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

In the Matter of the Surety Fund Claim of:)
)
IAN FRAZIER)
)
Claimant,)
)
v.)
)
DAVID DOWD)
)
Respondent.) OAH No. 08-0271-RES
) Agency No. S-28-008

DECISION AND ORDER

I. Introduction

This case is a claim against the Real Estate Surety Fund arising from a failed purchase of a fifty-plex for $4.4 million. The transaction was initiated by David Dowd, then a licensed real estate salesman working under the supervision of licensed broker Patricia Baker of Northern Trust Real Estate, Inc. Dowd filled the roles of listing broker, selling broker, and potential co-investor. The buyer was Ian Frazier, a first-time investor of modest means. Although the transaction never closed, Mr. Frazier eventually lost most or all of his net worth in dealings with Mr. Dowd in connection with the transaction. He seeks to recover the maximum available from the Surety Fund, alleging "fraud" and "intentional misrepresentation."

The Executive Administrator of the Real Estate Commission notified Mr. Dowd and Ms. Baker of Mr. Frazier's Surety Fund claim, and both participated in the initial case planning conference (Ms. Baker through counsel and Mr. Dowd on his own behalf). Neither Mr. Dowd nor Ms. Baker attended the hearing to take evidence on the claim.

Mr. Frazier has demonstrated systematic and pervasive deception on Mr. Dowd's part in connection with the transaction, resulting in losses to him exceeding the $15,000 maximum that the Surety Fund may disburse. A Surety Fund award of $15,000 is therefore appropriate.

II. Facts

The record on which this decision is based consists of testimony from Mr. Frazier, Exhibits A-P admitted at the hearing, and the Surety Fund claim file submitted by the Executive Director.[1] Because there was only one witness, citations to witness testimony have generally been omitted from the factual findings below; only documentary sources are cited.

A. Ian Frazier

In the spring of 2006, Ian Frazier was in his mid thirties, married, and raising two daughters. An hourly employee of the Alaska Railroad in the capacity of conductor and brakeman, he earned $110,000 to $120,000 per year but achieved this income only by working extensive overtime; overtime accounted for 60 percent of his earnings. He hoped to find a less time-intensive way to earn a living so that he could spend more time with his family.

Frazier had observed that some of his co-workers had been able to achieve a positive cash flow from four-plexes, and he hoped to purchase one as a beginning real estate investment. Apart from retirement savings of about $150,000 and educational savings for his daughters,[2] he had less than $10,000 on hand, and so he hoped to use equity from his home to generate funds for the investment. He lived in a home he had built himself, on which he owed about $215,000. Based on comparable sales in the neighborhood, he believed the home to be worth about twice that amount.

B. Agreement to Purchase Creekside Terrace Apartments

On the recommendation of a co-worker, Frazier contacted David Dowd, who was then a licensed real estate salesman with Northern Trust Real Estate, Inc.[3] After two or three meetings with Frazier, Dowd began to encourage Frazier to consider a larger investment, explaining that bigger is better because one can better insulate oneself from vacancies if they are spread across a large volume of units. He proposed to Frazier that he consider investing in a 50-plex property, the Creekside Terrace Apartments at 573 East Dowling Road in Anchorage, which he said had just become available. Dowd said he had cold-called the owner and told the owner he had a potential buyer, and the owner had shown an interest in selling.

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[1] This file consists primarily of the claim itself and a set of documents numbered NTRE 1 to NTRE 30 that were submitted by Northern Trust Real Estate, Inc.

[2] He had about $150,000 in retirement assets and $10,700 in educational savings. *See* Ex. D, p. 2.

[3] Mr. Dowd surrendered his license about a year after these events.

