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:	)	
	)	
RICHARD FORRESTER, JR.,	)	
	)	
Claimant,	)	
	)	
v.	)	
	)	
WILLIAM BOLLING,	)	
	)	
Respondent.	)	OAH No. 06-0322-RES
	)	[S-26-010]

ORDER OF DISMISSAL

I. Introduction

This case is a claim against the Real Estate Surety Fund ("Fund"). William Bolling, a licensed broker, gave an opinion of value regarding real property at issue in divorce litigation to which the claimant, Richard Forrester, was a party. Mr. Forrester contends that Mr. Bolling deliberately understated the value of the property, and that this resulted in a property division that was less favorable to Mr. Forrester than it should have been.

Mr. Bolling denies that he gave a false opinion in the court proceeding. He further contends that the conduct alleged, even if it occurred, is not within the scope of the Surety Fund statute and cannot support a claim against the Fund. Since the second contention, if accepted, would make it unnecessary to devote time and expense to a hearing on the underlying claim, he has asserted it in a pre-hearing motion to dismiss.

The administrative law judge agrees that the allegations in this Surety Fund claim are outside the coverage of the Fund, and that it is appropriate to dismiss them without a hearing.

II. Facts

William R. Bolling is a licensed real estate broker with Gateway City Realty in Ketchikan, which he co-owns with Ray Matiashowski and Bob Jackson.[1] Ray Matiashowski is the brother of Teri Forrester.[2]

1 *Forrester v. Forrester,* 1KE-04-394 CI, Trial Transcript at 2.

Teri and Richard Forrester were married until June of 2005. On August 18, 2004, perhaps in connection with impending divorce proceedings, Mr. Bolling prepared a broker's opinion of value at Teri Forrester's request, calculating a market value of between $239,000 and $249,000 for a house the Forresters owned that has been called the Pandora's Lane property.[3] At the time he gave the valuation, he "assumed that there was a sale . . . about to occur."[4] He later prepared brief opinions of value for three other Forrester properties, two of them at Richard Forrester's request.[5] Only the Pandora's Lane valuation is at issue in this case.

In April of 2005 Mr. Bolling testified, apparently under subpoena, as a witness for Teri Forrester at the Forresters' divorce trial. He was questioned briefly about the Pandora's Lane valuation, and he confirmed that he had valued the house at $239,000 to $249,000 when he did his analysis the previous year.[6] He was not asked by counsel for either party to comment on whether the value might have increased in the time between the analysis and the trial.

In its findings of fact and conclusions of law entered shortly after the trial, the court valued the Pandora's Lane property at $240,000. It was one of the assets allocated to Teri Forrester.[7] As part of his obligation flowing from that court-ordered allocation, Mr. Forrester apparently later signed a quitclaim deed formally relinquishing any interest in the Pandora's Lane property.[8]

In late 2005 or early 2006, about sixteen months after the opinion of value, Gateway City Realty listed the Pandora's Lane property for sale at $299,000. On February 10, 2006, the house sold for $281,000.[9] This gross sale price in 2006 was 12.8% higher than the high end of the value range Mr. Forrester calculated in 2004.[10]

The essence of Mr. Forrester's claim in this case is the following allegation:

> I never had reason to believe Mr. Bolling would be deceitful. However, it is clear to me now that he intentionally under valued the home in order to benefit his business partner, Ray Matiashowski's sister, my ex-wife. The judge and I accepted Mr. Bolling's professional opinion of value although

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2 *Id.*

3 Trial Exhibit C.

4 Trial Transcript at 18.

5 Trial Exhibits A and B; Trial Transcript at 3-7.

6 Trial Transcript at 5-6, 18.

7 The outstanding debt associated with the property was also allocated to Ms. Forrester.

8 Forrester's response to motion to dismiss (June 7, 2006). While there is no formal evidence of the execution of a quitclaim deed, for purposes of this motion it will be assumed that one was executed.

9 These facts are not fully illustrated by exhibits, but are undisputed.

10 Mr. Bolling contends, but the record is not sufficiently developed to establish, that there were repair concessions lowering the net sales price to $268,600. Because the lower net sales price is not undisputed, it should not be used in evaluating this motion to dismiss.

> the subsequent sale was evident that the opinion of value was tremendously short.[11]

Mr. Forrester further alleges that the low valuation effectively cost him half of the difference between the value Mr. Bolling attributed to the Pandora's Lane house and its true value, as revealed by the sale.[12] For purposes of deciding the present motion, it will be assumed, without deciding, that these allegations are true.

