

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

In the Matter of the Surety Fund Claim of)
)
JEFFREY SMART,)
Claimant)
v.)
CARL BURDEN)
Respondent)
_____)

Case No. OAH 08-0423-RES
Agency Case No. S-29-001

DECISION

I. Introduction

Jeffrey Smart submitted a claim against the Real Estate Surety Fund for losses allegedly suffered as the result of a transaction involving the respondent, licensee Cedric Burden. A hearing on the matter was held on September 25, 2008. Mr. Smart and Mr. Burden both appeared and testified by telephone. In addition, testimony was taken from three witnesses: Steve Shell, Jason Smith, and Audrey Kirn.

Because Mr. Smart did not meet his burden of establishing a loss suffered as the result of fraud, misrepresentation, deceit, or the conversion of trust funds or community association accounts, the claim is denied.

II. Facts

Mr. Burden is a licensed realtor. In 2006, Mr. Burden was the owner of a condominium in an Anchorage complex known as the River Park Condominiums. River Park is a larger development consisting of 117 units in multiple buildings. River Park was a newer development at the time; the first elected officers of the River Park Condominium Association (“the association”) assumed governance of the association from the original developer in May, 2006. In the summer of 2006, a great deal of activity was going on in the complex, with common area landscaping underway and a number of owners engaged in various projects, such as construction of decks and fences.

Mr. Burden’s unit was a ground level unit with a private yard area containing a very small deck or porch off of the back door. Mr. Burden decided that he would like to build a larger deck adjoining the small deck that was already in place.

Mr. Burden testified that when he decided to build the deck, he did not know that approval of the association was required, or that a deck might be subject to building code requirements, and

he began building the deck on his own as a do-it-yourself project. Mr. Burden testified that after he had the deck partially completed, the president of the association, Steve Shell, informed him that board approval was necessary to build the deck and that Mr. Shell directed him to cease construction of the deck until he obtained approval of the board. Mr. Burden testified that, as directed, he stopped construction of the deck until he received approval from the association. It is undisputed that neither Mr. Burden nor the association ever contacted the Municipality of Anchorage regarding the project, applied for a building permit, or requested an inspection from the municipality. There is not extensive evidence in the record about Anchorage building code requirements, but an engineer has advised Mr. Smart a permit is normally needed to build a deck, although there are exemptions for structures less than 30 inches from the ground or covering less than 100 square feet.¹ When it was finished, the deck was approximately 310 square feet and 42.5 inches off the ground in at least one place.²

Steve Shell was one the original three directors of the association's board of directors. Mr. Shell was elected at the board's first annual meeting in May of 2006, when the board took over the association from the original developer.

Mr. Shell testified that while he had some vague recollection of interacting with Mr. Burden on behalf of the association around 2006, he did not recall the extent to which the board considered Mr. Burden's deck project. Mr. Shell recalled that there was a great deal of activity in the complex in the summer of 2006, and the board members were making almost daily rounds of the grounds to check on numerous projects of both the association and of individual homeowners. Mr. Shell testified that in preparation for the hearing he checked back over the board's minutes and found one entry indicating that a request had been submitted for approval of a deck that had already been constructed; the minutes do not indicate that the board took any action on the matter. Mr. Shell opined that if a request had been approved, the minutes would reflect that fact.

Jason Smith was also a board member at the time, and Mr. Burden's next-door neighbor. In his testimony, Mr. Smith recalled that he was present when a large truck arrived to deliver the materials for Mr. Burden's deck. Mr. Smith stated that he asked whether Mr. Burden had obtained approval from the board to build a deck, knowing very well that no such request had been submitted. When Mr. Burden replied that he did not know permission was required, Mr. Smith

¹ Report of Alan Corthell, P.E., July 28, 2008. Both parties submitted exhibits, but did not number or label them as such. Documents relied upon in this decision are therefore identified by description.

² *Id.*

explained to him that board approval was required for improvements to units and that there were forms available from the board for owners to request permission for their various projects. Mr. Smith stated that Mr. Burden then obtained a form and submitted the appropriate paperwork to the board for consideration. Mr. Smith recalled that the property manager brought the application to the board for approval, that the board approved the project, and that he personally signed the approval form. In his testimony, Mr. Smith seemed to be able to recall the meeting. He could not remember whether that meeting had been held in his unit or in Mr. Shell's, but he did recall that only the three board members and the property manager were present at that meeting, as was normal. Mr. Smith testified that, while he was sure the approval had been given, he could not be sure whether the minutes accurately reflected the approval as they should have.

Audrey Kirn was the property manager for the condominium project during the year 2006. Ms. Kirn testified that while she was property manager Mr. Burden submitted a request to build a deck in writing, with attached hand-drawn schematics showing the dimensions of the proposed deck. Ms. Kirn testified that she submitted the paperwork to the board for consideration, and that the deck project was discussed at a formal meeting conducted at Mr. Shell's residence. The board advised Ms. Kirn that the project was approved, and Ms. Kirn then conveyed this information to Mr. Burden. Ms. Kirn also testified that she, Mr. Shell, and sometimes one of the other two board members and the landscaper would frequently walk the grounds, sometimes during lunch. Ms. Kirn stated that on one of these tours Mr. Shell noticed that Mr. Burden had stored a small amount of lumber for the deck in a common area, and he asked Ms. Kirn to advise Mr. Burden that approval of the deck did not include permission to store materials in a common area. Ms. Kirn did so, and Mr. Burden then moved the lumber to a private area, either in his backyard or garage.

