BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL FROM THE REAL ESTATE COMMISSION

In the Matter of the Surety Fund Claim of:	)	
	)	
THADDEUS DuBOIS	)	
	)	
Claimant,	)	
	)	
v.	)	
	)	
DAVID DOWD	)	
	)	
Respondent.	)	OAH No. 07-0581-RES
	)	Agency No. S-28-003

DECISION AND ORDER

I. Introduction

This case is a claim against the Real Estate Surety Fund arising from a failed purchase of a four-plex by an individual seeking to become a first-time investor in such properties. Thaddeus DuBois, the buyer, was represented in the transaction by Vanguard Real Estate. He posted apparently nonrefundable earnest money. When his hoped-for financing failed to materialize and the transaction became impossible to consummate, he brought this claim against one of the Vanguard licensees involved in the transaction, David Dowd. He seeks reimbursement of the apparently lost earnest money and certain related expenses.

Three parties have participated in this case: Mr. DuBois; William de Schweinitz, the broker who supervised Dowd; and Lori Moore, an involved licensee. David Dowd did not participate. On April 8, 2008, the Office of Administrative Hearings clerk reached him by telephone at a correctional halfway house; he confirmed on that date that he did not wish to reopen the record or otherwise participate.

The decision in this case has been delayed by agreement of the participating parties, first in order to complete mediation and subsequently in order to allow a related lawsuit to proceed. The parties have indicated that they now desire a decision.

Because Mr. DuBois has not demonstrated fraud, deceit, wrongful misrepresentation, or conversion in this transaction, no payment from the Surety Fund is appropriate. While Mr. Dowd may have advised Mr. DuBois poorly in some respects, the Surety Fund is not an insurer for erroneous advice or unwise business decisions.

II. Facts

The record on which this decision is based consists of testimony from four witnesses, the exhibits filed with Mr. DuBois's complaint, a single exhibit ("A") admitted at the hearing, and, for procedural context, certain records from *De Schweinitz v. DuBois*, 3AN-07-10114CI (Alaska Superior Court). Mr. DuBois submitted an unsworn statement on March 19, 2008, after the evidentiary record had closed. Because testimony must be under oath, this statement has not been considered.

A. The Transaction[1]

In the spring of 2007, Thaddeus DuBois hoped to begin building a portfolio of multifamily investment properties. At a dinner program on real estate investment, he met David Dowd, who was then a licensed real estate salesperson employed by Vanguard Real Estate. He asked Dowd to be on the lookout for a four-plex investment for him. Through Dowd, DuBois became interested in such a property at 1102 Broaddus Street in Anchorage.[2]

Mr. DuBois had no cash available for a down payment. His only option to complete the transaction successfully was a VA loan with no down payment. He explained this to Dowd, and also raised a potential issue: his military service had ended with a discharge that, while not "dishonorable," was in an "other-than-honorable" category. Dowd asked DuBois to explain to him what an "other-than-honorable" discharge was. DuBois explained that there were several levels of discharge. Dowd told DuBois that as long as the discharge was not dishonorable he "would be fine" and "should be able to get" the financing.[3]

Dowd's statement that DuBois would be or should be eligible for VA financing was probably correct. The VA's website indicates that veterans are eligible if their discharge was "other than **dis**honorable"[4], although it notes that applicants with "other than honorable" discharges may need to await a determination by the VA that "the service was under other than dishonorable conditions."[5]

DuBois and Dowd worked with Brian Brigman, a loan officer at Residential Mortgage. Brigman indicated that the VA loan would be possible. Based on the understanding that he could get the VA financing that was essential to him, on April 8, 2007 DuBois entered into a contract to purchase 1102 Broaddus Street for $495,000. He gave Dowd $4000 in earnest

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1 The footnotes in this section ordinarily give sources for the whole paragraph preceding the footnote call.
2 Testimony of DuBois.
3 *Id.* The quoted language is from DuBois's testimony and does not purport to be a direct quote from Dowd.
4 The emphasis on "dis" has been added.

money, which Dowd placed in the Vanguard Real Estate trust account. The $4000 was borrowed at 11% interest.[6]

The Purchase Agreement called for a closing by May 14, 2007 and provided that the buyer was to obtain a loan commitment by the same date. It provided that if through no fault the buyer the buyer was unable to obtain a commitment by that date, the buyer could "provide written notice to Seller and this Purchase Agreement shall terminate automatically." The agreement provided for an appraisal by April 15, 2007, with the buyer to request "only the minimum repairs required for financing." It provided that the earnest money "will be nonrefundable once appraisal required repairs are negotiated."[7]

