

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:)
)
MADA ANGELL)
)
 Claimant,)
)
 v.)
)
DAVID DOWD)
)
 Respondent.)

OAH Case No. 07-0364-RES
Commission No. S-27-013

DECISION AND ORDER

I. Introduction

Mada Angell (“Ms. Angell” or “Claimant”) filed a claim on June 11, 2007 with the Alaska Real Estate Commission (“AREC”) seeking an award of damages in the amount \$4,000 and naming David Dowd (“Mr. Dowd” or “Respondent”) as the Respondent. Ms. Angell alleged that Mr. Dowd committed fraud and failed to deposit her earnest money to an appropriate trust account, thereby converting trust funds to his own use within a real estate transaction. Ms. Angell was the proposed purchaser of a four-plex rental property located in Independence Park, Anchorage.¹ 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. Ms. Angell testified in person. Mr. Dowd did not testify; at the time of the hearing, Mr. Dowd did not hold a real estate license.² The hearing was recorded. Exhibits 1 through 10 were admitted into evidence without objection.

Ms. Angell’s alleges that Mr. Dowd is responsible for a failed real estate transaction which prevented Ms. Angell from completing the purchase of a residential property in

¹ Exhibit 4.

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

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 her \$4,000 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. Facts³

The sellers purportedly⁴ listed their nine four-plex properties with Realty Executives in early 2007. In early March 2007, Mr. Dowd contacted Ms. Angell 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 Ms. Angell. Even though Ms. Angell’s earlier offers had not been accepted, Mr. Dowd knew that claimant was a serious and qualified investor.

Mr. Dowd explained to claimant in January 2007 or early February 2007 that he was assembling buyer-investors to purchase nine 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 one of the nine four-plex units; the selling price for the four-plex chosen by Ms. Angell was \$508,000.

The closing and recording of the sale was scheduled to occur no later than March 9, 2007; the closing and recording 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 eight four-plex properties, the record does not reveal how Mr. Dowd was organizing the sales to other buyer-investors. The multiple postponements of the closing date suggest that Mr. Dowd was having difficulty bringing all buyer-investors “into 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 property.⁵ The record is clear that Mr. Dowd did not

³ The facts recited herein are from the record assembled in this case, unless another source is cited. The record includes the sworn testimony of Ms. Angell and all exhibits.

⁴ Realty Executives is presumed to be the listing and selling brokerage because the purchase and sale agreement so state. However, a formal listing agreement is not part of the record.

⁵ Exhibit 5, p. 6. provides that “contract is contingent upon all nine buildings seller currently owns on Martha’s Vineyard recording simultaneously: “Martha’s Vineyard” is a street in Independence Park subdivision, Anchorage.

keep his client, the claimant, informed as to the status of the overall transaction involving the nine properties.

Claimant was qualified to purchase one of the nine properties for \$508,000. The earnest money for the four-plex unit would be \$4,000. On February 5, 2007, claimant delivered two checks totaling \$4,000 to Mr. Dowd; at Mr. Dowd's request, both checks were payable to David Dowd; at Mr. Dowd's instruction, both checks were annotated to state "earnest money reimbursement" on the front of both checks; both checks were deposited to the account of the payee, David Dowd, on February 6, 2007.⁶ 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 Realty Executives. A broker's failure to deposit earnest money into the trust account of the real estate brokerage is a violation of AS 8.88.351(3); however, the record supports a finding that the responsible broker of Realty Executives didn't know that Mr. Dowd had received the earnest money.

Ms. Angell thought it odd that she would be instructed by Mr. Dowd to make the earnest money checks payable to him personally. Her suspicion was allayed when Mr. Dowd told Ms. Angell that he owned the four-plex in question. On or about February 5, 2007, Mr. Dowd supplied Ms. Angell with a copy of a document captioned *Addendum or Amendment to the Purchase and Sale Agreement* ("amendment" hereinafter) which specifically referred to a purchase and sale agreement between "David Dowd and/or Assigns to Mada Angell", the buyers, and "Brad and Lisa Wilson", sellers.⁷ The amendment further stated that "Contract is assigned to Mada Angell." and "Mada Angell reimbursed previous buyer, David Dowd \$4000 in earnest money". Nothing in the record supports the assertion by Mr. Dowd that he owned the four-plex in question. At best, it is possible that Mr. Dowd had the four-plex in question under contract of sale with the true owner.

