

claimed damages arise from fraud, intentional misrepresentation or deceit by a real estate licensee, the surety fund is not a source of compensation for financial loss resulting from a real estate licensee's poor performance of obligations flowing from a real property listing and selling agreement.

II. Facts³

Mr. Erkins was first licensed by the state of Alaska as a real estate salesperson September 24, 2004. At all times pertinent to this case, Mr. Erkins has been associated with Email Realty whose employing broker is Gregory T. Erkins. Email Realty was first issued a business license on April 14, 1999.

Mr. and Mrs. Grinnell first met Mr. Erkins on July 22, 2006. Prior to their first meeting, Mr. and Mrs. Grinnell had been marketing their residence in Anchorage by placing a *For Sale By Owner* ("FSBO") sign on Lake Otis Boulevard in Anchorage. Mr. Erkins saw the sign, came to the Grinnell residence, identified himself as a licensed real estate salesperson, and asked if he could view the premises. After a tour of the home and a period of friendly discussion, Mr. Erkins persuaded the Grinnells to allow Email Realty to market their home. Mr. Erkins represented to the Grinnells that he would be able to sell their home in no more than thirty days using a "powerful combination" of marketing methods.

Mr. Erkins described the array of services that Email Realty could render. Mr. Erkins provided a brochure describing four "packages" that Email Realty offered. The Grinnells opted for the third "package" captioned "Full Service Representation, MLS Participation with or without FBSO Assistance for a one time fee of \$1,000 plus 2% to Email Realty and 3% to Selling Office."⁴ The Email Realty services promised by Mr. Erkins to the Grinnells included:

1. Writing an unlimited number of earnest money agreements (anticipating numerous offers).
2. Production of a Comparative Market Analysis with the highest available comparables to show prospective buyers.
3. A buyer's 90% letter from the proposed Buyer's lender.⁵

³ Unless another source is cited, the facts recited herein are derived from the record assembled in this case. The record includes the sworn testimony of Mr. Grinnell and Mrs. Grinnell and all exhibits.

⁴ Email Realty offered four packages or bundles of service. The packages are not in fact numbered. The Grinnells opted to buy the third bundle of services that was listed on the brochure.

⁵ A "90%" letter is frequently required by the seller to confirm that a lender is "90% certain" that the proposed buyer will qualify for a loan sufficient to close the transaction in question.

4. A home inspection (at seller's expense) arranged by Email Realty.⁶
5. A preliminary commitment for title insurance ("prelim").
6. Obtain existing mortgage loan payoff statement.
7. Obtain an as-built (survey) or recertification of an existing as-built drawing by a surveyor (at seller's expense).
8. Requisition an appraisal (at Seller's expense).
9. Provide a state of Alaska property disclosure statement (to be completed by seller).
10. Provide a lead-based paint disclosure statement applicable to pre-1978 homes.
11. Follow-up with lender requirements required of buyer.
12. Arrange buyer's final walk through the home (before closing).
13. Review the HUD-1 (closing) statement with seller and the escrow officer.
14. Provide professional yard arm sign for high visibility.
15. Provide a box attached to yard arm sign for flyers.
16. Provide CD's with the flyers to give a potential purchaser all information necessary to make an informed decision to purchase seller's home.
17. Place advertising in the Anchorage Daily News, to include the Multiple Listing Service ("MLS") number.
18. Place the information about the Seller's home, sale terms, price, etc. in the MLS.

The Grinnells gave Mr. Erkins a check for \$1, 000 on July 22, 2006. The term of the listing agreement commenced on that date; the termination date of the listing agreement, as later extended, was October 30, 2006. Mr. Erkins convinced the Grinnells to list their home for sale at an offering price of \$369,950, a price higher than the Grinnells had been using with their own FSBO program. In a "worst case scenario", Mr. Erkins assured the Grinnells that they would "net" \$341,000 from the sale of their home. Entering into a listing agreement with Email Realty

⁶ The Grinnells paid \$395 for the home inspection which was ultimately not needed because the home did not sell. The more typical practice is to wait until a bona fide offer is received and then let the buyer select their own inspector.

was motivated in large part by the deteriorating health of Mrs. Grinnell; she needed to move into a home without stairs.

