

**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: )  
 )  
 KIRK WHITEHURST )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 DAVID DOWD )  
 )  
 Respondent. )

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OAH Case No. 07-0363-RES  
 Commission No. S-27-012

**NOTICE TRANSMITTING FINAL DECISION**

Attached is the Real Estate Commission's decision in this matter, which the commission adopted at its December 13, 2007 meeting. Under AS 44.62.520, the board's decision becomes effective 30 days after the attached decision is mailed or otherwise delivered to you.<sup>1</sup>

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  
 550 W. 7<sup>th</sup> Ave Ste 1600  
 Anchorage, AK 99501

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.

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<sup>1</sup> This notice is the formal transmittal of this decision under 2 AAC 64.340(c). It supersedes any prior notice or distribution to the parties.

DATED this 18th day of December, 2007.

By: \_\_\_\_\_

Linda Schwass

Office of Administrative Hearings

**Certificate of Service:** The Undersigned hereby certifies that on the 18<sup>th</sup> day of December 2007, a true and correct copy of this document was sent by certified mailed to the following: Kirk Whitehurst; David Dowd; with a copy hand delivered to Sharon Walsh, Real Estate Commission. Courtesy copies sent to R. Younkens, DCED and Lt. Governor.

By: \_\_\_\_\_

Linda Schwass

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**DECISION AND ORDER**

**I. Introduction**

Kirk Whitehurst (“Mr. Whitehurst” or “Claimant”)<sup>1</sup> filed a claim on June 8, 2007 with the Alaska Real Estate Commission (“AREC”) seeking an award of damages in the amount \$12,000 and naming David Dowd (“Mr. Dowd” or “Respondent”) as the Respondent. Mr. Whitehurst alleged that Mr. Dowd committed fraud, engaged in intentional misrepresentation, and acted with deceit in a real estate transaction wherein Mr. Whitehurst was the proposed purchaser of three four-plex rental properties located in Independence Park, Anchorage. Mr. Dowd did not contest the allegations contained in the surety fund claim.

The case was referred to the Office of Administrative Hearings (“OAH”) and assigned to Administrative Law Judge (“ALJ”) James T. Stanley. The formal hearing in this matter was held August 1, 2007. Mr. Whitehurst testified in person. Ms. Stenstrom-Mozelle testified in person. Mr. Dowd did not testify; at the time of the hearing, Mr. Dowd did not hold a real estate license.<sup>2</sup> The hearing was recorded. Exhibits 1 through 7 were admitted into evidence without objection.

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<sup>1</sup> The term “claimant” includes Mr. Whitehurst and his wife, Dorothy Stenstrom-Mozelle, even though Mr. Whitehurst is the claimant of record.

<sup>2</sup> Mr. Dowd relinquished his real estate license number 16146 and the Real Estate Commission accepted the relinquishment on June 14, 2007.

The thrust of Mr. Whitehurst's allegations are that Mr. Dowd is responsible for a failed real estate transaction which prevented Mr. Whitehurst from completing the purchase of residential property in Anchorage from the Bradley J. Wilson Revocable Trust and the Lisa A. Wilson Revocable Trust ("sellers") in March 2007; and, Mr. Dowd failed to cause the return of the \$12,000 earnest money after the proposed transaction failed to close through no fault of the buyer.

Payment from the surety fund to Claimant is warranted for the reasons set forth hereinafter.

## II. Facts<sup>3</sup>

The sellers purportedly<sup>4</sup> listed their nine four-plex properties with Vanguard Real Estate<sup>5</sup> in early 2007.<sup>6</sup> In early March 2007, Mr. Dowd contacted Mr. Whitehurst and his wife, Dorothy-Stenstrom-Mozelle, concerning nine four-plex units that were on the market. Prior to these nine units becoming available, Mr. Dowd had showed several investment properties to Mr. Whitehurst and Ms. Stenstrom-Mozelle; the properties did not meet their investment criteria. Even though no attempt to purchase these properties was made, Mr. Dowd knew that claimant was a serious and qualified investor.

Mr. Dowd explained to claimant on or about March 12, 2007 that he was assembling buyer-investors to purchase all nine of the four-plex units. Mr. Dowd's grand plan was to convert the rental properties into condominium units. The claimant herein would qualify for, and close the purchase of three of the nine four-plex units; the selling price for three units was \$1,500,000. The closing scheduled for March 21, 2007 was intended to be simultaneous, meaning that even if the nine properties were purchased by several unrelated buyers, the transaction would close and record simultaneously. With respect to the other six four-plex properties, the record does not include a description of how Mr. Dowd was organizing the sales

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<sup>3</sup> The facts recited herein are from the record assembled in this case, unless another source is cited. The record includes the sworn testimony of Mr. Whitehurst and Ms. Dorothy Stenstrom-Mozelle and all exhibits.

