

**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:)
)
VIKTOR SOLOTOV)
)
 Claimant,)
)
 v.)
)
DAVID DOWD)
)
 Respondent.)
_____)

OAH No. 07-0057-RES
Commission No. S-27-006

DECISION AND ORDER

I. Introduction

Viktor Solotov (“Solotov” or “Claimant”) filed a claim on January 17, 2007 with the Alaska Real Estate Commission (“AREC”) seeking an award of damages in an unspecified amount and naming David Dowd (“Dowd” or “Respondent”) as the Respondent. Solotov alleged that Dowd committed fraud, engaged in intentional misrepresentation, and acted with deceit in a residential real estate transaction. Dowd opposed the claim and the case was referred to the Office of Administrative Hearings (“OAH”). Administrative Law Judge (“ALJ”) James T. Stanley convened a hearing in Anchorage, Alaska on April 12, 2007. The hearing was recorded.

The transaction at issue was the proposed but unconsummated sale of a four-plex owned by Solotov to Brandon Humphries (“Humphries”). The crux of Solotov’s claim is “...David has lied to me and made it impossible for me to sell my home.”¹ Solotov also raises issues about alleged diversion of rent from his tenants and further alleges that Dowd “stole” tenants and installed them in property owned by Dowd.

Viktor Solotov and Simone Obey testified on behalf of Claimant. David Dowd, Brandon Humphries, and Simone Obey² testified on behalf of Respondent. Claimant’s Exhibits B, C and

¹ Exhibit A to Claimant’s AREC Surety Fund Claim for Payment.

² Ms. Obey was a fact witness for both Claimant and Respondent.

E³ were admitted into evidence. Respondent's Exhibits A through Q were admitted into evidence. At the hearing, the Respondent moved for judgment on the pleadings after the submission of all evidence and testimony was completed; the motion was denied. The record on which this decision is based consists of the sworn testimony of the witnesses, the admitted exhibits, pleadings, and affidavits filed by the parties.

Respondent filed a Motion for Summary Judgment on March 21, 2007. On March 27, 2007, Claimant filed his "Objection" to the Claimant's Motion for Summary Judgment. To facilitate ruling on Respondent's dispositive motion, the ALJ solicited additional testimony at the hearing on several key points.

Claimant filed an Objection to David Dowd's Interrogatories on April 3, 2007. The objections focus on labels and procedural matters. This tribunal treated the objection as a motion to strike the interrogatories and overruled the objection, noting that absent a motion with good cause shown, or by stipulation of the parties, discovery is generally not permitted in administrative proceedings unless authorized in advance.⁴

Payment from the surety fund to Claimant is not warranted for two discrete reasons.⁵ First, Claimant has failed to prove by a preponderance of the evidence that Dowd committed fraud, engaged in intentional misrepresentation, or engaged in deceitful conduct in his capacity as a real estate licensee. Second, Respondent has established that a genuine dispute does not exist on any issue of material fact; accordingly, Respondent's Motion for Summary Judgment⁶ is granted.

II. Facts

All facts stated herein are drawn from the record established in this case, unless another source is identified.

Dowd has been a licensed real estate agent for three years. His license is hung with Executive Realty, an Anchorage real estate brokerage, whose broker is Dena Nading. Dowd was

³ Per the scheduling order, Claimant's exhibits should be numbered. Each of Claimant's exhibits is marked with the prefix of "AAA", e.g. AAA-B, AAA-C, AAA-E.

⁴ AS 44.62.440(a) and 2 AAC 64.240(b). However, the ALJ may require parties to exchange intended exhibits, file exhibit lists, and witness lists. 2 AAC 64.240(a).

⁵ Of the two reasons cited, either would suffice to support a ruling in Respondent's favor.