The appraiser required no repairs on the property, leaving financing as the only open issue. Brigman issued a 90% letter regarding the VA loan. However, Brigman had difficulty getting the VA to rule on DuBois's eligibility. The problem was made more difficult by the fact that DuBois's discharge document, form DD 214, had been left blank in the location where the type of discharge should be specified. Brigman found the VA "difficult to deal with," repeatedly telling him over a period of several weeks that the matter was "in process." Meanwhile, the closing date was delayed, apparently by informal agreement.[8]

Brigman informed DuBois that he did not qualify for the VA financing. By this point—apparently about June 1—David Dowd had been asked to leave Vanguard Real Estate and had surrendered his licence. DuBois's purchase had been passed on to salesperson Lori Moore. Moore assessed the transaction and concluded that the earnest money was nonrefundable under the circumstances. She thought the financing could still be worked out, however. Under her guidance, on June 6 DuBois proposed an amendment to the Purchase Agreement extending the closing to June 20. It is not clear whether the seller accepted the amendment. In any event, the transaction did not close. On July 6 DuBois abandoned the transaction because "this is taking too long" and asked Vanguard to return his earnest money.[9]

Brigman's impression is that the VA made a final determination that DuBois was ineligible for VA mortgages. DuBois, who has the more specific and credible recollection, is

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5 Hearing Exhibit A.

6 Testimony of DuBois and Brigman; Purchase Agreement.

7 Purchase Agreement. Nonetheless, under clause 13, if the Purchase Agreement were "terminated as provided [in the agreement] absent a default by the Buyer, all earnest money shall be returned." Thus a termination by May 14 under the loan commitment clause would probably have overridden the nonrefundability of the earnest money. Nothing in this decision should be construed as a determination of whether clause 13 would under any circumstances override the nonrefundability provision in the event of a termination after May 14 but prior to closing.

8 Testimony of DuBois and Brigman.

certain that the VA has never made a determination about his eligibility and that his application is still "active" with the VA. DuBois's recollection is bolstered by a letter dated June 26, 2007 from the Department of Veterans Affairs. That letter indicates that a "request for a Certificate of Eligibility for Loan Guarantee Benefits" had been received as late as June 19, 2007 (the day before the extended closing deadline), and that at least 120 days would be needed to process the request.

The above transaction took place under the general supervision of broker William de Schweinitz. De Schweinitz feels it is a bad practice to advise individual, nonprofessional buyers like DuBois to put up nonrefundable earnest money. He says that when he learned that Dowd was setting up such transactions, he asked him to stop doing so.

B. The Interpleader Lawsuit

When this Surety Fund claim was filed, the $4000 earnest money was still in the possession of William de Schweinitz d/b/a Vanguard Real Estate. Vanguard then filed an interpleader action in Alaska District Court, alleging that DuBois and the seller had competing claims to the money and offering to deposit the money with the court (less a deduction for Vanguard's expenses) so that the two claimants could resolve their dispute.[10] Initially, DuBois responded to the interpleader complaint but the seller did not.[11] De Schweinitz contacted the seller[12] and the seller eventually appeared and asserted a claim to the funds. The court has accepted the money and has given the two claimants until June 30, 2008 to reach an agreement or file suit regarding their right to receive it.

III. Discussion

This case falls under the Surety Fund statutes in place prior to the passage of substantial amendments that will probably become effective March 1, 2010.[13] To recover from the Surety Fund under the law in effect in 2007, an individual must show a loss in a real estate transaction resulting from a licensee's fraud, misrepresentation, deceit, or conversion of trust funds.[14]

The four bases listed above on which the Real Estate Commission can authorize reimbursement from the Surety Fund fall in two categories. The first category is fraud,

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9 Testimony of DuBois, Moore, and de Schweinitz; 7/6/07 letter from DuBois to Vanguard Real Estate.

10 Attachments to "Notice" filed by counsel for Vanguard in this proceeding on October 23, 2007; attachments to letter from counsel for Vanguard to Sharon J. Walsh dated November 5, 2007.

11 *See* letter from de Schweinitz to Kennedy, Feb. 14, 2008.

12 *See* letter from de Schweinitz to Kennedy, Feb. 27, 2008.

13 CSHB 357 (L&C) (2008). As of May 5, 2008, this bill was awaiting transmission to the governor and had not been signed into law.

misrepresentation, or deceit, which encompass similar and largely overlapping types of conduct, discussed more fully below. The second category is conversion of trust funds; it has no applicability here because the funds held in trust remained in trust at all times when the respondent, David Dowd, was involved in the transaction.

