

a source of compensation for financial loss incurred by a party to a real estate transaction. Mr. Devlin's damages do not arise from intentional misrepresentation by Mr. Radvansky or from any of the other covered causes; thus, an award to Mr. Devlin from the surety fund is not warranted.

II. Facts²

Mr. Radvansky was first licensed by the state of Alaska as a real estate salesperson on March 29, 1991. At all times pertinent to this case, Mr. Radvansky has been associated with Soldotna Realty Inc., of which he is the employing broker of record. Soldotna Realty Inc. was incorporated in Alaska on September 2, 2004; Soldotna Realty Inc. was first issued a business license on September 27, 2004. According to the public records, Mr. Radvansky is the sole owner of Soldotna Realty Inc.

The Devlins began looking for property to purchase in the Kenai-Soldotna area in early 2005. At the time the Devlins began their search for property to purchase, they resided in Anchorage. The Devlins' intent was to purchase an unimproved parcel of land, build a recreational cabin on the property, and later replace the cabin with a permanent residence. The Devlins conducted some of their search for a suitable property via the internet. In 2006, the Devlins purchased a business located in Soldotna.

Soldotna Realty Inc. listed several parcels of land in Silent Hills Subdivision for owners John and J. Diane Galley in 2003. The listing was placed in the Multiple Listing Service ("MLS"); information about the parcels was added to the Soldotna Realty Inc. web site. Referring to the Silent Hills parcels, both the MLS listing and the web site stated that "...the road is maintained year round."³ Mr. Devlin read the information about the Silent Hills parcels on the Soldotna Realty web site.

On May 24, 2005, Mr. Devlin purchased a parcel of approximately 4.5 acres from John and J. Diane Galley for the sum of \$18,500. The parcel is legally described as Tract 14, Silent Hills Subdivision, Part 1, Plat 2003-13, Kenai Recording District, Third Judicial District, State of Alaska. The property is physically located in the Funny River area. Access to the parcel is generally from mile 14.5 of the Funny River Road. The parcel fronts the extension of Rick Avenue; Rick Avenue intersects the extended portion of Huckleberry Street. The extension to

² 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. Devlin, Mrs. Devlin, Mr. Radvansky, and all exhibits.

³ The "road" is the access to the lots listed in Silent Hills Subdivision.

Huckleberry Street is approximately 650 feet in length.⁴ The extension to Rick Avenue is approximately one-quarter of a mile.⁵ The platted width of the Huckleberry Street extension is 30 feet; the platted width of the Rick Avenue extension appears to be 60 feet.⁶

The Devlins spent the summer of 2005 clearing their property as necessary to construct a recreational cabin. They constructed a 300 foot long driveway and an approximately 10,000 square foot gravel pad upon which to construct the cabin. By the fall of 2005, the cabin was constructed. When the Devlins attempted to access the cabin in the winter of 2005-2006, access was close to impossible because the road intersecting their driveway was not maintained (plowed) by the Kenai Peninsula Borough (“borough”).

The winter access problems facing the Devlins spurred frequent and acrimonious communication between Mr. Devlin and Mr. Radvansky, and between Mr. Devlin and Mr. Galley. Upon voicing his complaints regarding access to his property, Mr. Devlin was incorrectly informed that the borough may not have been plowing the road because it did not know that the Devlins had constructed a dwelling on their land.⁷ Mr. Devlin contacted borough officials and learned that the road in question had not been accepted by the borough and therefore was not on the borough list of roads to be maintained. Roads which do not meet borough specifications are not “accepted” and therefore do not receive year-round borough maintenance.

Email communications between Soldotna Realty (or its employee, Cindy Weeks)⁸ and Mr. Devlin were frequent in December, 2006. Mr. Devlin repeatedly insisted that the access road to his property be made “year-round” accessible. With respect to parcels still on the market, Mr. Radvansky corrected the information provided to MLS regarding year-round road maintenance, but neglected to correct the Soldotna Realty web site erroneous information on the same topic.

The Devlins consulted attorney Phil Nash in July, 2007. Mr. Nash wrote to Mr. Radvansky on July 17, 2007 and alleged oral and written misrepresentation concerning borough

⁴ Exhibit 22.

⁵ Exhibit 22. The record does not disclose when Rick Avenue and Huckleberry Street were extended. Based upon the fact that the relevant plat was recorded in 2003, it is likely that the road extensions were constructed in 2002 or the summer of 2003.

⁶ P.2, Exhibit 14 and Exhibit 15.

⁷ E-mail to Mr. Devlin from Cindy Weeks which communicated Mr. Radvansky’s incorrect belief that the borough would maintain the road once they knew of the Devlins’ dwelling.