The transaction did not close on March 9, 2007 as had been promised by Mr. Dowd. Claimant called Mr. Dowd several times over the next week. Mr. Dowd stated that the closing was delayed, but that the transaction would soon close. Mr. Dowd offered no clear explanation for the delay. Mr. Dowd led Ms. Angell to believe that he had all nine of the four-plexes "tied

⁶ One check for \$1000 was drawn on an Anchorage-area credit union, and a second check for \$3000 was drawn on an out of state bank

⁷ Exhibit I, p. 4.

up” and that closing was imminent. The designated closing agent was to be 1st Alaska Mortgage Company. Despite inquiries directed to 1st Alaska Mortgage, Ms. Angell was unable to learn the status of the transaction. On May 16, 2007, claimant emailed Mr. Dowd and formally requested return of her earnest money because months had passed without a closing; she reiterated that she had completed her due diligence and was qualified for the loan, but she needed to “...move on.”

On June 11, 2007, claimant filed his surety fund claim. On June 14, 2007, Mr. Dowd emailed claimant and stated, *inter alia*, “I never promised you your earnest money back. I don’t understand why you think I should pay your earnest money back.” Ms. Angell strenuously and credibly testified that she would never offer to buy any investment property which included a non-refundable earnest money provision. In the transaction at hand, Ms. Angell refused to initial and approve the deletion of a provision in the purchase and sale agreement which would allow the return of her earnest money, providing she was not in default when the transaction terminated without closing.⁸

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.⁹ If a Claimant proves 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.¹⁰ 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.¹¹

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

⁸ Exhibit 4, p. 5.

⁹ AS 08.88.460(a)

¹⁰ *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.

¹¹ *Jarvis v. Ensminger*, 134 P.3d. 353 (Alaska 2006); *see also* Restatement of Torts 2nd §526.

is damaged as a result of the deceitful conduct.¹² 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”.¹³ To support a recovery from the Surety Fund, such a misstatement or nondisclosure must be “wrongful”; an innocent misrepresentation or nondisclosure is not enough.¹⁴

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 another’s possession.¹⁵ Conversion is also described as “any unauthorized act which deprives an owner of his property permanently or for an indefinite time.”¹⁶

Mr. Dowd’s conduct as a licensed agent in this transaction supports a finding of fraud and the conversion of trust funds. The acts constituting either of these two grounds are sufficient, standing alone, to support the granting of claimant’s surety fund claim.

The transformation of claimant’s property (her \$4,000) to Mr. Dowd’s own use or purposes is conversion. Mr. Dowd induced claimant to commit \$4,000 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; conversion of trust funds is a serious violation of the law and also supports a finding of deceit.¹⁷ Under 12 AAC 64.260, Mr. Dowd’s failure to deposit the claimant’s funds into the appropriate trust account constitutes

¹² 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.”

¹³ *Carter v. Hoblit*, 755 P.2d 1084, 1086 (Alaska 1988).

¹⁴ *Alaska Real Estate Commission v. Johnston*, 682 P.2d 383, 386-87 (Alaska 1984)

¹⁵ *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).

¹⁶ *Black’s Law Dictionary*, abridged 6th edition (1991)

¹⁷ 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 which the licensee is assisting.

“fraudulent and dishonest conduct” which in turns allows the real estate commission to suspend or revoke the license of a licensee.¹⁸

Even though the transaction “fell through” without fault by the buyer, Mr. Dowd has not returned the claimant’s funds which he personally received. If the \$4,000 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 property close simultaneously. Because the simultaneous closing contingency was not satisfied, claimant’s obligation to close did not mature and her earnest money of \$4,000 should be returned.¹⁹

The record is clear that Mr. Dowd needed the money and credit of claimant in order to make the larger 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 seriously breach his duties to his client.. As the holder of a real estate license, Mr. Dowd cannot deliberately mislead the proposed purchaser to believe that he was the owner of the property in question.

Mr. Dowd promised the claimant on more than one occasion that the transaction would close on March 9, 2007. It did not. Mr. Dowd again intentionally misrepresented the status of the transaction when he gave false assurances that the transaction would close “soon”. Promises of closing dates 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

¹⁸ AS 08.88.071(a)(3)(A)(iv).

¹⁹ 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 in this case does not disclose whether other earnest money was collected by Mr. Dowd.

his statements about the imminent closing and his alleged ownership of the property; otherwise, claimant would pull out of the transaction; (4) claimant relied on his representations and was damaged when she could not retrieve her earnest money once it was evident that the transaction would not close. When Mr. Dowd dropped from sight, claimant's ability to retrieve here earnest money dropped precipitously.

The weight of the evidence in this case establishes that claimant justifiably relied on the false representations of Mr. Dowd, to her ultimate detriment. 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 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 \$4,000 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 Mada Angell in the amount of \$4,000 against the real estate surety fund in case number S-27-013 is GRANTED.

DATED this 30th 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 June, 2007.

By: _____
Signature
Gene DuVal
Name
Chair
Title