<sup>4</sup> Vanguard Real Estate is presumed to be the listing and selling brokerage because the purchase and sale agreements so state. However, formal listing agreements are not part of the record.

<sup>5</sup> Vanguard real Estate, LLC, opened 2/07/97 under license number 643.

<sup>6</sup> As will be explained later, there is some confusion as to whether Mr. Dowd was associated with Realty Executives Alaska Inc. (opened 3/27/97 under license number 656) or Vanguard Real Estate at the pertinent times. The record supports a finding that Mr. Dowd was associated with Realty Executives in early 2007, and later moved his license to Vanguard Realty.

to other buyer-investors. The multiple postponements of the closing suggest that Mr. Dowd was having difficulty getting all buyer-investors "in line" for a simultaneous closing. The purchase and sale agreement, and the testimony of claimant support a finding that the sellers wanted a simultaneous closing and did not want "piecemeal" closings of the nine four-plex properties.<sup>7</sup> The record is clear that Mr. Dowd did not keep his client, the claimant, informed as to the status of the overall transaction involving the nine properties.

Claimant qualified to purchase three of the nine properties for \$1,500,000. The earnest money for each of the three four-plex units would be \$4,000, for a total earnest money deposit from claimant of \$12,000. On March 12, 2007, on Mr. Dowd's instruction, claimant delivered a check for \$12,000 payable to David Dowd. The record is silent as to why Mr. Dowd wrongfully directed that the earnest money be paid to himself and not to the trust account of either Realty Executives or Vanguard. Failure to deposit earnest money into the trust account of the real estate brokerage is a violation of AS 8.88.351(a)(3) and 12 AAC 64.200; however, the record supports a finding that the responsible brokers of Realty Executives and Vanguard Real Estate were deprived of information by Mr. Dowd, and didn't know that Mr. Dowd had received the earnest money. On March 13, 2007, Mr. Dowd endorsed and negotiated the check.<sup>8</sup>

Each of the three properties is the subject of a separate purchase and sale agreement, each dated January 26, 2007; each listing shows Vanguard Real Estate as both the listing and selling brokerage. Each of the three agreements provides that the "Earnest money is non refundable."<sup>9</sup>

Mr. Dowd offered the claimant an opportunity to invest for the short-term or the long term. Because the three rental properties did not produce sufficient net profit to satisfy the claimant's investment criteria, claimant opted for the short term investment opportunity. Mr. Dowd and claimant agreed that in exchange for purchasing the three four plex properties, Mr. Dowd would refund the \$12,000 earnest money to the claimant at the closing and also pay an additional \$20,000 in exchange for a quit claim deed conveying the three properties to Mr. Dowd after closing.<sup>10</sup> In short, Mr. Dowd was willing to pay \$20,000 to use the good credit of

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<sup>7</sup> Exhibits 4, 5 and 6, each at p. 5. provide that "contract is contingent upon all nine buildings seller currently owns on Martha's Vineyard recording simultaneously:

<sup>8</sup> Exhibit 2.

<sup>9</sup> P. 6 of exhibits 4, 5, and 6.

<sup>10</sup> No finding or conclusion is made in this decision as to the legality, import or effect of the memorandum agreement between Mr. Dowd and claimant.

claimant.<sup>11</sup> Mr. Dowd also advised in a written and signed memorandum<sup>12</sup> that when he received title to the properties via the quit claim deed, he would somehow cause the claimant to be released from any further liabilities derived from, or flowing from, the purchase.<sup>13</sup> In the event that Mr. Dowd could not refinance the properties within 210 days after closing, the memorandum provided that Mr. Dowd would quitclaim the properties back to claimant.<sup>14</sup>

The transaction did not close on March 21, 2007 as had been promised by Mr. Dowd. Claimant called Mr. Dowd several times over the next week. Mr. Dowd stated that the closing would occur on March 27, 2007. Closing did not occur on March 27. Mr. Dowd offered no clear explanation for the delay. The originally designated closing agent was to be 1<sup>st</sup> Alaska Mortgage Company. Without notice to claimant, 1<sup>st</sup> Alaska Mortgage Company was replaced by Northstar Mortgage Company.<sup>15</sup> In the months after March 27, 2007, the claimant continued to call Mr. Dowd and Northstar each week, but he received no encouraging news.