⁶ 2AAC 64.250 provides for the granting of summary adjudication. This regulation is the functional equivalent of Alaska Rule of Civil Procedure 56 which allows for the granting of summary judgment.

acting at all pertinent times in a neutral capacity, filling the role of both listing and selling agent; both seller and buyer had executed waivers of their right to be represented by their "own" real estate licensee.⁷

On September 16, 2006, Solotov spoke with Dowd and asked Executive Realty to list his four-plex for sale.⁸ Solotov executed an Alaska MLS Authorization and Exclusive Right to Sell Agreement on September 18, 2006 which set the purchase price at \$530,000.00.⁹ In response to a low level of interest from prospective buyers, Solotov approved a reduction in listing price from \$530,000.00 to \$490,000.00; the new, lower price was entered into the MLS listing system on November 29, 2006.¹⁰ On that same day, a full price offer was received from Brandon Humphries in the amount of \$530,000.00.¹¹ In standard MLS form, the buyer agreed to apply in good faith for financing and obtain a loan commitment by January 5, 2007; if the buyer was unable to obtain financing through no fault of his own, notice of the inability to finance to seller would automatically cancel the purchase agreement.¹² By addendum to the purchase agreement, the seller was required to pay at closing the sum of \$28,200.00 to the contractor chose by the buyer.¹³

The four-plex owned by Claimant appraised for \$485,000.00 as of December 15, 2006.¹⁴ Because the Claimant's four-plex property was encumbered by three deeds of trust with accompanying promissory notes in the beginning principal amounts of \$360,000.00, \$67, 500.00, and \$22,500.00, and because Claimant (promissor) was in default under at least one of the notes,¹⁵ almost no net proceeds would be available to seller from the closing at a sales price of \$530,000.00.¹⁶ The estimated settlement statement shows that at a selling price of \$530,000.00,

⁷ Exhibit C, pages 3 and 6. A neutral licensee does not represent either buyer or seller; instead, the neutral licensee provides specific assistance to both parties in the same transaction. Prior to the creation of "neutral licensee" status under Alaska law, the label would have been "dual agent".

⁸ Exhibit A.

⁹ Exhibit B.

¹⁰ Exhibit B.

¹¹ Exhibit D.

¹² Exhibit D, page 2.

¹³ Exhibit D, page 9.

¹⁴ Exhibit I, page 4.

¹⁵ Exhibit J, page 6 discloses that a Notice of Default had been recorded on October 2, 2006; the notice set a foreclosure sale date of January 4, 2007. The notice states that payments due under the note accompanying the first deed of trust on June 1, 2006 and after had not been made.

¹⁶ Claimant's exhibit C.

cash to seller from the closing would be less than \$2500.00.¹⁷ If the sale price dropped to the appraised value of \$485, 000.00, the predicament for the seller would become worse; the seller would be required to provide funds in order to close the transaction.

Claimant and Respondent discussed the impact of the appraisal on the proposed transaction in mid-December, 2006. They also discussed rents and deposits¹⁸ and loss of tenants in the same time frame. By all reports, the discussion was heated. While the record is not entirely clear as to what transpired verbally between Claimant and Respondent in mid-December, the evidence and testimony support a finding that by approximately December 20, 2006, Dowd and Solotov had signed (but failed to date) a Termination of Agreement to Purchase¹⁹ which would terminate the purchase agreement earlier received from Humphries, providing Humphries executed the termination agreement. Humphries executed the agreement within a few weeks thereafter. The termination agreement purports to release buyer, seller, brokers and licensees from any claim of liability asserted one against the other.²⁰

Notwithstanding the termination agreement, Solotov demonstrated renewed interest in trying to close the sale. Solotov called Dowd, the title company, and Dowd's broker on or about January 4, 2007, purportedly to find out when the transaction would close. Solotov's renewed interest appears to have been triggered by Dowd's email to Solotov on January 3, 2007 which expressed regret that Solotov was unable to comply with the purchase contract. Solotov responded by email on January 4, 2007, alleging that he thought the transaction was closing that day. Dowd responded by email within a few hours and told Solotov that (1) the proposed buyer, Humphries, could not obtain financing because the four-plex would not support a loan sufficient to close the transaction, and (2) because the first deed of trust was in default and because of the low appraised value, Solotov might be required to bring as much as \$80,000.00 "to the table" in order to close the transaction. Solotov filed his surety fund claim on January 17, 2007.

Claimant asserts that Respondent wrongfully collected \$300.00 from Simone Obey which should have been delivered to Claimant. That Respondent received the \$300.00 is undisputed.

¹⁷ Claimant's exhibit C.

¹⁸ Former Solotov tenants Obey, Haller, and Paradis each complained in writing (Exhibits N and Q) that Solotov refused to return their security deposits. Evidence is not in the record to determine whether or not Solotov complied with AS 34.03.070(b) which requires written itemization of how landlord intends to apply or withhold security deposits.