Mr. Erkins met with the Grinnells on July 23, 2006 and promised the Grinnells that their home would be advertised forthwith in the Anchorage Daily News (“ADN”) until the home sold. For reasons not disclosed in the record, Mr. Erkins did not cause any advertising to appear in the ADN until almost five weeks later on August 26. When the advertisement finally commenced to run in the ADN, the advertisement included the incorrect MLS number.⁷ At or about the same time, Mr. Erkins arranged for a home inspection at the Grinnells’ expense.⁸

The Grinnell home was not shown to any prospective purchasers during the first thirty days of the listing period. Needless to say, the Grinnells were concerned by the lack of selling activity. Toward the end of the first month of the listing term, Mr. Erkins requested that the Grinnells lower the asking price of their home from \$369,950 to \$339,950. The Grinnells acquiesced.

On or about August 22, 2006, Mr. Erkins assured the Grinnells that their home would sell if they did two things: (1) reduce the asking price from \$339,950 to \$329,950; and, (2) pay Mr. Erkins the sum of \$2500 (in addition to the \$1000 fee already paid).⁹ Again, the Grinnells acquiesced. In exchange for the \$2500, Email Realty (John and Greg Erkins) agreed to “do everything” and waive any further compensation, unless Email Realty was the selling agency; if another licensee was the selling agent, the selling agent would receive a commission of 3% of the selling price; if Email Realty was the selling agency, it would receive a commission of 2% of the selling price in addition to the \$3500 already received.

Mr. Erkins promised the Grinnells that he would host a luncheon for other real estate licensees in their home on August 29, 2006. The Grinnells prepared the home for the luncheon. The Grinnells were later informed by Mr. Erkin’s assistant that no licensees attended the purported luncheon. Mr. Erkins reneged on his promise to hold another luncheon the following week.

Mr. Grinnell contacted Mr. Erkins on September 7, 2006 and complained that there had not been a showing of the property in almost five weeks. According to Mr. Erkins, another

⁷ The incorrect MLS number was also contained in the advertising brochures and on the Email Realty website.

⁸ The Grinnells paid \$395 for a home inspection at the insistence of Mr. Erkins.

⁹ Mrs. Grinnell wrote the \$2,500 check payable to Flash Realty, LLC. Greg T. Erkins organized Flash Realty, LLC on May 10, 2000; it was involuntarily dissolved by the state of Alaska on April 16, 2007. The precise relationship between Email Realty and Flash Realty is unknown.

licensee contacted Mr. Erkins that same day and requested a showing on September 8, 2006 for two potential purchasers. The showing lasted less than five minutes and produced no offer. The “lookers” had not been pre-qualified as Mr. Grinnell had required at the outset of the listing period.

Mr. Grinnell emailed Mr. Erkins on September 9, 2006 and listed a multitude of complaints and deficiencies about Mr. Erkins’ services to date. Mr. Grinnell generally described the owner-licensee relationship as a failure; Mr. Grinnell demanded a refund of the \$2500 paid on August 15, 2006.¹⁰

A licensee for another Anchorage real estate brokerage produced an offer on September 19, 2006 for \$320,000.¹¹ The offer contained a short window for acceptance lasting only until 6:00 p.m. on September 20, 2006. In violation of applicable law, Mr. Erkins failed to timely present the offer to the Grinnells before it expired according to its own terms.¹² For reasons not explained in the record, Mr. Erkins ceased advertising the Grinnell property on or about September 20, 2006 even though he had promised on July 23, 2006 to continue advertising in the ADN until the property was sold.¹³

On October 21, 2006, the Grinnells moved into a single story home in Wasilla. The listing agreement expired on October 30, 2006 without any further offer to purchase having been generated or received by Mr. Erkins and Email Realty. On November 15, 2006, the Grinnells rented their Anchorage home to others.

