

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

SVEN WELIN)
Claimant,)
v.)
CHERYL MCGREGOR)
Respondent.)
_____)

OAH No. 06-0697-RES
REC No. S-27-001

NOTICE TRANSMITTING FINAL DECISION

Attached is the Alaska Real Estate Commission's decision in this matter, which the commission adopted at its March 15, 2007 meeting. Under AS 44.62.520, the commission's decision becomes effective 30 days after the attached decision is mailed or otherwise delivered to you.

A party may request reconsideration of the decision by filing a petition under AS 44.62.540 within 15 days after delivery or mailing of the decision. Send the petition requesting reconsideration to the following address:

Office of Administrative Hearings
Attn. Real Estate Commission
PO Box 110231
Juneau, Alaska 99811-0231

At the same time, send a copy of the petition to the opposing party's legal counsel, or to the opposing party if not represented by counsel.

Judicial review of the commission's 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 after the decision is mailed or otherwise distributed.

DATED this 23 day of March, 2007.

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:

Sven Welin
Cheryl McGregor
Sharon Walsh, Real Estate Commission
OFFICE OF THE LT. GOVERNOR

Signature

Date

3/23/07

By: _____
Neff Roberts
Office of Administrative Hearings

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_____)	REC No. S-27-001

DECISION and ORDER

I. Introduction

Sven Welin filed this claim against the Real Estate Surety Fund to recover funds allegedly converted by Cheryl McGregor, a licensee who was managing an eight-unit apartment complex for Mr. Welin.

At a prehearing conference, Ms. McGregor stated that she does not dispute Mr. Welin's claim. Mr. Welin submitted documentation to support his claim, alleging a total loss of \$19,689.70, plus costs.

The administrative law judge recommends an award of \$11,525, plus interest.

II. Facts

Cheryl McGregor, a licensed real estate broker, managed an eight-unit apartment complex located at 8329 Rangeview Avenue in Anchorage for its owner, Sven Welin. Ms. McGregor's husband, Robert McGregor, executed the written contract for management services and assisted Ms. McGregor in the management activities.

In 2006, Ms. McGregor began using some of the rental income from the property for personal purposes. In June, 2006, a check written to Mr. Welin on Ms. McGregor's account in the amount of \$4,654.50 was rejected for insufficient funds. In September, 2006, Ms. McGregor failed to make a deposit to Mr. Welin's account of that month's net income from the apartment complex. When he did not receive a September payment, Mr. Welin attempted to contact the McGregors, but was unsuccessful. In early October, Mr. Welin flew from Florida to Anchorage to investigate.

Mr. Welin contacted an attorney, who notified tenants to cease making payments to Ms. McGregor, and Mr. Welin took over management of the property.

III. Discussion

Alaska law provides that the commission may award reimbursement from the surety fund for a loss resulting from fraud, misrepresentation or deceit by a licensee in connection with a real estate transaction, or for conversion of trust funds.¹ The collection of rents under a property management contract is a real estate transaction.² All rentals collected by a licensee under a property management contract must be deposited into the licensee's trust account, and may only be distributed to a proper person.³ Each transaction involving those funds must be recorded on a ledger showing the amount, date and purpose of the transaction.⁴

Conversion is "an intentional exercise of dominion or control over [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 [property]."⁵ Damages for conversion are generally limited to the value of the property converted, plus interest.⁶

Ms. McGregor does not dispute Mr. Welin's claim. However, her admission of wrongdoing does not establish either Mr. Welin's right to recover from the surety fund, or the amount of his damages: it is Mr. Welin's right to recovery from the surety fund, not from Ms. McGregor, that is at issue in this case. Because Ms. McGregor is not the party who will pay Mr. Welin's claim, and her obligation to reimburse the fund for any payment made is contingent on a successful action by the fund to recover money from her, Ms. McGregor had little immediate incentive to limit Mr. Welin's claim. Accordingly, Ms. McGregor's general admission of wrongdoing does not mean that each and every item claimed by Mr. Welin must be taken as proved. Rather, the burden of proof was on Mr. Welin to establish, by a preponderance of the evidence,⁷ that for each item of claimed damages, Ms. McGregor converted the funds at issue, and that the amount of the claim does not exceed the value of the funds converted.

¹ AS 08.08.470.