On May 31, 2006, Frazier and Dowd met to prepare an offer for the property. Troy Stafford of BMC Capital was also present at Dowd's invitation. Dowd filled out a Purchase and Sale Agreement under which "Ian Frazier and/or assigns" would purchase the 50-plex for $4.4 million.[4] Dowd was listed as both listing and selling broker, "assisting both the Buyer and Seller as a Neutral Licensee."[5] Frazier, who may have seen the property from the road but otherwise had not inspected it, signed the agreement as an offer to purchase.

The May 31 offer required the seller to provide financial and leasing information about the property within seven days.[6] The offer contained a contingencies for physical inspection by a professional (by June 10) and for approval of conventional financing (by August 1).[7] Closing was to occur by August 4.[8] The document recorded the deposit of $10,000 in earnest money to be "held in trust" by the selling broker.[9]

Frazier did not in fact deposit $10,000 in earnest money; instead, he wrote a check for $5000 to Northern Trust Real Estate for that purpose. These funds were deposited on June 1, 2006 in Northern Trust's trust account.[10] The discrepancy in earnest money amounts reflects an understanding between Dowd and Frazier that Dowd would find an additional investor or investors, including Dowd himself if need be, to form a viable group to complete the purchase. The remainder of the $10,000 was to come from these unnamed additional participants. The Purchase and Sale Agreement, however, made no reference to these additional investors apart from the mention of possible "assigns" on the line for "Buyer(s)."

The sellers made a counteroffer on June 1 accepting most terms, including the $4.4 million purchase price, but making some technical changes and adjusting some dates.[11] The closing date was adjusted to August 31 with the sellers having a right to unilaterally extend for 30 days thereafter. Frazier accepted the counteroffer on June 1, 2006.[12] On the same date, Frazier submitted a partly-completed application for financing to BMC Capital.[13]

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4 Ex. A, p. 1.
5 *Id.*
6 *Id.* at 6.
7 *Id.* at 2, 4.
8 *Id.* at 3.
9 *Id.* at 1.
10 NTRE 20.
11 Ex. B.
12 *Id.* at 2.
13 Ex. D. Frazier apparently never heard from BMC Capital again.

C. Loss of Down Payment Funds

During the ensuing six months, Dowd and Frazier communicated every week or two. Dowd assured Frazier the deal was still on track to close but that "a project of this kind takes time." He showed Frazier financial projections that he said were drawn from financial data provided by the sellers. He told Frazier that an inspection had been conducted but the inspector was still writing up his report.

In the meantime, without Frazier's knowledge, Dowd served as both listing and selling licensee in a second transaction involving the same property. On July 28, 2006, he represented the sellers and buyers in connection with an offer by Titus and Glenn Hermann to purchase the Creekside Terrace Apartments for $4.4 million.[14] Frazier was not a part of this offer and his still pending contract with the sellers was not mentioned in it. The sellers appear to have entered into a contract with the Hermanns, because several months later Land Title Company of Alaska, Inc. issued a Preliminary Commitment for Title Insurance to the Hermanns in connection with a $4.4 million purchase of the same property.[15]

In 2008, during the investigation of this matter by Frazier's counsel, the sellers provided a "Termination of Agreement to Purchase" relating to the Frazier contract.[16] The termination is undated, but it carries a fax imprint indicating that it was transmitted on August 11, 2006 from Realty Executives (where Dowd was working by August of 2006). The termination bears signatures of the sellers and Dowd; it also has a signature for Mr. Frazier that, so far as one can tell from a faxed copy, is almost identical to one of the signatures Frazier had written on the May 31 offer.[17] The preponderance of the evidence in this proceeding indicates that Frazier's signature on the termination was forged.[18]

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[14] Ex. O.

[15] Ex. P.

[16] Ex. E.

[17] *Compare id. with* Ex. A, p. 9. Using a ruler, one can determine that the relative proportions of some of the elements are not consistent. Therefore, the later signature is not a photographic copy of the earlier one.