¹⁹ Exhibit O.

²⁰ The enforcement and scope of the termination agreement is discussed elsewhere in this decision.

The question is why did Ms. Obey give the money to Respondent? The testimony supports findings that (1) Ms. Obey believed that she had no choice but to move from Claimant's property because the building was being sold (2) Ms. Obey's apartment lacked maintenance (3) Respondent offered an apartment in his building, and Ms. Obey accepted, and (4) Ms. Obey moved from Claimant's building to Respondent's building in December, 2006 and paid the \$300.00 to Respondent as pro-rated rent for the balance of December, 2006.

III. Discussion

A. The Termination of Agreement to Purchase.

The seller, Viktor Solotov, and the buyer, R.B. Humphries, and the listing and selling licensee, David Dowd, signed a standard form 70113 Alaska MLS Termination of Agreement to Purchase ("agreement"). The form is undated, but the evidence in this case supports the finding that the signatures of Mssrs. Solotov and Dowd were affixed within days after the appraisal was issued on December 15, 2006. Mr. Humphries signed shortly thereafter. The Respondent has raised the agreement as a defense to the surety fund claim and as justification to grant the Respondent's Motion for Summary Adjudication. In pertinent part, the agreement states "...each releases the other and the Brokers and their Licensees from any and all present or future liability thereunder and/or in connection with said sale, other than as set forth hereinafter."

The law in Alaska favors settlement agreements.²¹ A valid release of all claims will bar any subsequent claims covered by the release.²² A valid release between buyer, seller and licensee would release present and future claims among the parties to the release agreement. In this case, the claim is against the surety fund which is not a party to the release. Claimant's affidavit states that he has no knowledge of how his signature came to be affixed to the agreement;²³ the probable reason is that Claimant either did not understand the content or understand the effect of the agreement. In any event, the agreement does not protect the surety fund from the claim. It may be possible for a licensee and a buyer or seller to create an enforceable agreement specifically precluding the filing of surety fund claims.

²¹ Alaska Airlines v. Sweat, 568 P.2d 916, 930 (Alaska 1977).

²² Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Service Co., 584 P.2d 15, 24 (Alaska 1978)

²³ Claimant's affidavit dated April 6, 2007 and filed April 10, 2007.

B. The Fraud and Misrepresentation Claims

Alaska law allows the Real Estate Commission to reimburse a claimant for losses resulting from fraud, misrepresentation, deceit or conversion of trust funds, by a licensee in connection with a real estate transaction.²⁴ If a claimant can prove by a preponderance of evidence intentional or fraudulent misrepresentation by a licensee acting in his or her professional capacity, the claimant is eligible to receive an award of money from the surety fund.²⁵ 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 (4) that the claimant justifiably relied on the representation; and (5) that the claimant was damaged as a result of the reliance.²⁶ The term “deceit” means a fraudulent and deceptive misrepresentation used by one or more persons to deceive and trick another person (claimant) who is unaware of the true facts and is damaged as a result of the deceitful conduct.²⁷ Fraud, misrepresentation, or deceit may also be found on the basis of nondisclosure in some circumstances, such as when conduct is induced through a “literally true statement [that] omits additional qualifying information likely to affect the listener’s conduct”.²⁸ To support a recovery from the Surety Fund, such a misstatement or nondisclosure must be “wrongful”; an innocent misrepresentation or nondisclosure is not enough.²⁹

Claimant has not identified any fraud or misrepresentation by Respondent that resulted in Claimant losing money³⁰ in the real estate transaction at hand. To the contrary, the record suggests that Respondent lost monies advanced for renovations within the Claimant’s four-plex which were designed to increase the building’s value.³¹

²⁴ AS 08.88.460(a)

²⁵ *State Real Estate Commission v. Johnson*, 682 P.2d 383 (Alaska 1984), noting that mere innocent or negligent misrepresentations do not justify an award from the surety fund.

²⁶ *Jarvis v. Ensminger*, 134 P.3d. 353 (Alaska 2006); *see also* Restatement of Torts 2nd §526.