² AS 08.88.990(11)(B). "Property management" includes leasing, contracting for maintenance, and otherwise managing real estate for a fee. *See* AS 08.88.990(8). All property management contracts must be in writing and signed by the broker or an associated licensee. AS 08.88.341. The property management contract in evidence was signed by Robert McGregor, not by Cheryl McGregor, the licensee.

³ AS 08.88.351(a)(3)

⁴ 12 AAC 64.220(b).

⁵ McKibben v. Mohawk Oil Company, 667 P.2d 1223, 1228 (Alaska 1983) (quoting RESTATEMENT OF TORTS 2D §222A). The term used in the Restatement is "chattel", which is may be understood, in some contexts, as not including money.

⁶ Rollings v. Leibold, 512 P.2d 937, 944 (Alaska 1973). *Accord*, Carver v. Quality Inspection and Testing, Inc., 946 P.2d 450, 456 (Alaska 1997); Dressel v. Weeks, 779 P.2d 324, 328 (Alaska 1989).

⁷ *See* AS 08.88.465(d).

Mr. Welin seeks compensation for the following alleged damages: (1) \$100.00 for powerwash; \$526.70 to paint trim; (2) \$520 court filing fees; (3) \$3,385 boiler expenses; (4) \$120 pest control; (5) \$1,506 appliances; (6) \$5,425 September rent; (7) \$6,200 security deposits; (8) \$1,3825 washing and drying; and (9) \$514.40 attorney's fees and costs.

(1) \$100.00 for powerwash; \$526.70 to paint trim

These expenses were listed on the July 27, 2005, statement. Mr. Welin asserts that he was informed by tenants that the building was never power washed and that the railing was not painted.

The evidence does not show that the tenants to whom Mr. Welin spoke were residing on the premises in July, 2005. Mr. Welin failed to prove by a preponderance of the evidence that Ms. McGregor converted these funds, and the claim for these amounts should be denied.

(2) \$520 court filing fees

This expense was listed on the July 27, 2005, statement. Mr. Welin asserts that "research shows that no court records in the names of Winterland Properties, MFE Services, McGregor, or Sven Welin have been filed." He asserts that this charge is for non-existent court filings.

The preponderance of the evidence is that no court cases were filed. However, the record indicates that two tenants were evicted in July, and the claimed fees could have been for service of an eviction notice, or other related costs. Mr. Welin failed to prove by a preponderance of the evidence that Ms. McGregor converted the funds, and the claim should be denied.

(3) \$3,385 boiler expenses

These expenses were shown on the February 10, 2006 (\$385) and March 6, 2006 -- August 30, 2006 (\$500 per month) statements.

According to a memorandum that was provided to Mr. Welin with the January 9, 2006, statement, the McGregors anticipated replacing an existing oil fired boiler with a natural gas boiler, at a total budgeted cost of \$4,000. The monthly amount withheld was to be applied to the cost of a new boiler and labor; the McGregors informed Mr. Welin in July, 2006, that they planned to complete the project in August.

Mr. Welin asserts that he has been in the boiler room, and there has been no work done on this project, and no parts were on site.

The preponderance of the evidence is that the \$3,000 withheld from the monthly rental payments was converted by Ms. McGregor, because no work on the boiler project was actually accomplished. However, the parts might have been purchased, left on the premises, and

absconded with by anyone. Mr. Welin failed to prove that the McGregors did not purchase the \$385 in parts. The claim should be granted in the amount of \$3,000.

(4) \$120 pest control

Mr. Welin was charged \$600 for this service on the July 12, 2005, statement. He asserts that he contacted the pest control contractor, who informed him that the actual charge was \$480.

According to the statement, the agreement with the contractor was to do eight units for a total of \$600, at a reduced rate of \$75 per unit. According to Mr. Welin, the contractor did only four units for a total of \$480, at its regular rate of \$120 per unit.

The evidence suggests that there is a dispute regarding the amount of the fee and the number of units to be serviced. Mr. Welin failed to prove by a preponderance of the evidence that Ms. McGregor converted the amount in dispute. This claim should be denied.

(5) \$5,425 September rent

According to Mr. Welin, the September rent for seven apartments was never credited to his account.

There is no evidence that the September rents, or any portion of them, was either paid to Mr. Welin or credited to his account. However, it is not established that seven of the apartments were rented as of September 1, 2006: apartment #7 was admittedly vacant, and there is no evidence (apart from Mr. Welin's claim for rent) that apartment #2 had been rented after the prior occupant vacated at the end of July, 2006.