The terms "fraud, misrepresentation and deceit" are frequently tied together in Alaska licensing statutes. The Alaska Supreme Court likewise uses the three terms essentially interchangeably, requiring for a claim of "fraud," "knowing misrepresentation," or "deceit" proof of: (1) a false representation of fact (2) knowledge that the representation was false (or lack of confidence in the representation, or knowledge that the basis for the representation was not as stated or implied), (3) intention that the other person rely on the representation; (4) justifiable reliance on the representation; and (5) damage as a result of the reliance.[15] "Deceit" has not been separately defined under Alaska law. "The term "deceit" generally means a fraudulent and deceptive misrepresentation used by one or more persons to deceive and trick another person who is unaware of the true facts and is damaged as a result of the deceitful conduct.[16] 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. Fraud, misrepresentation, or deceit can 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".[17] To support a recovery from the Surety Fund, however, any misstatement or nondisclosure must be "wrongful"; an innocent misrepresentation or nondisclosure is not enough.[18]

Mr. DuBois regards two representations made by Mr. Dowd as deceitful. Most centrally, he believes Dowd deceived him when he expressed confidence that DuBois would qualify for VA financing. This claim fails for at least two reasons. First, it has not been demonstrated in this case that Dowd's opinion was erroneous. Mr. DuBois's application with the VA apparently was never denied, and if, as Mr. DuBois claims, he was not dishonorably discharged from the service, it is probable that when the VA completes its investigation he will be found eligible. Second, there is no evidence that Dowd believed his statement to be false or did not have

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14 *See* AS 08.88.460(a).

15 *City of Fairbanks v. Amoco Chemical Co.*, 952 P.2d. 1173, 1176 & n.4 (Alaska 1998); *Bubbel v. Wien Air Alaska, Inc.*, 682 P.2d 374, 381 (Alaska 1984).

16 *See* Black's Law Dictionary Abridged 6th Ed. (1997).

17 *Carter v. Hoblit*, 755 P.2d 1084, 1086 (Alaska 1988); *see also, e.g., Spence v. Griffin*, 372 S.E.2d 595, 599 (Va. 1988).

confidence in its accuracy. To establish fraud, misrepresentation, or deceit, it is not enough to show that a statement about the future later did not come to pass; the intent to deceive or other defect in the statement has to have been existed when the statement was made.[19]

Mr. DuBois also suggests that Mr. Dowd deceived him by indicating that the transaction would close by the date projected in the Purchase Agreement. DuBois did not show, however, that Dowd made any unequivocal prediction or guarantee of a timely closing. Again, moreover, there is no evidence that Dowd was not confident that the transaction could be expected to proceed as planned. Brian Brigman, the loan officer, testified that the processing of VA loans is ordinarily very fast. Dowd had no apparent motive to deceive DuBois on this score, as Dowd would gain nothing unless the transaction held together and closed.

The testimony from the real estate professionals who appeared in this proceeding suggests that Mr. DuBois entered into an unwise transaction. A key element of that transaction was the nonrefundable earnest money provision, and DuBois acceded to that provision on Dowd's advice. However, the Commission cannot use the Surety Fund as an insurance fund to cover bad professional advice. There is no basis in Mr. Dowd's conduct, as demonstrated in this proceeding, to support a payment from the Surety Fund.

Looking beyond Mr. Dowd, it is within the power of the commission, under 12 AAC 64.310, to sustain a claim against the fund on the basis of conduct by any "involved licensee" who received notice of the Surety Fund proceeding. William de Schweinitz and Lori Moore were involved licensees who received notice of and participated in this proceeding. Mr. DuBois did not assert prior to or during the hearing, nor prove during the hearing, that either of them had engaged in conduct supporting a recovery from the Surety Fund.

IV. Conclusion

Because Thaddeus DuBois has failed to prove fraud, wrongful misrepresentation, deceit, or conversion of trust funds, Surety Fund claim S-28-003 is denied.

Nothing in this decision should be construed as a determination of which claimant has a right to receive the earnest money at issue in the interpleader action. Nothing in this decision

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

[19] *Bubbel,* 682 P.2d at 381.

should be construed as a determination of whether any licensee has or has not engaged in conduct subject to discipline.

DATED this 5th day of May, 2008.

By: _____
Christopher Kennedy
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 20 day of June, 2008.

X By: _____
Signature
Gene DuVal
Name
Chairperson
Title