

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

MATT ROWLEY,)
dba Quick Commission LLC,)
Claimant,)
v.)
JOSEPH SHAW,)
Respondent.)
_____)

OAH No. 07-0042-RES
REC No. S-27-004

DECISION

I. Introduction

Matt Rowley filed this claim against the Real Estate Surety Fund to recover money allegedly owed to him by Joseph Shaw, a licensee with whom Mr. Rowley had an agreement for the advance purchase of a real estate commission earned by Mr. Shaw.

At a prehearing conference, the administrative law judge advised the parties that on the facts as alleged, the claim did not appear to be compensable. The administrative law judge provided an opportunity for the parties to file memoranda addressing the compensability of the claim. Mr. Rowley filed a memorandum and Mr. Shaw did not respond.

The administrative law judge concludes that under the facts as alleged by Mr. Rowley, the claim is not compensable. The claim is therefore denied.

II. Facts¹

Joseph Shaw is a licensed real estate broker. On July 18, 2005, he entered into a written contractual agreement (Master Agreement) with Quick Commission LLC. According to the Master Agreement, Quick Commission “engages in the business of purchasing commissions from real estate brokers, agents, and mortgage brokers.” The terms of the Master Agreement establish a framework for “purchase [by Quick Commission] of a portion of the real estate brokerage commission...payable to [Mr. Shaw or his agents] for services rendered by [Mr. Shaw

¹ The facts as set forth are those asserted in the claim as filed by Quick Commission and in the documents accompanying the claim. Those facts are taken as established for purposes of this decision.

or his agents] in furtherance of real estate brokerage contracts between [Mr. Shaw or his agents] and third parties for the purchase or sale of real property.”

The Master Agreement characterizes these transactions between Quick Commission and Mr. Shaw or his agents as “a true purchase of an account receivable with transfer of title...and...not...a loan arrangement or secured transaction.”² The Master Agreement provides that by executing the agreement, the broker “releases and waives any title, claims, or encumbrances [Mr. Shaw] has in law or equity against the Commission.”³

Mr. Shaw represented a party as an agent in a real estate sales transaction. Mr. Shaw was entitled to a commission of \$3,450 “earned and payable upon final closing of the property.”⁴ In accordance with the Master Agreement, on July 18, 2005, Mr. Shaw entered in to a written agreement (Agent Agreement) under which he sold his anticipated commission of \$3,450 to Quick Commission for \$3,105.⁵ The real estate sale closed on August 29, 2005.⁶ Mr. Shaw did not pay Quick Commission in accordance with the terms of the Master Agreement and the Agent Agreement.

III. Discussion

In the absence of any disputed material facts,⁷ no evidentiary hearing is necessary.⁸ In this case, the material facts as set out above are undisputed, and therefore summary adjudication without an evidentiary hearing is appropriate.

A. The Surety Fund is Not Obligated to Pay After Default

Alaska Statute 08.88.465(c) provides that a licensee must be afforded an opportunity to file, within ten days after receiving notice of a claim, “either a written statement in opposition to the claim or an application for the presentation of additional evidence.” Although Mr. Shaw was provided that opportunity, he did not file either a statement in opposition or an application to present additional evidence.

² Whether the assignment of an as-yet unearned commission may properly be characterized as an assignment of accounts receivable, rather than as a loan subject to the provisions of AS 06.20.010-920 or other law, is a question outside the jurisdiction of the Real Estate Commission.

³ Master Agreement ¶7.

⁴ Agent Agreement.

⁵ Agent Agreement.

⁶ Condo Licensee Report (October 5, 2005).

⁷ A fact is not “material” unless it would make a difference to the outcome. Whaley v. State, 438 P.2d 718, 720 (Alaska 1968).

⁸ See Smith v. Dep’t of Revenue, 790 P.2d 1352, 1353 (Alaska 1990).