⁸ The precise relationship of Ms. Weeks to Soldotna Realty is not disclosed by the record. The context of her emails indicates she works for Soldotna realty or Mr. Radvansky.

maintenance of the road serving as access to the Devlin property.⁹ Mr. Nash's letter invited Mr. Radvansky to respond to the letter, and advised that Mr. Devlin intended to file a claim with the Alaska surety fund. The letter also recounted advice to Mr. Devlin that he need not worry about the statute of limitation barring a surety fund claim because "...a statute of limitations is construed to commence with the discovery of the misrepresentation, and therefore the statute did not start to run until he learned that the road was in fact not on the maintenance list..."¹⁰

Mr. Radvansky responded to Mr. Nash by letter dated July 26, 2007.¹¹ Mr. Radvansky stated that because Huckleberry Street was of inadequate right of way width, it did not meet the requisite borough standards for inclusion in the borough road maintenance plan.¹² As an immediate solution, Mr. Radvansky commissioned a local contractor to plow the road to the Devlin parcel until such time as the road in question could be brought to borough standards and officially added to the borough's road maintenance list. At a point in time not disclosed in the record, Mr. Galley had been in contact with the borough and was contacting owners of property fronting on Huckleberry Street to obtain an additional 30 feet of right of way width. The status of Mr. Galley's efforts was unknown as of the time of the hearing in this matter.

Mr. Nash sent a second letter to Mr. Radvansky on August 6, 2007 largely reiterating the content of his earlier letter. Because good access to the Devlin preoperty is not available on a year-round basis, Mr. Nash urges that the property is probably uninsurable. If the property is uninsurable, then the property cannot be used to collateralize construction or long term financing for the home that the Devlins hoped to build. Mr. Nash suggested several actions that Mr. Galley might take, pending borough acceptance of the road in question. As of the date of the hearing in this matter, the record is silent regarding any agreements reached between Mr. Devlin and Mr. Galley.

⁹ Exhibit 11.

¹⁰ P. 2, Exhibit 11. The advice regarding the statute of limitation given to Mr. Devlin is incorrect. Sale of the property in question closed May 24, 2005. The surety fund claim was filed August 6, 2007. Alaska Statute 08.88.460 requires that a surety fund claim be filed "within two years after the *occurrence*" of the fraud, misrepresentation or deceit claimed as the basis for reimbursement from the fund. Mr. Radvansky did not assert a statute of limitations defense to the claim; however, this Commission has held that the statute is to be interpreted as written, and is not extended by delay in discovery. *Roe v. Leisek*, Real Estate Commission Case No.S-25-009 (decision adopted December 14, 2006).

¹¹ Exhibit 12.

¹² KPB 14.06.050 provides that only roads which meet the design and construction standards set forth in KPB 14.06 may be certified by the RSA board for inclusion in the RSA program. "KPB" means Kenai Peninsula Borough. "RSA" means road service area.

Mr. Devlin filed his Alaska Real Estate Commission Surety Fund Claim for Payment on August 7, 2007. He alleged intentional misrepresentation by Mr. Radvansky and requested an award of \$15,000. On or about August 20, 2007, Mr. Radvansky gave written notice to the Real Estate Commission that he did not intend to present a defense to the claim.¹³

Mr. Devlin, Mrs. Devlin, and Mr. Radvansky testified at the hearing. Each provided candid and credible testimony. To his credit, Mr. Radvansky admitted that the parcel of land purchased by Mr. Devlin from the Galleys was not in fact maintained year-round by the borough as initially stated in the MLS information and on the Soldotna Realty Inc. web site. Mr. Radvansky explained that he lives in the area of the Devlin property and passes by Huckleberry Street very frequently, in summer and in winter. Over a period of several winters before Mr. Devlin's purchase in May of 2005, Mr. Radvansky observed as he drove by Huckleberry Street that it was regularly plowed by the borough. What Mr. Radvansky did not know and could not easily see was that the *extension* to Huckleberry Street was *not* plowed because it had not been accepted by the borough.

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 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

¹³ Exhibit 21. The Notice of Intent to Defend language is provided at the base of the Notice of Claim and Application to Submit Additional Evidence letter sent by the Real Estate Commission to the licensee. The statement is: "I hereby make application to present additional evidence regarding the claim against the surety fund in the case file referenced above. Written response and supporting documents are enclosed with this letter. () YES () NO." If the licensee checks the NO box, signs his/her name, affixes the date, there can be some uncertainty as to whether the licensee is stating that he/she does not intend to defend against the claim, or whether the checked NO means that the licensee is not providing a written response or supporting documents. Drawing from Mr. Radvansky's testimony at the hearing, it appears that he did not intend to defend against the claim filed by Mr. Devlin.

¹⁴ AS 08.88.460(a)

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.