[18] Frazier so testified, and his testimony was credible. His subsequent documented conduct that will be reviewed below is consistent only with an understanding that the purchase remained pending. That conduct, includes the procuring of cash for closing the Creekside Terrace Apartments purchase in the amount required to supply half the down payment (just as he had supplied half the supposed earnest money). Moreover, the termination document itself is unconvincing in several respects. It bears a date substantially after the property was placed under a second contract with different buyers. It indicates forfeiture of 100% of the earnest money to the sellers. Putting aside whether Frazier would plausibly have agreed to such a forfeiture under the circumstances, it is notable that Northern Trust Real Estate, the holder of the earnest money, did not disburse the earnest money according to the purported termination agreement. Instead, Northern Trust continued to hold the portion of the earnest money that was in its trust account and eventually refunded that remainder to Frazier. This suggests that those who were aware

In October of 2006 Dowd told Frazier that they were "getting close" to closing the Creekside Terrace Apartments purchase and that Frazier needed to draw down the equity in his home to generate his portion of the down payment. Based on discussions with Dowd, Frazier understood that he needed to supply $440,000 of an $880,000 (20 percent) down payment and that when the transaction was consummated, Frazier would be a 50% owner of the complex. Dowd arranged an appraiser for Frazier's home, Rowan Associates, who appraised it at $660,000, $438,750 more than the balance owing on the first deed of trust on the home.[19] Dowd arranged for Frazier to apply for a second deed of trust with Brian Brigman of Northstar Mortgage. On November 30, 2006, Frazier, working through Brigman, closed a loan with Residential Mortgage LLC in the principal amount of $436,000.[20] The loan was secured to his house. It carried an interest rate of 8.525 percent and required payments of $3360.19 per month. Settlement charges of $9179.32 were paid from the loan proceeds, leaving a net disbursement to Frazier of $426,820.68.

Dowd suggested that Frazier enter into a "VOD loan" to recover his closing costs. Dowd described this kind of loan as a standard practice in the real estate industry.[21] The loan was arranged in the offices of Land Title Company of Alaska.[22] Frazier placed his funds into an escrow account there, where the money supplied required funds for a verification of deposit in connection with a transaction involving a real estate investor named Doug Johnson.[23] Frazier was paid $8500 for this service. His principal was returned to him on December 12, 2006.[24]

Dowd told Frazier the closing on the 50-plex was still close but that inspections were taking more time than expected. He also said that the appraisal of the property had come back at only $4.0 million and that he was finding an additional investor to put in the extra down payment cash that would therefore be required to complete the purchase at $4.4 million. Ostensibly because Frazier had made clear that the money he had collected for the down payment needed to be self-sustaining, Dowd proposed another loan to make that possible. He introduced Frazier to

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of the termination document, including Dowd, had no illusions that it was a valid or enforceable contractual action by Frazier.

[19] *See* Ex. F, p. 56. At the time, the municipal assessment for the property was $440,000.

[20] *See* Ex. F.

[21] Nothing in this decision should be construed to suggest that a "VOD loan" of the type described is an ethical, legal, appropriate, or common device.

[22] There was no evidence in this proceeding that Land Title Company of Alaska knew of or facilitated the loan.

[23] Some details of the transaction, such as the file number and the name of the escrow officer, can be found in Ex. I, p. 4.

[24] *Id.*

Aaron Scott, his brother in law, and drew up loan documents whereby Frazier would loan Scott $444,064.24 to be repaid in monthly installments of $3360.19,[25] exactly the amount Frazier had to pay on his second deed of trust. The loan could be called on 30 days' notice. The first six months of payments were prepaid by deducting them from the amount disbursed, and there also seems to have been an $8700 "origination fee" deducted, so that the amount disbursed to Scott was $415,195.95.[26]

Frazer and Scott executed the documents for this loan on December 6, 2006, while the "VOD loan" to Johnson was still outstanding. For reasons that are unclear, Dowd countersigned one of the documents.[27] The loan to Scott was ostensibly secured to a home Scott was building on the Anchorage hillside. Frazier did not know about (and did not know enough about real estate to inquire about) a prior deed of trust on the same property.[28] In any event, Frazier's deed of trust was not notarized and was not recorded at the time he disbursed the $415,195.95 to Mr. Scott.[29] Frazier disbursed $415,195.95 to Scott on December 12, 2006, the same day his money was returned from the "VOD loan."