Ms. Kirn was a particularly credible witness. Ms. Kirn was very specific about the details she could recall from memory and was candid about any gaps in her memory. Ms. Kirn testified that in most cases she would probably not remember one small deck project from several years ago, but she did remember Mr. Burden's project specifically because of the incident involving the building materials stored in the common area. Before she went to Mr. Burden to discuss the improperly stored building materials, she had again reviewed his request for permission to build the deck, and this review impressed the entire matter in her memory. Ms. Kirn testified that she specifically remembered distributing the request with drawings to the board. Ms. Kirn explained that homeowners often submit drawings they make with computers available at home improvement stores, but Mr. Burden's drawings were made by hand either in pencil or black ink.

Mr. Burden offered his unit for sale in 2007, and submitted a counter offer to Mr. Smart on October 23, 2007; Mr. Smart accepted the counter offer the same day. On a standard disclosure form signed on October 15, 2007, Mr. Burden checked boxes to indicate the following answers to questions on the form:

25. Have you remodeled, made any room additions, structural modifications or improvements?....YES

If Yes, please describe. Was the work performed with necessary permits in compliance with building codes?....YES

Was a final inspection performed?....NO

Attached to the disclosure form was a preprinted page entitled, "Explanation Addendum or Amendment To The Disclosure Statement." In spaces provided, Mr. Burden hand wrote the following:

- 1) Upgraded entire house from brass to brushed nickel
- 2) Add ceiling fans, lights
- 3) Added a trex deck to maximize backyard useage.

Before closing the purchase and sale, Mr. Smart had an opportunity to fully inspect the residence. Mr. Smart did not hire an engineer or any other professional to inspect the unit.

After he purchased the unit Mr. Smart began to notice that a part of the deck appeared to be uneven due to "sinking." Mr. Smart testified that he talked to other owners who were building decks and fences, and he learned that there was a process for approval of projects by the association. Mr. Smart inquired but was unable to find any record that Mr. Burden had received approval from the association to build the deck.

Mr. Smart then hired an engineer to inspect the deck. The engineer reported that "the new deck is framed with treated 2x10 wood joists, supported on 4x4 treated wood beams. The beams in turn are supported on concrete pedestals set on the surface of the ground."³ The engineer found that the components of the deck were "generally of adequate size for the spans and loads involved." However, the engineer concluded that

the capacities of the foundations set on the surface of the ground are questionable, as accepted practice requires all footings to be set at a minimum depth of one foot. In this building code jurisdiction, "cold" foundations (foundations not in a heated structure) are required to be buried a minimum of 5 feet, and in some cases as much as 10 feet. These foundations are subject to heaving by frost action in the soil, as are the fence posts. The

³ *Id.*

fence posts appear to have heaved, and the northwest corner of the deck is bent. Because of the frost heaving, the rigid connection of the newer deck to the joists that extend from the dwelling floor creates a risk of damage.

There are several features of the deck that do not conform to building code requirements. The code exempts certain detached structures of 120 square feet or less from the requirement for building permits, but this deck of about 310 square feet does not appear to qualify for the exemption and it is attached in a way that cannot be regarded as "detached". There are some deficiencies in conformance with code, including foundations, guard rails and lack of blocking of joists over supports.

If code-compliant foundations are to be provided, economy will probably require that new or supplemental beams be provided. Many fewer piers than the existing arrangement can provide adequate support, if the beam size and arrangement are modified, and piers will be the costly elements. The decks should be detached from the fences, and the connection to the cantilever joists from the building floor should be modified to permit some differential movements.⁴

The Declaration governing the condominium community does not permit individual unit owners to apply for building permits from the city.⁵ All building permits must be obtained by the association.

A preponderance of the evidence shows the following: when Mr. Burden began planning his deck, he was not aware that any type of permission from either the city or the association was required. After his building materials were delivered and possibly after he began building the deck, Mr. Burden learned that he needed permission from the association to build the deck. At that point, Mr. Burden stopped all construction activity and submitted an appropriate request with supporting drawings to the association. The association approved the request, and Mr. Burden then completed his project. As an inexperienced and unusually busy entity, the board may not have followed proper procedures, either for documenting its decisions or obtaining building permits when necessary. The board did not request a building permit, and it might not have properly documented its decision to approve the deck.