²⁷ *See* Black’s Law Dictionary Abridged 6th Ed. (1997). The terms “fraud, misrepresentation and deceit” are frequently tied together in Alaska licensing statutes, but “deceit” has not been separately defined under Alaska law; however, 3 AAC 08.620(a)(3)(B), which concerns land sales offerings, states that “fraud and deceit include the making of untrue statements of material facts or omitting to state material facts.”

²⁸ *Carter v. Hoblit*, 755 P.2d 1084, 1086 (Alaska 1988).

²⁹ *Alaska Real Estate Commission v. Johnston*, 682 P.2d 383, 386-87 (Alaska 1984)

³⁰ Claimant alleged no specific dollar amount of loss, either in his original claim or at the forma hearing.

³¹ The record indicates that Dowd may have advanced as much as \$8000.00 to convert each of the units in the four-plex into four bedroom units.

It is abundantly clear that Claimant is very dissatisfied that he was not able to sell his four-plex for \$530,000.00. Simply because a seller has reason to be dissatisfied or simply because the transaction failed to close are not grounds sufficient to support a surety fund claim. It is also abundantly clear that Claimant was under great pressure to bring about a sale before he lost the property at an upcoming foreclosure sale set for January 5, 2007.³² While it is evident that there is a disagreement whether Claimant accurately told Respondent how many payments were in arrears under the note secured by the first deed of trust, being in arrears, or going further in arrears, is not a situation created by the Respondent.

Claimant argues that Respondent caused Claimant to lose tenants. The evidence supports a finding that the three tenants in question were dissatisfied by the lack of upkeep and maintenance, and they harbored a belief that they would need to move because Claimant's building was being sold. The evidence does not support a finding that Respondent wrongfully induced the tenants to leave Claimant's building.

Claimant argues that Respondent wrongfully diverted \$300.00 from Ms. Obey to himself. The testimony established that the \$300.00 in question was the prorated rent paid to Respondent when Ms. Obey became a tenant of Respondent in December 2006.

Claimant alleges that Respondent wrongfully requested Claimant to produce a check in the amount of the tenant's security deposits for delivery to the title company. The evidence is not clear as to whether or not this actually occurred. If it did happen as described by Claimant, it would be unusual; the industry practice is to have the landlord/seller confirm the exact amount of security deposits being held so that proper credits and debits can be made on the closing statement prepared by the closer at the title company.

C. The Motion for Summary Judgment

Motions for Summary Adjudication are the administrative equivalent of Motions for Summary Judgment made under the formal civil rules. If a genuine dispute does not exist between the parties on an issue of material fact, summary adjudication may be granted to the moving party in an administrative proceeding.³³ If a motion for summary adjudication is supported by an affidavit or other documents establishing that a genuine dispute does not exist

³² Records of the Anchorage District Recorder indicate that Claimant lost the four-plex when a non-judicial foreclosure sale was completed. A trustee's deed was recorded against subject property on February 20, 2007, document number 2007-010440-0

³³ 2 AAC 64.250(a)

on an issue of material fact, to defeat the motion a party may not rely on mere denial but must show, by affidavit or other evidence, that a genuine dispute exists on an issue of material fact for which an evidentiary hearing is required.³⁴

The genuine issue of material fact which is relevant to this surety fund claim is whether or not the Respondent intentionally or fraudulently made a misrepresentation to the Claimant. Both Claimant and Respondent have filed affidavits and other somewhat relevant documents with their respective opposition and motion. While it is true that the Claimant is critical of how the transaction was handled, the invectives of the Claimant do not establish, much less prove by any standard, that Respondent made a misrepresentation for which Claimant suffered a loss in the real estate transaction at hand. Claimant's unquantified losses flow from the Claimant's actions.

IV. Conclusion

Because Claimant failed to prove by a preponderance of the evidence that he suffered a financial loss as a result of fraud, misrepresentation or deceit by Respondent to him, the claim against the surety fund should be denied. The Respondent has also established that there is no dispute between the parties on the issues of material fact; the Respondent's Motion for Summary Adjudication is granted.

V. Order

IT IS HEREBY ORDERED that the claim of Viktor Solotov against the Real Estate Surety Fund in case number S-27-006 is **DENIED**.

DATED this 25th day of April, 2007.

By: _____
James T. Stanley /
Administrative Law Judge

³⁴ 2 AAC 64.250(b)

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 14 day of June, 2006

By: _____

Signature _____

Name

Title