

**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:)
)
ROBERT DAVIS,)
)
Claimant,)
)
v.)
)
GLENDA FEEKEN,)
)
Respondent.)
_____)

OAH No. 07-0119-RES
Commission No. S-27-009

**ORDER GRANTING CLAIMANT’S MOTION FOR RECONSIDERATION
AND
ORDER REAFFIRMING GRANT OF SUMMARY ADJUDICATION
(CORRECTED)¹**

I. Introduction

Robert Davis (“Davis” or “Claimant”) filed a claim on February 20, 2007 with the Alaska Real Estate Commission (“AREC”) seeking an award of damages in the amount \$310,000 and naming Glenda Feeken (“Feeken” or “Respondent”) as the Respondent. Davis alleged that Feeken committed fraud, engaged in intentional misrepresentation, and acted with deceit in a residential real estate transaction. Feeken opposed the claim and the case was referred to the Office of Administrative Hearings (“OAH”) and assigned to Administrative Law Judge (“ALJ”) James T. Stanley.

The thrust of Davis’ allegations is that Feeken is responsible for Davis’ inability to purchase residential property in Nikiski from James and Paulette Culbertson in January 2007.

¹ Respondent filed a proposal for action on July 18, 2007 requesting that two findings of fact be corrected. Pursuant to 2 AAC 64.350, the request is granted. The proposed decision and order which was distributed June 28, 2007 is corrected as follows: in the second line, page 2, “facts” section, \$320,000 is replaced with the correct asking price of \$310,000; in the first sentence of the first paragraph on page 5, Nadia Saxman at Innovative Finance is correctly identified as the person raising questions, rather than the title company.

The Culbertson property was listed with RE/MAX of the Peninsula located in Kenai. With her husband, Feeken has owned RE/MAX of the Peninsula since 1990. Davis was represented at all pertinent times by Fred Braun (“Braun”) with Freedom Realty, also located in Kenai.

Payment from the surety fund to Claimant is not warranted. Respondent has established that a genuine dispute does not exist on any issue of material fact; accordingly, Respondent’s motion for summary adjudication² should be granted.

II. Facts

The Culbertsons listed their home with RE/MAX in late 2006 and set an asking price of \$310,000. Through licensee Braun, Davis (and his wife) offered on or about December 22, 2006 to purchase the Culbertson property for \$320,000 and close by January 31, 2007. Braun prepared the offer using a standard MLS Purchase and Sale Agreement. At all times pertinent to the transaction, the Culbertsons were in Arizona; their absence from Alaska resulted in the frequent transmission of documents by facsimile and express mail. The Culbertsons executed a counteroffer to the Davis offer which provided, *inter alia*, (1) that the earnest money of \$1000 would become non-refundable when the appraisal of the Culbertson property was ordered (2) Davis was required to “remove contingency on Financing by January 12, 2007”, and (3) until the financing contingency was removed, the Culbertsons would continue to market the property and would accept “back up” offers. The counter offer was fully executed by January 8, 2007.

The Culbertsons received a “back up” offer on January 3, 2007 which was conditionally accepted. Davis removed the financing contingency on January 8, 2007. The appraisal was ordered January 11, 2007; the appraisal was available on or about January 24, 2007. Davis was working with loan originator Nadia Saxman at Innovative Finance located in Kenai. For reasons not entirely clear, closing papers did not arrive at the title company as necessary to close the transaction by the agreed deadline of January 31, 2007.

Feeken telephoned Braun on February 3, 2007 and wrote Braun on February 5, 2007³ advising that: (1) the Culbertson-Davis purchase agreement lapsed on January 31, 2007; (2) the Culbertsons were accepting a back up offer unless Davis wished “to match the back up offer”

² 2 AAC 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.

³ Respondent’s Exhibit V to her motion for summary adjudication.

and close by February 9, 2007. When Feeken did not receive a response to her February 5 letter, the Culbertsons sold their property to the back up offeror on February 15, 2007. Five days later, Davis filed a surety fund claim with the AREC.

Feeken filed a Motion for Summary Adjudication on April 27, 2007. Davis did not respond or oppose the motion. On May 23, 2007, ALJ Stanley granted the motion. On May 30, 2007, ALJ Kennedy issued a Notice Regarding Procedure in response to Davis inquiries. ALJ Kennedy advised Davis that he may file a motion for reconsideration (of the decision to grant summary adjudication) by June 11, 2007. Davis filed his motion to reconsider on June 11, 2007 and it has been granted to facilitate a complete review of all evidence filed to date in this matter. Even though Davis did not file documents or affidavits which are relevant to claims for intentional misrepresentation, fraud, or deceit, a careful review of the entire file and its contents has been conducted.

III. Discussion

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.⁴ 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.⁵ 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; (4) that the claimant justifiably relied on the representation; and, (5) that the claimant was damaged as a result of the reliance.⁶ 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.⁷ Fraud, misrepresentation, or

⁴ AS 08.88.460(a)

⁵ *Alaska Real Estate Commission v. Johnston*, 682 P.2d 383 (Alaska 1984), noting that mere innocent or negligent misrepresentations do not justify an award from the surety fund.

