of the wrongful act.²² The following factors are considered in determining whether a person converted another's chattel: the person'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.²³ Many courts have held that if a plaintiff is neither in possession, nor entitled to immediate possession of a chattel, the plaintiff may not maintain an action for conversion.²⁴

The chattel in this case is the \$2,500 earnest money deposited by Miller and held in trust at Re/Max.²⁵ To establish that conversion of trust funds has occurred, Papes would need to establish that they has a possessory interest in the funds at the time Miller withdrew the funds

²⁰ Alaska Continental, Inc. v. Trickey, 933 P.2d 528, 536 (Alaska 1997).

²¹ Dressel v. Weeks, 779 P.2d 324, 328 (Alaska 1989); Restatement, *supra*, § 231 (1965).

²² McKibben v. Mohawk Oil Company, Ltd., 667 P.2d 1223, 1228 (Alaska 1983); K & K Recycling, Inc. v. Alaska Gold Co., 80 P.3d 702, 717 (Alaska 2003)

²³ Alaska Continental, Inc. v. Trickey, 933 P.2d at 536 (citing Restatement Second of Torts § 222A (2) (b), (c) and (f)).

²⁴ See generally W. Prosser, Law of Torts § 15, at 93-95 (4th ed. 1971) wherein Prosser criticizes this position. Alaska had adopted the holding of the McKibben case, *supra*, that a future possessory interest is sufficient for a plaintiff to maintain an action for conversion.

²⁵ 12 AAC 64.180 requires that a real estate broker establish and maintain a trust account.

from the Re/Max trust account. For the Papes to have a possessory interest in the funds, they must show that they had a right to exert control over the funds to the exclusion of others.

The control of funds in a trust account is mandated by regulations and by the contract. Nothing in the applicable regulations²⁶ creates a possessory interest in the funds in favor of Papes. The contract provides that in the event of any controversy regarding the earnest money held by the broker, the broker may make the determination as to the cause of the failure to close the transaction and distribute the earnest money accordingly.²⁷ The last available date to close was October 21, 2005. The \$2500 refund of the earnest money was by Re/Max check dated October 25, 2005. Because the financing contingency was never satisfied or removed, Papes' potential possessory right to the earnest money did not mature. If the financing contingency had been satisfied or removed, and Miller failed to close, Miller would have defaulted under the contract, Papes' right to the earnest money would have matured, and the earnest money held in trust should then be released to the Papes.

IV. Conclusion

Jerome and Lorraine Pape did not meet the burden of proof to establish that Miller or Korting committed fraud or conversion of trust funds. Having failed to prove fraud or conversion, the Papes cannot demonstrate that they suffered a financial loss as a result of fraud or conversion. While it is clear that the real estate transaction in question was problematic and the property was off the market for longer than expected, neither fact can support the claim of fraud or conversion of trust funds. The Papes' claims for an award from the Surety Fund are DENIED.

DATED this 16th day of February, 2007.

Signed

James T. Stanley
Administrative Law Judge

²⁶ Trust accounts are regulated by 12 AAC 64.180-271.

²⁷ Exhibit 1, page 5, at paragraph 15, Purchase and Sale Agreement executed by Pape and Miller, July 19, 2005.

Adoption

On behalf of the Alaska Real Estate Commission, the undersigned adopts this decision 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 22nd day of March, 2007.

By: Signed
Signature
Rita Wilson
Name
Commissioner
Title

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