The preponderance of the evidence is that Ms. McGregor converted the rental income from six apartments for September, 2006. This claim should be granted in the amount of \$4,650.

(6) \$6,200 security deposits

Mr. Welin asserts that he is owed the security deposits for seven apartments that were rented as of September, 2006, plus the security deposit for a prior four month rental of apartment #8 that terminated in March, 2006. He contends that all of the security deposits were held by the management company and that none had been transmitted to Mr. Welin.

The record indicates that Mr. Welin held the security deposits for tenants in possession prior to the date of the management agreement. The record also indicates that the occupants of apartment #'s 1 and 5 were in possession prior to the date of the management agreement, since there is no showing any of those apartments was vacant after January 1, 2004. The occupant of apartment #2 vacated at the end of July, 2006, and there is no evidence that the apartment had been re-rented prior to October 1, 2006.

Mr. Welin has failed to prove by a preponderance of the evidence that the security deposits for apartment #'s 1, 2 or 5 were held by the management company. As to apartment #'s 3, 4, 6, 7 and (for the short term rental in 2006) 8, the preponderance of the evidence is that the manager had retained security deposits and did not credit or reimburse those amounts to Mr. Welin.

This claim should be granted in the amount of \$3,875.

(7) \$1,506 appliances

Mr. Welin claims that he was charged for two new refrigerators and two new stoves that were never purchased. He asserts that he has looked in the apartments for which the appliances were allegedly bought, and that the existing appliances in those apartments are not new.

The record indicates that Ms. McGregor notified Mr. Welin on a variety of occasions during 2005 and 2006 that refrigerators or stoves were replaced and at times shifted between apartments. In light of the evidence that appliances were at times moved from one apartment to another, it unclear which apartment might have had one of the new appliances at any given time. Lack of proof that an event (the purchase of specific appliances) did occur is not the same as proof that the event did not occur. Mr. Welin had the right to obtain documentation for the expenses the management company claimed to have incurred during the time the management agreement was in effect, and he did not. Had Mr. Welin requested confirmation, Ms. McGregor's failure to provide confirmation would have been persuasive evidence that she never purchased the appliances. However, in the absence of a timely request for confirmation, the current lack of confirmation is not persuasive evidence that Ms. McGregor did not purchase the items. While Mr. Welin may not have located the appliances where he expected to find them, he has not established that they were never purchased.

Mr. Welin has failed to prove by a preponderance of the evidence that the alleged expenses were not incurred. This claim should be denied.

(8) \$1,325 washing and drying

This is a claim for compensation for the cost of re-keying the washers and dryers (\$825) plus the income from them for two months (\$500).

The re-keying cost has not been incurred, and therefore cannot be said to be a conversion of funds belonging to Mr. Welin, and the coin income loss is speculative. These items should be denied, the former as outside the scope of damages available for conversion, and the later as not proved by a preponderance of the evidence.

(9) \$514.40 attorney's fees and costs

Mr. Welin seeks an award of \$514.40 as compensation for the cost of an attorney's services and certified mail used to notify the tenants of the termination of the management agreement. This cost was incurred by Mr. Welin as a result of Ms. McGregor's conversion of the September rent and the security deposits, which prompted Mr. Welin to terminate the management contract and retain an attorney. Such an expense is not within the scope of damages available for conversion of the rent and security deposits, because damages for conversion are generally limited to the value of the goods converted, plus interest.⁸ Accordingly, the claim for this item should be denied.

IV. Conclusion

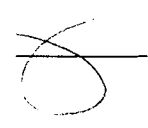
Mr. Welin incurred compensable damages of \$11,525 as the result of the conversion of management funds. Compensation should be paid in that amount, together with interest at the statutory rate of 10.5% per year.

V. Order

The Real Estate Surety Fund shall provide compensation to Sven Welin in the amount of \$11,525, together with interest at the rate of 10.5% per annum from October 1, 2006, until paid.⁹

DATED February 1, 2007.

By:
Andrew M. Hemenway
Administrative Law Judge



⁸ See note 6, *supra*.

⁹ AS 45.45.010; 12 AAC 64.325(c).

Adoption

This Decision and 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 15 day of March, 2007.

By:

Signature

Name

Title

Vincent Goals DuVal
CHAIRMAN - REAL ESTATE COMMISSION