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

JOSEPH DOUGLAS, claimant v. ALAN K. WARD & MARK KORTING, respondents	))))))	Case No. OAH 06-0148-RES

DECISION & RECOMMENDED ORDER

I. Introduction

Joseph Douglas filed a claim against the real estate surety fund under AS 08.88.640, alleging that he was the victim of fraud, misrepresentation, deceit, or the conversion of trust funds on the part of Alan Ward and Mark Korting. The Real Estate Commission referred the claim to the Office of Administrative Hearings to establish the facts and recommend a decision. The parties stipulated on the record that there are no material issues of fact in dispute, and that the questions presented in the case are purely legal. The parties submitted written argument based on the agreed-upon facts. The administrative law judge recommends that the Real Estate Commission deny the claim. The case is now referred back to the Real Estate Commission for a final decision in the matter.

II. Facts

In his written brief, Mr. Douglas asserts the following facts, which the respondents do not dispute:

> In early March of 2004, my wife and I were looking for a single-family home to rent for our assisted living business. We looked in the 'Homes' for rent section of the Anchorage Daily News classified advertisements. One ad looked promising, for a 4 bedroom, 3.5 bath home in South Anchorage for $2150 per month. It was listed by Re/Max. I called the number and spoke with a gentleman who asked what I was looking for. I explained our assisted living needs and he proceeded to tell me about the unit. I asked for the address to drive by, and he said, "It's a zero lot line." I said, 'Okaaay.' He gave me the address and I went to look at it.
>
> A zero lot line is a two-family structure with each side owned separately. This unit was a townhouse-style, close to our home and looked like it was in good condition. We called the agent, Alan Ward, to set up a time to do a walk through.

Mr. Douglas appeared at the appointment to inspect the property, and a person from the agency overseeing assisted living facilities also inspected the property and determined that it was suitable for an assisted living home. Mr. Douglas and his wife then filled out an application to rent the property and gave Mr. Ward a check for $2150 as a deposit. On March 10, 2004, the parties

executed a residential lease agreement which was to begin March 15, 2004 and end May 31, 2005. The lease agreement contains a typographical error stating the term was to end May 31, 2004. The lease provides that the tenant will pay the last month's rent in $400 increments beginning May 1, 2004, and the final payment by September, 2004. Mr. Douglas did not notice the typographical error, but he was aware of the last month's rent provision when he signed the lease.

On March 14, 2004, Mr. Ward called Mr. Douglas and told him the ice maker in the unit's refrigerator wasn't working, but it would be fixed as soon as a part arrived. Mr. Douglas refused to accept the unit with a broken ice maker. Mr. Ward used an overnight express service to get the part shipped in, and he had the refrigerator working by March 16, 2004. Mr. Ward offered to reduce the rent by one day's worth to compensate Mr. Douglas for the day the ice maker was being fixed. Mr. Douglas, however, responded that he no longer approved the lease and had decided not to move in. Mr. Ward again tried to rent the unit, and then decided to sell it. After Mr. Ward found a buyer in June of 2004, litigation ensued between the parties.

Before the parties entered into a contract and lease agreement, Mr. Ward verbally disclosed that he was the owner of the property, and also the realtor offering it for lease, and that there was therefore a potential conflict of interest. Mr. Ward did not provide a written disclosure of the potential conflict.

Mr. Korting owns the Re/Max franchise in which Mr. Ward is an associate. Mr. Korting did not have any significant involvement in the transaction.

III. Discussion

In a claim upon the real estate surety fund,

> The claimant bears the burden of proof of establishing that the claimant suffered losses 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 real estate licensee and the extent of those losses. All facts shall be established by a preponderance of the evidence.[1]

In order to establish fraudulent misrepresentation in Alaska, Mr. Douglas must establish the following elements: (1) a misrepresentation of fact or intention, (2) made fraudulently (i.e., knowingly), (3) for the purpose of inducing another to act in reliance, (4) with justifiable reliance by the recipient, (5) causing loss.[2]

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[1] AS 08.88.465(d).
[2] *Anchorage Chrysler Center, Inc. v. DaimlerChrysler Corporation*, 129 P.3d 905 (Alaska 2006).

Mr. Douglas first asserts that because the home in question was a zero lot line or a townhouse style of home, it should have been listed in a different column in the newspaper than the one headed by the word "Homes." By placing the ad in a column where detached single-family homes usually appear, Mr. Douglas argues that Mr. Ward deceived him by baiting him into answering the ad for a single-family home, and then switching a zero lot line that is worth less.