Claimant contacted Realty Executives on May 30, 2007 because Mr. Dowd had indicated that he was associated with this brokerage when he was first in contact with the claimant. Realty Executives informed claimant that Mr. Dowd had not been associated with Realty Executives for several months. Realty Executives referred claimant to Vanguard Real Estate, which advised that Mr. Dowd had not worked for Vanguard Real Estate since May 14, 2007. Vanguard Real Estate also professed that it had no knowledge of the proposed transaction with the claimant, or the whereabouts of the \$12,000 earnest money paid to Mr. Dowd.

Claimant visited with the real estate commission investigator on June 5, 2007. On June 8, 2007, claimant filed his surety fund claim. On June 14, 2007, Mr. Dowd emailed claimant and stated, *inter alia*, that "...I need to get you your \$12,000 earnest money back" and "I will

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<sup>11</sup> While the record is not replete with details of how Mr. Dowd intended to deal with the other six four-plex properties, it strongly appears that Mr. Dowd intended to use the money and good credit of others in order to ultimately gain control of the nine properties.

<sup>12</sup> Exhibit 3.

<sup>13</sup> The record does not disclose exactly how the claimant would produce the \$1,500,000 to close the transaction; however, it appears that claimant would be borrowing some or all of the funds. If that assumption is true, then a quit claim deed from the claimant to Mr. Dowd would not retire or cancel any liability acquired by the claimant as necessary to close the transaction.

<sup>14</sup> During the running of the 210 day period, no explanation is given as to who would be making the payments on indebtedness incurred by the claimant.

<sup>15</sup> Each of the three purchase and sale agreements provides at paragraph 3(b)(v) that any change of lender, type of financing, or allocation of closing costs, must be approved in writing by Seller. Nothing in the record indicates that Mr. Dowd brought this provision to the attention of the claimant.

pay you the \$12,000...”<sup>16</sup> Despite these admissions and statements by Mr. Dowd, claimant has not received a refund of the earnest money.

### 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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup> 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”.<sup>21</sup> To support a recovery from the Surety Fund, such a misstatement or nondisclosure must be “wrongful”; an innocent misrepresentation or nondisclosure is not enough.<sup>22</sup>

The act of “conversion “ is committed when a party intentionally interferes or dispossesses another of their property or intentionally uses or interferes with a chattel in

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<sup>16</sup> Exhibit 7.

<sup>17</sup> AS 08.88.460(a)

<sup>18</sup> *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.

<sup>19</sup> *Jarvis v. Ensminger*, 134 P.3d. 353 (Alaska 2006); see also Restatement of Torts 2<sup>nd</sup> §526.

<sup>20</sup> See Black’s Law Dictionary Abridged 6<sup>th</sup> 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.”

<sup>21</sup> *Carter v. Hoblit*, 755 P.2d 1084, 1086 (Alaska 1988).

<sup>22</sup> *Alaska Real Estate Commission v. Johnston*, 682 P.2d 383, 386-87 (Alaska 1984)

another's possession.<sup>23</sup> Conversion is also described as "any unauthorized act which deprives an owner of his property permanently or for an indefinite time."<sup>24</sup>

Mr. Dowd's conduct as a licensed agent in this transaction constitutes fraud, intentional misrepresentation, deceit, and the conversion of trust funds<sup>25</sup>. The acts constituting any one of these four grounds are sufficient, standing alone, to support the granting of claimant's surety fund claim.

The transformation of claimant's property (their \$12,000) to Mr. Dowd's own use or purposes is conversion. Mr. Dowd induced claimant to commit \$12,000 to a proposed real estate transaction while failing to disclose qualifying and important information, both at the outset and while the transaction was in play. Mr. Dowd intentionally directed that the earnest money be paid to him personally, rather than to the brokerage trust account; this is a serious violation of the law and constitutes deceit.<sup>26</sup> Under 12 AAC 64.260, Mr. Dowd's failure to deposit the claimant's funds into the appropriate trust account constitutes "fraudulent and dishonest conduct" which in turns allows the real estate commission to suspend or revoke the license of a licensee.<sup>27</sup>

Even though Mr. Dowd admits that the \$12,000 should be returned to claimant<sup>28</sup> because the transaction fell through without fault by the buyer, Mr. Dowd has not returned the claimant's funds which he personally received. If the \$12,000 had been paid into a brokerage trust account, at least the funds would be accounted for and available for proper disbursement. Although the record is not fully developed, particularly as to the larger potential transaction involving the nine separate properties, the inference is strong that Mr. Dowd was unsuccessful in making the entire

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<sup>23</sup> *K & K Recycling Inc. Alaska Gold Co.*, 80 P.3d 702, 717 and n. 26 (Alaska 2003), citing *the Restatement (Second) of Torts*, sect. 27 (1965).