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 claimant (or plaintiff) in a misrepresentation case bears the burden of establishing by a preponderance of the evidence that the misrepresentation was material.¹⁷ Case law in Alaska describes a material fact as one “to which a reasonable man might be expected to attach importance in making his choice of action. It is a fact which could reasonably be expected to influence someone’s judgment or conduct concerning a transaction.”¹⁸

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.¹⁹ 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”.²⁰ To support a recovery from the surety fund, such a misstatement or nondisclosure must be “wrongful”; an innocent misrepresentation or nondisclosure is not enough.²¹

Mr. Devlin has established that Mr. Radvansky’s representation that the road in question was maintained year-round was a false representation and that he reasonably relied on the representation when making his decision to purchase the parcel of land from the Galleys. By publishing incorrect road maintenance information in the MLS and on the Soldotna Realty web site, Mr. Devlin has established that Mr. Radvansky intended that potential purchasers, including Mr. Devlin, would rely on the false representation. Mr. Devlin has established that he has suffered damages.

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

¹⁷ See *Nelson v. Progressive Corp.*, 976 P.2d 859-65 (Alaska 1999) (noting that preponderance of evidence is standard of proof to establish that defendant engaged in knowing misrepresentation); see also *Schlesinger v. Herzog*, 2 F.3d 135, 141 (5th Cir. 1993) (“In order to prevail, plaintiffs must show that the defendants engaged in fraudulent practices or made material omissions or misrepresentations...upon which plaintiffs relied, and which ultimately resulted in damages to plaintiffs.”).

¹⁸ *Diblik v. Marcy*, 166 P.3d 23, 28 (Alaska 2007), citing to *Cousineau v. Walker*, 613 P.2d 608, 613 (Alaska 1980) (quoting W. PROSSER, LAW OF TORTS, section 108, at 719 (4th ed. 1971)).

¹⁹ 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.”

²⁰ *Carter v. Hoblit*, 755 P.2d 1084, 1086 (Alaska 1988).

²¹ *Alaska Real Estate Commission v. Johnston*, 682 P.2d 383, 386-87 (Alaska 1984).

Mr. Devlin has not established that Mr. Radvansky knew or believed that the road maintenance representation was false at the time it was made, or that Mr. Radvansky knew that the basis for the representation was not as stated or implied. A review of all evidence presented in this case supports a finding that Mr. Radvansky did not intend to misrepresent whether or not the road was maintained throughout the year; rather, Mr. Radvansky made a mistake. In some surety fund cases, establishing the requisite *intent* of the licensee to meet surety fund award standards is frequently an evidentiary challenge.

Considering all of the evidence, I find that Mr. Radvansky did not intend to misrepresent anything about the parcel purchased by Mr. Devlin. I find that Mr. Radvansky did have confidence in his initial representation that the road in question was maintained “year-round”, but at that time he did not know that the representation was not as stated or implied.

A brief review of the damages suffered by Mr. Devlin is warranted.²² After Mr. Radvansky’s mistake came to light, Mr. Radvansky attempted to mitigate Mr. Devlin’s damages by hiring, at his expense, a private contractor to plow the road accessing the Devlin property, until a better result could be achieved. Mr. Devlin suggests that if he had known that the road was not maintained all year, he would not have purchased the lot, and he would not have spent money on improvements. That may be true. However, the fair market value of the lot is not zero. The value of the lot has been enhanced by the improvements. Without making a finding of fact on Mr. Devlin’s damages, the damages suffered by Mr. Devlin may be a sum of money attributable to his lost use of his property during the period of ownership, until “year-round” access is achieved, as originally represented.²³

IV. Conclusion

Mr. Devlin has established that the property he purchased cannot be immediately used for the purpose he intended—construction of a permanent residence. Having said that, claimant has not proven by a preponderance of the evidence that Mr. Radvansky, while acting in his professional capacity as a real estate licensee, *intentionally* misrepresented facts in connection

²² Because no award from the surety fund is warranted under the facts of this case, the exact amount of Mr. Devlin’s damages need not be quantified in this decision.

²³ See *Alaska Construction Equipment, Inc. v. Star Trucking, Inc.*, 128 P.3d 164 (Alaska 2006) for a discussion of “loss of use” damages.

with a proposed real estate transaction. Mr. Devlin's surety fund claim should be denied without prejudice²⁴ to any other claims he may have against Mr. Radvansky.²⁵

V. **Order**

IT IS HEREBY ORDERED that the claim of David Devlin in the amount of \$15,000 against the real estate surety fund in case number S-28-002 is DENIED.

DATED this 21st day of February, 2008.

~~By:~~ _____

James T. Stanley
Administrative Law Judge

²⁴ 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.

²⁵ While the facts in this case do not support a finding of intentional misrepresentation, they appear to support a finding of negligent misrepresentation. The *Restatement (Second) of Torts*, section 552, defines the four elements required to establish negligent misrepresentation as (1) the party accused of misrepresentation must have made the statement in the course of his business, profession or employment; (2) the representation must supply "false information"; (3) the plaintiff must show "justifiable reliance" on the false information, and (4) the accused party must have failed "to exercise reasonable care or competence in obtaining or communicating the information." Fraudulent misrepresentation requires an additional element: proof that the party making the misrepresentation knew it was untrue.

Devlin v. Rahowly

Adoption

SF28-002

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 Nov, 2008.

By: _____
Signature *[Handwritten Signature]*
Name ARAC
Title _____