III. Discussion

A. Resolution in Advance of a Hearing

Were this case to go to a hearing, Mr. Forrester would have the burden of proving by a preponderance of the evidence that he suffered a loss that can be reimbursed by the Fund.[14] He would first have to show that his claim is of the type covered by the Fund, and second, that he suffered a loss entitling him to reimbursement from the Fund. Mr. Bolling's motion addresses only the first threshold: whether or not Mr. Forrester's claim is within the coverage of the Fund.

The purpose of a hearing is to resolve issues of disputed fact. If facts that are not disputed establish that one side or the other must prevail, the evidentiary hearing is not required.[15] Accordingly, if Mr. Bolling can show by motion—relying only on undisputed facts or on facts alleged by the complainant he chooses not to contest for purposes of the motion—that he should prevail, he is entitled to a summary decision without the need to weigh additional evidence taken at the hearing.

In this case, the motion relies to some degree on documentary exhibits, and so it is, in effect, a motion for summary adjudication. Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.[16] Where there is room for differing interpretations of factual matters, all facts are to be viewed, and inferences drawn, in the light most favorable to the nonmoving party.[17] With respect to legal interpretations, the deciding body may draw its own conclusions and need not accept the views of any witness or party.

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11 Statement of Claim.
12 *Id.*
14 AS 08.88.465(d).
15 *See Smith v. State of Alaska,* 790 P.2d 1352, 1353 (Alaska 1990); 2 Davis & Pierce, *Administrative Law Treatise* § 9.5 at 54 (3d ed. 1994).
16 *See, e.g. Schikora v. State, Dep't of Revenue,* 7 P.3d 938, 940-41, 946 (Alaska 2000).
17 *Samaniego v. City of Kodiak,* 2 P.3d 78, 82-83 (Alaska 2000).

B. Scope of the Surety Fund Statute

The statute establishing the Real Estate Surety Fund allows people to seek reimbursement for losses suffered in "a real estate transaction" for certain listed wrongful acts "on the part of a licensee."[19] To recover from the fund Mr. Forrester must establish that the event in question was "a real estate transaction," and must establish that there was a wrongful act on the part of a licensee of the type covered by the fund. His claim does not meet either requirement.

1. Testimony not a real estate transaction

Mr. Forrester contends that Mr. Bolling's testimony was part of a "real estate transaction." The Surety Fund statute's definition of "real estate transaction" includes, in relevant part, "the transfer or attempted transfer of an interest in a unit of real property, an act conducted as a result of or in pursuit of a contract to transfer an interest in a unit of real property, or an act conducted in an attempt to obtain a contract to market real property."[20] Mr. Forrester's central contention is that a real estate transaction must have occurred because he eventually signed a quitclaim deed on the Pandora's Lane property and gave up his interest in it.[21]

While Mr. Forrester's quitclaim deed was "a real estate transaction," it is too remote from Mr. Bolling's court testimony for the court testimony to be deemed part of that transaction. After Mr. Bolling testified, the judge still had to weigh all the testimony and argument from all sources and make a decision before anything approaching a property transfer could take place. This intervening step makes the connection between the testimony and the later transaction too tenuous to support a Surety Fund claim.

Indeed, it would be poor policy, and a misapplication of the Surety Fund statute, ever to treat court testimony as conduct covered by the Surety Fund mechanism. There is a universally-respected common-law principle, dating from the sixteenth century, that witnesses testifying in court are absolutely immune from civil liability for what they say.[22] The purpose of this principle is to avoid self-censorship and distortion of court testimony by fear of retaliatory lawsuits.[23] Since a Surety Fund claim, if allowed, effectively causes civil liability on the part of the individual accused of wrongdoing, the common law policy applies in this context. While it was within the power of the legislature to abrogate the common law when it enacted the Fund

19 AS 08.88.460(a).
20 AS 08.88.990(11).
21 Forrester's response to motion to dismiss (June 7, 2006).
22 *See, e.g., Briscoe v. LaHue*, 460 U.S. 325, 330-34 (1983).
23 *Id.* at 333.

statute, there is no indication that it intended to do so. Without such an indication in the text or history of the statute, the statute should be construed to leave the common law immunity intact.[24] For this reason, court testimony should not be viewed as "a real estate transaction" within the coverage of the act.

2. Coverage of Fund limited to actions requiring a license

Read literally, the Surety Fund statute applies to all fraud, deceit, misrepresentation, or conversion of trust funds by licensees that are connected with real estate transactions.[25] Thus, if a licensee made a misrepresentation on the disclosure form in the sale of his own home, for example, a literal reading of the statute might suggest that the Surety Fund must answer for it.