<sup>24</sup> *Black's Law Dictionary*, abridged 6<sup>th</sup> edition (1991)

<sup>25</sup> Claimant did not allege conversion of trust funds. The record established in this case includes facts and circumstances which clearly constitute the conversion of trust funds. When the facts are clear and support the claimant's surety fund claim, the claimant should not be penalized for not "checking the right box." See *Doss v. South Central Bell Telephone Co.*, 834 F.2d 421 (5<sup>th</sup> Cir. 1987) for the proposition that naming the wrong theory is not fatal to a complaint. Claimant herein did not select the wrong box; it appears that claimant may not have understood what constitutes "conversion".

<sup>26</sup> AS 08.88.351(a)(3) requires that a brokers deposit funds collected from other in the course of a real estate transaction into a trust account. 12 AAC 64.200 requires that a person employed or affiliated with a broker, such as Mr. Dowd, deposit funds collected in conjunction with a real estate transaction be deposited to "...the appropriate trust account within five days following receipt..." AS 08.88.615 (a)(5) requires that a licensee account for all money received from a person the licensee is assisting.

<sup>27</sup> AS 08.88.071(a)(3)(A)(iv).

<sup>28</sup> Exhibit 7.



properties close simultaneously. Because the simultaneous closing contingency was not satisfied, claimant's obligation to close did not mature and his earnest money of \$12,000 should be returned.<sup>29</sup>

The record is clear that Mr. Dowd needed the money and credit of claimant in order to make the transaction close. Mr. Dowd misrepresented who the earnest money should be paid to and repeatedly failed to inform claimant of the transaction status. In a real estate transaction, there is almost always the risk that the purchase may turn out to be an unwise decision. However, the risk to a buyer should not be that his licensed agent will abscond with the earnest money and fail to represent the best interests of the client, especially as the transaction "falls apart".

Mr. Dowd promised the claimant on more than one occasion that the transaction would close on March 21, 2007. He then promised that it would close on March 27, 2007. When it did not close on March 27, 2007, Mr. Dowd again intentionally misrepresented the status of the transaction when he gave false assurances that the transaction would close "next week".<sup>30</sup> Promises given to a proposed buyer in a real estate transaction do not always rise to the level of an intentional misrepresentation. In Mr. Dowd's case, his intentional, repeated, and inaccurate promises are intentional misrepresentations because: (1) Mr. Dowd repeatedly represented as a fact that the transaction would close when he knew that the transaction was tenuous and dependent on numerous contingencies; (2) he had no factual basis to support the promise that the transaction would close on a date-certain; (3) he intended that claimant rely on his statements about the closing, otherwise claimant would pull out of the transaction; (4) claimant relied on his representations and was damaged when they could not retrieve their earnest money once it was evident that the transaction would not close. When Mr. Dowd dropped from sight, his earlier misrepresentations about whether his license was with Realty Executives or Vanguard Real Estate came to light; the record supports a finding that some of the confusion and misinformation was deliberately instigated by Mr. Dowd to "buy time".

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<sup>29</sup> If the earnest money had been paid into a brokerage trust account, and the sellers asserted their right to the earnest money because it was non-refundable under the purchase and sale agreement language, seller's claim might be the subject of a civil action. The record does not disclose seller's position once the transaction did not close. The record does not disclose whether other earnest money was collected by Mr. Dowd.

<sup>30</sup> Exhibit 1, p.3.

The weight of the evidence establishes that claimant justifiably relied on the false representations of Mr. Dowd, to the ultimate detriment of the claimant. None of Mr. Dowd's conduct in this proposed transaction would raise the possibility that his conduct was simply innocent and nothing more than insignificant oversight; rather, Mr. Dowd's conduct as a licensee was wrongful and intentional

**IV. Conclusion**

Claimant has proven by a preponderance of the evidence that Mr. Dowd, while acting in his professional capacity as a real estate licensee, engaged in fraudulent and deceitful conduct, made intentional misrepresentations in connection with the proposed real estate transaction in which the claimant was involved, and wrongfully converted claimant's funds (which should have been placed into a trust account) to his own use. As a result, claimant incurred damages of \$12,000 while justifiably relying on Mr. Dowd to muster the transaction to a successful closing, or secure the return of claimant's earnest money. Mr. Dowd did neither.

**V. Order**

**IT IS HEREBY ORDERED** that the claim of Kirk Whitehurst in the amount of \$12,000 against the real estate surety fund in case number S-27-012 is GRANTED.

DATED this 30<sup>th</sup> day of November, 2007.

By: \_\_\_\_\_  
James T. Stanley  
Administrative Law Judge

**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 December, 2007

By: \_\_\_\_\_

Signature

Gene DuVal

Name

Chair

Title