III. Discussion

Alaska law allows the Real Estate Commission to reimburse a Claimant from the surety fund for losses resulting from fraud, misrepresentation, deceit or conversion of trust funds, by a licensee in connection with a real estate transaction.¹⁴ 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

¹⁰ Exhibit 9.

¹¹ Exhibit 12.

¹² AS 08.88.615(a)(3) requires that a real estate licensee present all written offers in a timely manner to the person(s) they are assisting within the transaction.

¹³ Exhibit 30.

¹⁴ AS 08.88.460(a)

surety fund.¹⁵ 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.¹⁶

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.¹⁷ 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”.¹⁸ To support a recovery from the surety fund, such a misstatement or nondisclosure must be “wrongful”; an innocent misrepresentation or nondisclosure is not enough.¹⁹

Claimant has not identified any misrepresentation or deceitful conduct by Respondent that resulted in Claimant losing money in the real estate transaction at hand. It is abundantly clear that Claimant has a plethora of reasons to be very dissatisfied with Mr. Erkins and Email Realty’s failure to perform as promised. Claimant can rightfully be unhappy that he was not able to sell his residence for a reasonable sum. Even when a seller has good and valid reasons to be dissatisfied with his real estate licensee’s promised assistance, such strong dissatisfaction does not distill to grounds sufficient to support a surety fund award.

Claimant has established that Mr. Erkins’ trail of broken promises and breaches of contract raise legal issues and may well support a civil claim, but Claimant does not have a cognizable claim of intentional misrepresentation or deceit sufficient to warrant payment from the real estate surety fund. If Claimant were able to establish by a preponderance of the evidence that Mr. Erkins *knew* or *intended* at the time of contracting and accepting Claimant’s money that

¹⁵ *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.

¹⁶ *Jarvis v. Ensminger*, 134 P.3d. 353 (Alaska 2006); *see also* Restatement of Torts 2nd §526.

¹⁷ *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.”

¹⁸ *Carter v. Hoblit*, 755 P.2d 1084, 1086 (Alaska 1988).

¹⁹ *Alaska Real Estate Commission v. Johnston*, 682 P.2d 383, 386-87 (Alaska 1984)

he had no intention of performing the promised activities, the decision in this case might well be different. Unfortunately for the Claimant, a real estate licensee's sloppy or incomplete or unprofessional performance, failure to exercise reasonable skill and care, and failure to make a good faith and continuous effort to find a buyer does not always sustain a surety fund claim.²⁰ As in this case and other surety fund cases, establishing the requisite *intent* of the licensee to meet surety fund award standards is frequently an evidentiary challenge.

IV. Conclusion

Mr. Grinnell has clearly and credibly established that he was served very poorly by Mr. Erkins. Having said that, claimant has not proven by a preponderance of the evidence that Mr. Erkins, while acting in his professional capacity as a real estate licensee, *intentionally* misrepresented facts or engaged in deceitful conduct in connection with a proposed real estate transaction. Mr. Grinnell's surety fund claim should be denied without prejudice²¹ to any other claims he may have against Mr. Erkins.

V. Order

IT IS HEREBY ORDERED that the claim of Fred Grinnell in the amount of \$3,895 against the real estate surety fund in case number S-27-010 is DENIED.

DATED this 18th day of December 2007.

By: _____

James T. Stanley
Administrative Law Judge

²⁰ AS 08.88.615 describes the duties that a real estate licensee owes to persons that he or she is assisting in a real estate transaction. AS 08.88.620 describes the duties owed by a licensee representing a person.

²¹ In the context of this case, the term "without prejudice" means that no rights or privileges of the Claimant are to be considered as waived or lost because the claim against the surety fund was not successful.

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 4 day of February, 2008.

By: _____

Signature

V. GORDON DUVAL

Name

Chairman

Title

Alaska Real Estate Commission