Assuming that the act of placing the ad in the wrong column was a misrepresentation of fact that was made fraudulently for the purpose of inducing another to act in reliance, it is impossible to establish justifiable reliance in this case. Upon Mr. Douglas's very first call in answer to the ad, the person taking the call informed Mr. Ward that the home in question was a zero lot line home. Mr. Douglas then went and looked at the home, where it could plainly be seen to be a zero lot line building with another residential unit attached to it. Mr. Douglas then actually inspected the home with Mr. Ward present; there is no evidence that there was any effort made by Mr. Ward to conceal the existence of another housing unit attached to the one he showed to Mr. Douglas.

Reliance on an initial impression of what type of property was being offered was not justifiable when the false impression was unequivocally dispelled well before any transaction occurred. To say that Mr. Douglas was justified in leasing the premises in the belief that it was a single-family detached house, when he had been specifically told otherwise and had seen the property before agreeing to lease it, is simply an unreasonable proposition. It does not appear that Mr. Douglas asserts that he actually did believe the property to be a single-family home after his first phone call in response to the ad.

It also cannot be said that Mr. Douglas suffered any loss from the appearance or positioning of the ad. The person answering the phone when Mr. Douglas first answered the ad informed Mr. Douglas that the home was a zero lot line. At that point, if Mr. Douglas was not interested in such a property or if he felt the listed price was too high for this type of property, he had the option of hanging up. His loss would have been no more than the few minutes it took to make the call. From that point on, Mr. Douglas went forward with the deal with full knowledge of what kind of property was being offered. Mr. Douglas suffered no loss from the layout or positioning of the ad.

Mr. Douglas asserts that he was deceived by Mr. Ward's failure to disclose a conflict of interest as required by AS 08.88.391(a). Mr. Douglas has not explained how the failure to provide a written disclosure resulted in a loss. Further, Mr. Douglas admits that Mr. Ward provided a verbal disclosure before the transaction took place, and that Mr. Douglas understood that Mr. Ward owned

the property personally. While Mr. Ward did not provide the written disclosure, there was no intent to misrepresent or deceive, there was no actual deception, and there was no resulting loss.

AS 08.88.460(a) requires claimants to state the amount of their alleged loss. Mr. Douglas has not stated an amount that he believes he has lost, and it is unclear specifically why he believes he has lost anything. The essence of Mr. Douglas's claim appears to be that he signed a lease for $2150 per month for a property that he later decided was probably worth in the range of $1700 to $1900 per month. Mr. Douglas stated that he accepted Mr. Ward's lease amount "due to [Mr. Ward's] superior bargaining position as an associate broker with Re/Max and as an owner of unit." He states that "Mr. Ward created a false impression as to the value of the unit in question."

There is nothing in this case to indicate an imbalance of bargaining power. Mr. Douglas himself points out that there are many other properties available for rent in Anchorage. There is no apparent reason that Mr. Douglas could not have shopped around for a less expensive unit, or offered to rent the unit on better terms. If there was some reason that Mr. Douglas needed this particular property, that factor may support a higher market value.

Mr. Douglas complains that

> Mr. Ward runs ads with his smiling face and his name in large block letters—when you meet him, its like you already know him. On the back of his business cards he writes 'thank you for your trust.' To bolster the credibility of his ad he used the Re/Max name in bold type."

It is too much to ask that people in sales industries to scowl and use fine print for their names in promotional materials. This case presents no evidence of any conduct going beyond what a reasonable consumer would expect in an open market.

IV. Conclusion

Mr. Douglas has not proved by a preponderance of the evidence that he has been a victim of fraud, deceit, misrepresentation or conversion of funds or assets by either Mr. Ward or Mr. Korting.

V. Recommended Order

IT IS HEREBY ORDERED that the claim of Joseph Douglas against the Real Estate Surety Fund be DENIED.

DATED this 19 day of July, 2006.

By _____
DALE WHITNEY
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 44.33.010 and AS 44.17.010. The undersigned, on behalf of The Alaska Real Estate Commission and in accordance with AS 44.64.060, adopts this Decision and Order 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 with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days of the date of this decision.

DATED this 20th day of September, 2006.

By: _____
Signature
Barbara Ramsey
Name
Chairperson
Title

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:
T. Douglas
A. Ward
M. Korting
Sharon Walsh
Signature _____ Date 10-03-06