Quick Commission argues that because Mr. Shaw failed to contest the claim within ten days, he has defaulted and the claim must be paid.⁹ However, 12 AAC 64.310(e) provides that in the event a licensee fails to respond to a claim with the ten day limit, the commission will consider the claim under the procedures set out in AS 08.88.465. That statute provides that the commission may consider a claim in an administrative hearing. The commission has chosen to consider the claim following an administrative hearing in this case, consistently with its own regulation. The commission is not required to pay the claim simply because the licensee did not respond to the notice of claim within ten days.

B. The Loss Did Not Occur In a Real Estate Transaction

Alaska law provides that the commission may award reimbursement from the surety fund for a loss in a real estate transaction resulting from fraud, misrepresentation or deceit by a licensee.¹⁰ Quick Commission asserts that Mr. Shaw fraudulently failed to pay to Quick Commission a real estate commission Mr. Shaw earned in a real estate transaction, and that for this reason Quick Commission is entitled to recover on its claim.

To be eligible for an award based on fraud, misrepresentation or deceit, the claimant must show an intentional or fraudulent misrepresentation, rather than merely an innocent or negligent misrepresentation.¹¹ In this case, whether Mr. Shaw engaged in intentional or fraudulent misrepresentation has not been established. However, for purposes summary adjudication, it is assumed that all of the material facts asserted by Quick Commission are true. Under the facts as alleged by Quick Commission, the legal question to be resolved is whether the loss Quick Commission suffered occurred “in a real estate transaction.”¹²

Quick Commission argues that its loss was suffered in a real estate transaction because the Agent Agreement specifically refers to and applies to a specific real estate transaction.¹³ It argues that the real estate transaction was specifically identified in the agent agreement, and that “by reference therein, became part of the overall transaction.”¹⁴ Quick Commission concludes

⁹ Initial Memorandum at 3.

¹⁰ AS 08.08.470.

¹¹ State, Real Estate Commission v. Johnson, 682 P.2d 383 (Alaska 1984).

¹² AS 08.88.990(1)(B) defines a “real estate transaction”, for purposes of a sale, as “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.”

¹³ Initial Memorandum at 5.

¹⁴ Initial Memorandum at 5-6.

that the agent agreement has the same effect as would “any other assignment or amendment to the initial agreement between the parties to the transaction.”¹⁵

This argument fails to distinguish between the parties to the two types of agreements at issue in this case. The parties to a real estate purchase and sale agreement are the buyer and the seller; the licensees are involved not as parties, but as agents of the parties to that transaction. The parties to the Master Agreement and the Agent Agreement are the licensees and Quick Commission; the buyer and the seller have no connection whatsoever to those agreements. For this reason, Quick Commission’s agreements with Mr. Shaw (the Master Agreement and the Agent Agreement) are not remotely like an assignment or amendment to the “initial agreement between the parties to the [real estate] transaction”: an agent’s assignment of rights to a commission to a third party is not part of a real estate transaction unless the parties to the real estate transaction make it so. In this case, there is no evidence that the parties to the real estate transaction included the licensee’s assignment of his commission as part of the purchase and sale agreement.

Quick Commission was not a party to the real estate transaction. There is no evidence that the parties to the real estate transaction made Mr. Shaw’s disposition of the commission a part of the real estate transaction, and Mr. Shaw could not make it so without their consent. Quick Commission’s loss was suffered in a transaction memorialized in the Master Agreement and in the Agent Agreement: that transaction, under the express terms of those agreements, purports to concern accounts receivable, not real estate. The loss that Quick Commission suffered was not “in a real estate transaction” within the meaning of AS 08.88.470.


IV. Conclusion

The loss suffered by Quick Commission is not compensable under the facts as alleged by Quick Commission.

V. Order

The claim is DENIED.

DATED July 16, 2007.

By: 
Andrew M. Hemenway
Administrative Law Judge

¹⁵ Initial Memorandum at 6.

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 13 day of Sept, 2007

By: 

Signature

Gene DuVal

Name

Chair person

Title

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

Kowley, Shaw
Sharon Walsh

LT Governor's Office
Signature

Date 9/17/07