A preponderance of the evidence also shows that at the time of the sale, Mr. Burden was not aware of any possibility that a building permit might have been required for the deck. Even if Mr. Burden had known that a building permit might have been required, he did not have authority to apply for the permit; only the association could apply for building permits for improvements to

⁴ *Id.*

⁵ Declaration of River Park Condominiums, submitted by Mr. Burden. Article XIII, section 13.1(d) of the Declaration states that "Any application to any department or to any governmental authority for a permit to make any addition, alteration or improvement in or to any Unit shall be executed by the Association only."

individual units. Mr. Burden submitted all the information the board would have needed to determine whether a building permit was necessary. Mr. Burden had no reason to believe there was any irregularity in the way the board handled his request for permission to build the deck. Mr. Burden disclosed everything he knew about the deck to Mr. Smart before the sale. The entire deck structure, including the foundation, was above ground and visible to prospective buyers, unconcealed by skirting or any kind of enclosure.⁶ Any structural defects were readily discoverable upon inspection by an engineer. Mr. Burden did not conceal any portion of the structure or intentionally withhold any information relating to its construction.

III. Discussion

In a claim upon the real estate surety fund,

The claimant bears the burden of proof of establishing that the claimant suffered losses in a real estate transaction as a result of fraud, misrepresentation, deceit, or the conversion of trust funds or the conversion of community association accounts under the control of a community association manager on the part of a real estate licensee and the extent of those losses. All facts shall be established by a preponderance of the evidence.⁷

Mr. Smart asserts that Mr. Burden fraudulently misrepresented on the real estate disclosure form that the deck had been built with the approval of the association and with a building permit from the Municipality of Anchorage, knowing that these representations were false.

The Alaska Supreme Court uses the terms “fraud,” “misrepresentation” and “deceit” interchangeably, requiring for a claim under any of the terms 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.⁸ In any case, knowledge is an essential element that must be proven. Black’s Law Dictionary defines “fraud” as “a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment” or “a misrepresentation made recklessly without belief in its truth to induce another person to act.”⁹ In the context of tort law, the Alaska Supreme Court has stated that

Alaska cases follow the Restatement (Second) of Torts on what constitutes a fraudulent misrepresentation. The Restatement identifies several elements of intentional misrepresentation: (1) a misrepresentation of fact or intention, (2) made fraudulently (i.e.,

⁶ Testimony of all witnesses; photographs submitted by Mr. Smart.

⁷ AS 08.88.465(d).

⁸ *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).

⁹ BLACK’S LAW DICTIONARY 685 (8th ed. 2004).

with *scienter*), (3) for the purpose of inducing another to act in reliance, (4) with justifiable reliance by the recipient, (5) causing loss.¹⁰

In his statement of claim, Mr. Smart asserts that “Mr. Cedric Burden stated on the Disclosure Statement at the time of purchase that the decking was done with a permit, but it was not.” It is true that the box Mr. Burden checked indicated that any work performed, including construction of the deck, was done “with necessary permits in compliance with building codes.” The evidence shows that at the time of the purchase and sale, Mr. Burden had no knowledge that the deck he had constructed might have been subject to a requirement for a building permit.

Mr. Smart argues that Mr. Burden had a duty to determine whether a building permit might have been necessary for his deck. At approximately 310 square feet and 43 inches off the ground in one place, the deck might not have been subject to building permit exemptions for structures less than 30 inches from the ground or covering less than 120 square feet. But the scope of the project was such that ignorance of the need for permit could not be considered reckless. The association had a duty to determine whether a permit was required, and to obtain one if necessary. It was the association not Mr. Burden who failed in meeting this duty. With the association have special expertise and a specific duty, Mr. Burden was not reckless in relying on the association’s decision that construction of an above-ground deck could proceed without a permit. Mr. Burden did disclose that no inspection was ever performed, a fact that apparently did not concern Mr. Smart when he decided to purchase the unit.

Even if Mr. Burden did have a duty to determine whether construction of the deck was subject to building code requirements, such a duty would not elevate this case to one of fraud. Mr. Burden truthfully stated his belief that construction was done in accordance with applicable code, and he did not intentionally conceal the possibility that a building permit might have been required; while possibly incorrect, Mr. Burden’s belief was that no permit was required to change door hardware, install light fixtures and ceiling fans, or build a deck. Mr. Burden did disclose that no final inspection had ever been performed on any of the work; thus, even if a building permit had been obtained, Mr. Burden did not represent that the project had been completed in compliance with the terms of the permit. Whatever other remedies might be available, mere negligence, if it existed in this case, is not a basis for recovery from the Real Estate Surety Fund. The fund does not serve as a guarantee or a warranty to homeowners against possible latent defects in property.

¹⁰ *Anchorage Chrysler Center, Inc. v. DaimlerChrysler Corporation*, 129 P.3d 905 (Alaska 2006).
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IV. Conclusion

Mr. Burden disclosed what he knew about the property in question. Before he bought the property, Mr. Smart had a chance to inspect it and to consult an engineer, but declined to do so. The Real Estate Surety Fund does not guarantee the condition of property, even property sold by a licensed realtor. Mr. Smart has not his burden of proving by a preponderance of the evidence that he has suffered losses as a result of fraud, misrepresentation, deceit, or the conversion of trust funds or community association accounts. The claim is denied.

DATED this 25th day of November, 2008.

By: Signed
DALE WHITNEY
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. The undersigned, on behalf of the Alaska Real Estate Commission and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 12th day of March, 2009.

By: Signed
Signature
Bradford Cole
Name
Chairman, REC
Title

[This document has been modified to conform to technical standards for publication.]