After facilitating the payment to Aaron Scott, Mr. Dowd became extremely difficult to reach and stopped returning Mr. Frazier's telephone calls. The Creekside Terrace Apartments purchase that was the subject of the May 31-June 1, 2006 Purchase and Sale Agreement did not close.

In May of 2007, Scott defaulted on the note to Frazier, having never repaid any of the $415,195.95. The preponderance of evidence in this proceeding indicates that there is no realistic prospect of recovering any of the principal or interest owing.[30]

Mr. Frazier now owes substantially more on his own home than its assessed value. His payments on his two mortgages exceed his monthly take-home pay. Because his wife has been

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25 *See* Ex. J, pp. 8-14.

26 Ex. I, p. 1.

27 Ex. G.

28 *See* Ex. K.

29 Many months later, after Scott had defaulted, Scott recorded the note and deed of trust. A notary named Cheryl Dowd signed a notarization purporting to attest that the principals signed before her on December 6, 2006. Ex. J pp. 1-7. Some alterations were made to the document prior to notarization and recording.

30 According to Frazier, the hillside property is in foreclosure and is not expected to yield any funds beyond the amount of the first deed of trust. Official notice is taken that Scott has recently been the subject of multiple collection actions in Alaska courts and that court dockets published on the Alaska Trial Courts website show that a writ of execution was recently returned without funds. [A party objecting to the taking of official notice of this fact may file an objection and submit evidence or authority to refute the officially noticed fact. Any such filing should be made prior to the date set in this case for submission of proposals for action under AS 44.64.060(e), and should be submitted separately from any proposal for action filed under that provision.]

able to begin working, the couple has avoided foreclosure. Their net worth, which exceeded $350,000 when they began working with Mr. Dowd, is largely or entirely gone. .

III. Discussion

This case falls under the Surety Fund statutes in place prior to substantial amendments that will become effective March 1, 2010.[31] To recover from the Surety Fund under the law in effect before that date, an individual must show a loss in a real estate transaction resulting from a licensee's fraud, misrepresentation, or deceit, or a licensee's conversion of trust funds or community association accounts.[32] The maximum recovery from the fund is $15,000 per transaction.[33]

A. Fraud, Misrepresentation, and Deceit

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, misrepresentation, or deceit, concepts that encompass similar and largely overlapping types of conduct discussed more fully below.

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.[34] "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.[35] Fraud, misrepresentation, or deceit can be found on the basis of nondisclosure in some circumstances,

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[31] Ch. 113, SLA 2008.

[32] *See* AS 08.88.460 - 470.

[33] AS 08.88.470. In addition, the fund's liability in connection with any one licensee is $50,000. AS 08.88.475. In connection with Mr. Dowd, the fund has previously paid awards in *Angell v. Dowd,* OAH No. 07-0364-RES (2007) ($4000) and in *Whitehurst v. Dowd,* OAH No. 07-0363-RES (2007) ($12,000).

[34] *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).

[35] *See* Black's Law Dictionary Abridged 6th Ed. (1997); *cf. also* 3 AAC 08.620(a)(3)(B), concerning land sales offerings ("fraud and deceit include the making of untrue statements of material facts or omitting to state material facts").

such as when conduct is induced through a "literally true statement [that] omits additional qualifying information likely to affect the listener's conduct."[36] To support a recovery from the Surety Fund, however, any misstatement or nondisclosure must be "wrongful"; an innocent misrepresentation or nondisclosure is not enough.[37]