To allow recovery from the Alaska Surety Fund for unscrupulous acts outside of the professional capacity of a real estate licensee would create problematic results. A literal interpretation of the statute would allow the possibility of recovery in any real estate deal to which a person who happened to be a real estate licensee was a party, expanding the number of claims that the Fund could be called upon to pay and turning the Fund into an insurer of private transactions rather than a guarantor of ethical behavior in the professional arena. While no Alaska cases have addressed the issues, cases from other jurisdictions argue convincingly that surety fund statutes should not be read so literally as to cover the private activities of licensees. For example, a Maryland real estate guarantee fund was statutorily established to provide relief to "any person aggrieved by any action of a real estate broker or real estate salesman, duly licensed in this State, arising out of a real estate transaction . . . ."[26] The Maryland Court of Appeals interpreted this statute to require that "in order for a licensee's loss causing conduct to be the basis of a claim against the Fund, that conduct must arise out of a transaction in which the licensee is acting in a capacity *for which a license is required.*"[27]

The Fund should not pay claims arising from property valuations because giving an opinion on the value of property does not require a real estate license. Alaska allows people who are neither real estate licensees nor certified real estate appraisers to perform valuations, requiring only that they do not hold themselves out as possessing certification.[28] Giving an

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24 *Id.* at 339-41 (U.S. Supreme Court declined, without evidence that Congress so intended, to construe the Civil Rights Act to abrogate the absolute common law privilege from civil liability for testimony given in court).

25 *See* AS 08.88.460(a).

26 *Sheppard v. Bay Country Realty, Inc.*, 465 A.2d 857, 858 (Md. 1983).

27 *Id.* at 860 (emphasis added); *see also Leishman v. Goodlett*, 608 S.W.2d 377, 378 (Ky. Ct. App. 1980) (disallowing recovery from the education, research, and recovery fund for loses suffered due to the fraudulent activities of a real estate agent acting in a private capacity to solicit a loan for a building project).

28 AS 08.87.340.

opinion of value about real property is not included in the statutorily delineated activities for which a real estate license is required.[29] Because the Fund should reimburse only claims arising out of the unscrupulous activity of persons acting in their professional capacity as real estate licensees, and valuation of property does not require a real estate license, the Fund should not reimburse claims arising out of the rendering of an opinion of value.

In this case, Mr. Bolling gave a broker's opinion of value in 2004 on Pandora's Lane,[31] and subsequently testified about that opinion. He was not required by either the Real Estate Commission or the Board of Certified Real Estate Appraisers to hold any license to perform these acts.[33] Because a license was not required for the type of work Mr. Bolling was doing, he was not working in his capacity as a real estate licensee when he provided an appraisal of the Forrester's home. Because Mr. Bolling was not working in the capacity of a real estate licensee, his actions are not within the coverage of the fund created to protect the public from wrongdoing by real estate licensees.

IV. Conclusion

The Real Estate Surety Fund is intended to provide reimbursement only for losses suffered as a result of real estate transactions executed by persons acting in their capacity as real estate licensees. When Mr. Bolling testified about his broker's opinion of value regarding Mr. Forrester's home, he was neither engaging in a real estate transaction nor acting in his capacity as a licensed real estate broker. Because Mr. Forrester cannot recover from the Real Estate Surety Fund any losses resulting from the valuation testimony, Mr. Bolling's motion to dismiss is GRANTED.

This decision does not address the merits of Mr. Forrester's claim that Mr. Bolling undervalued his home, and should not be interpreted to imply that the valuation was mistaken or wrongful.

DATED this 2nd day of August, 2006.

By: _____
Christopher Kennedy
Administrative Law Judge

29 AS 08.88.161.
31 Trial Exhibit C.
33 *See* AS 08.88.161; AS 08.87.340.

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 20th day of September, 2006.

By: _____
Signature

Barbara Ramsey
Name

Chairperson
Title

Non-Adoption Options

1. The undersigned, on behalf of the Alaska Real Estate Commission and in accordance with AS 44.64.060, declines to adopt this decision, and instead orders under AS 44.64.060(e)(2) that the case be returned to the administrative law judge to

take additional evidence about _____;

make additional findings about _____;

conduct the following specific proceedings: _____.

DATED this _____ day of _____, 2006.

By: _____
Signature

_____
Name

_____
Title