⁶ *Jarvis v. Ensminger*, 134 P.3d. 353 (Alaska 2006); *see also* Restatement of Torts 2nd §526.

⁷ *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;

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”.⁸ To support a recovery from the Surety Fund, such a misstatement or nondisclosure must be “wrongful”; an innocent misrepresentation or nondisclosure is not enough.⁹

The Respondent has filed a motion for summary adjudication which is supported by 24 exhibits, 3 of which are sworn affidavits attesting to the facts. When considering a claim of intentional misrepresentation, of particular significance is that Davis has never spoken with Feeken.¹⁰ After a careful review of Claimant’s documents and exhibits filed with his surety fund claim and the documents and exhibits filed with his reconsideration motion, the Claimant has not identified any false representation by the Respondent in her capacity as a real estate licensee in the context of, or related to the proposed transaction with the Culbertsons. Respondent has established that a genuine dispute does not exist on any issue of material fact; accordingly, Respondent’s Motion for Summary Adjudication is granted.¹¹

The genesis of the Davis damage claim is unclear. The \$310,000 claim may be the selling price of \$320,000 minus the \$10,000 credit from seller to buyer at closing for closing costs. It may be that the damage claim is \$10,000, comprised of the cost to Davis to refinance his personal residence as necessary to raise the down payment to purchase the Culberston property, plus the nonrefundable earnest money of \$1000.¹² To the extent that Davis has refinanced his personal residence to raise money and has incurred expenses in so doing, Feeken had no involvement, played no role in the Davis refinancing effort, and cannot be held liable for the expenses of the Davis refinancing. Feeken’s awareness that Davis was refinancing his property does not support a surety fund claim purportedly arising from the sale of the Culbertson property.

Davis has questioned the motives of Feeken and has pointed out minor dissimilarities between copies of the same document. Davis has complained about the quality of the appraisal

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.”

⁸ *Carter v. Hoblit*, 755 P.2d 1084, 1086 (Alaska 1988).

⁹ *Alaska Real Estate Commission v. Johnston*, 682 P.2d 383, 386-87 (Alaska 1984)

¹⁰ Affidavit of Glenda Feeken, para. 22.

¹¹ 2 AAC 64.250. To avoid granting of summary adjudication, Claimant must do more than deny the validity of Respondent’s assertions.

¹² The pleading suggest that Mr. Braun may have refunded the \$1000 from his own funds to Mr. Davis.

of the Culbertson property.¹³ Nadia Saxman at Innovative Finance raised questions about the purchase agreement and the appraisal. Davis takes serious issue with the inference that his credit may be less than sterling; however, it is undisputed that he was able to refinance his personal residence and he also qualified for a loan sufficient to purchase the Culbertson property.¹⁴ Even if we assume that each complaint of Davis has some degree of validity, the complaints do not distill to a misrepresentation by Feeken. If Davis had complaints about how the transaction was progressing, logic would suggest that Davis should voice these concerns to *his* agent. In any event, none of the complaints, suspicions, or questions raised by Davis are sufficient to support a surety fund claim. Merely taking issue with what Feeken or her counsel has said does not rise to a material fact in dispute which is sufficient to defeat the Respondent's motion for summary adjudication.

Bald statements do not defeat a motion for summary adjudication; for example, Davis states "The bottom line here is I was able to purchase the house but because of Ms. Feeken's *doings*, the loan was pulled and I was not able to purchase the home."(emphasis added)¹⁵ The facts which Davis brings into question are not the material facts central to proving misrepresentation, deceit or fraud by Feeken in the proposed transaction with Culbertsons.

IV. Conclusion

Claimant has used the surety fund claim process as a vehicle to air his assorted grievances, suspicions, and dissatisfaction with his failed attempt to purchase the Culbertson property. Claimant has failed to identify facts sufficient to support his claim for recovery from the surety fund. The Respondent has established that there is no dispute between the parties on the issues of material fact, and therefore, Respondent's motion for summary adjudication must be granted.

V. Order

IT IS HEREBY ORDERED that the Respondent's motion for summary adjudication is granted and the claim of Robert Davis against the real estate surety fund in case number S-27-009 is **DENIED**.

¹³ Davis insists that Feeken selected the appraiser, but this claim is not supported by the record. The practice in the industry is that the lender (or local agent for the lender) selects the appraiser.

¹⁴ Innovative Finance letters dated 2/14/2006(*sic*) and 05/01/2007.

¹⁵ Claimant's motion for reconsideration at page 6.

DATED this 21th day of July, 2007.

By: _____
James T. Stanley
Administrative Law Judge

Certificate of Service: The Undersigned hereby certifies that on the 27th day of July, 2007, a true and correct copy of this document was mailed to the following: Robert Davis; Andrea Girofamo-Welp, counsel for Glenda Feeken and Sharon Walsh, Real Estate Commission.

By: _____
Linda Schwass

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]
Signature
Gene DuVal
Name
Chairman
Title