This case presents a number of instances of wrongful misrepresentation and nondisclosure. Most significantly, after he had brought about the Hermann contract on July 28, 2006 and after he had generated a purported termination of the Frazier purchase, Mr. Dowd continued to assure Mr. Frazier that Frazier's transaction was moving forward. With these assurances, he induced Mr. Frazier to draw more than $400,000 in purported equity from his own home and to place virtually all of that money at the disposal of Dowd's brother-in-law in an inadequately secured loan. After July 28, 2006, Dowd knew that his assurances to Frazier were false. The assurances were a proximate cause of Frazier's loss of the $415,195.95 he disbursed to Dowd's relative. Viewed from another angle, the fraudulent assurances were a proximate cause of Frazier incurring interest costs at the rate of 8.525 percent on his down payment funds, costs that began when the $436,000 Residential Mortgage loan closed and that continue to the present. These costs exceed $3000 per month or $36,000 per year.[38]

B. Conversion of Trust Funds

The original Surety Fund complaint in this matter might be construed as a claim regarding both Mr. Dowd and Ms. Baker. The cover page of the claim lists both of them after the phrase "I/we hereby make a claim against the surety fund for losses suffered in a real estate transaction involving the following licensees."

Ms. Baker is apparently the broker in charge of Northern Trust Real Estate, Inc. The factual record developed in this proceeding indicates that Northern Trust Real Estate took $5000 into its trust account on June 1, 2006 solely as earnest money in connection with the May 31, 2006 offer to purchase 573 Dowling Road.[39] When Mr. Frazier requested return of the earnest money, only $2500 remained in the account. Northern Trust allegedly declined to account to Mr. Frazier for the discrepancy.[40] An account record obtained by the Executive Administrator and submitted with the referral of this case suggests that Northern Trust disbursed the funds to BMC

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36 *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).

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

38 *See* Ex. F, p. 17,

39 Ex. A, p. 1; Ex. C; NTRE 16.

40 Frazier testimony. *Cf.* 12 AAC 64.250(6).

Capital to cover an appraisal fee and a loan commitment fee.[41] Nothing in the documents Northern Trust presented to the Executive Administrator and nothing in the present record of this case would sustain a contention that this could be an appropriate basis to withdraw the earnest money under the documents setting up the escrow, nor that it was a withdrawal authorized by either principal.

Mr. Frazier suggests, plausibly, that these circumstances arguably could represent a "conversion of trust funds" by Northern Trust within the meaning of the Surety Fund statute. The most common form of conversion is "an unauthorized transfer or disposal" of another person's goods or funds.[42] A conversion can occur without any intent to steal or defraud.[43]

Nonetheless, recovery from the Surety Fund cannot be sustained in this case on the basis of conversion because the Surety Fund claim did not allege conversion of trust funds. Had the claim included that allegation, Ms. Baker, who was offered party status in this case but elected not to participate in the hearing, might have made a different decision about whether it needed to make a defense beyond the mere furnishing of documents from Northern Trust's file. It would not be fair to Ms. Baker or Northern Trust to resolve the conversion issue in this proceeding.

IV. Conclusion

Because fraud and knowing misrepresentations on the part of licensed real estate salesman David Dowd resulted in a loss to Ian Frazier exceeding $15,000, the claim of Ian Frazier against the Real Estate Surety Fund is sustained. Claim S-28-008 is granted in the amount of $15,000.

DATED this 28th day of July, 2008.

By: Christopher Kennedy
Administrative Law Judge

[41] NTRE 20. Two other documents, NTRE 3 and 14, leave the impression that this explanation may have been surmised long after the fact and then entered in NTRE 20.

[42] Prosser & Keeton, *The Law of Torts* (5th ed. 1984) § 15 at 96.

[43] *Id.* at 97 ("It is no answer that the defendant acted in good faith, in the honest belief that the delivery was lawful, proper, or authorized").

Adoption

The Alaska Real Estate Commission 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 15 day of September, 2008.

By: ______________________
Signature
V. Gene DuVal
Name
Chair
Title