IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

CHARLES MCALPINE,

Appellant,

vs.

GARY MANSON, STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION, OFFICE OF ADMINISTRATIVE HEARINGS, and ALASKA REAL ESTATE COMMISSION,

Appellees.

Case No. 3AN-10-06764CI

DECISION AND ORDER

I. INTRODUCTION

Charles McAlpine appeals the Alaska Real Estate Commission's denial of his claim against the Real Estate Surety Fund. The appeal presents a first impression question as to the scope and applicability of the Surety Fund. The issue raised is whether the Surety Fund provides recovery to a real estate licensee who suffered losses when his licensed broker misappropriated commissions. The Commission determined that the Surety Fund did not cover internal disputes between real estate licensees over commissions and denied the claim. The court agrees and affirms the Commission's decision.

II. FACTS

Charles McAlpine was a salesperson for and owner of McAlpine Investments. In 2006, he contracted with Gary Manson to serve as the company's licensed real estate broker.[1] Under the contract, Mr. Manson was entitled to a $3,000 per

[1] Although Mr. McAlpine owned the company, he was not a licensed real estate broker. Mr. McAlpine was technically Mr. Manson's employee for the purpose of real estate

month consulting fee and 60% of the commissions on his own sales. The remaining 40% of such commissions would go to the company. Either party could terminate the contract upon thirty days notice.

Mr. McAlpine and Mr. Manson's professional relationship quickly deteriorated. In November 2006, Mr. Manson terminated the contract and sued the company to recover his $3,000 consulting fee for November and $10,000 in unpaid commissions. Mr. McAlpine counterclaimed for $27,000 in commissions Mr. Manson wrongfully withdrew from a company trust account and for punitive damages. Mr. McAlpine alleged that Mr. Manson violated his fiduciary duty to the company by writing checks to himself from the company's trust account for commissions he was not entitled to.

Before the case went to trial, Mr. McAlpine filed a claim against the Surety Fund for payment of the wrongfully withdrawn commissions. The parties to the Surety Fund case agreed that an administrative hearing would not be necessary and that the District Court decision would be *res judicata* as to all findings of fact. The District Court judge subsequently ruled that Mr. Manson was entitled to $3,000 for brokerage services he rendered in November 2006. The judge also found that Mr. Manson had overpaid himself $19,800 in commissions but denied the punitive damages claim because there was insufficient evidence that Mr. Manson's actions were egregious, willful, or gross. Final judgment was entered for Mr. McAlpine in the amount of $16,800.

Based on the facts as determined by the District Court, the Office of Administrative Hearings (OAH) denied Mr. McAlpine's claims against the Surety Fund. The OAH found that Mr. McAlpine had failed to show that he had suffered losses "*in a real estate transaction* as a result of the…conversion of funds…."[2] It reasoned that only

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transactions. McAlpine Investments needed a licensed broker so it could continue its real estate business.

[2] In 2006, a Surety Fund claimant had the burden to prove, by a preponderance of the evidence, that he "suffered losses in a real estate transaction as a result of fraud,

the parties to a real estate transaction are protected by the Surety Fund and that "the governing statutes clearly contemplate that licensees who are not gaining or conveying an interest in the real property are not to be regarded as parties to the real estate transaction."[3] Because the contract dispute between Manson and McAlpine was only incidental to the underlying real estate transactions, the OAH concluded that the Surety Fund did not cover Mr. McAlpine's claim. The OAH further concluded that to the extent Mr. McAlpine's losses could be characterized as losses "in a real estate transaction," he had failed to show that the losses amounted to a conversion. Mr. McAlpine appeals both determinations.

III. DISCUSSION

A. Standard of Review

When reviewing an agency's resolution of questions of law not involving agency expertise, the court employs the substitution of judgment standard.[4] The agency's interpretation of a statute is not binding on the court.[5] But when a statute is ambiguous, the agency's interpretation is entitled to some weight in deciding the correct interpretation.[6] The court reviews an agency's factual findings under the "substantial evidence" test.[7] Substantial evidence to support an agency's findings exists when there

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misrepresentation, deceit, or the conversion of trust funds…on the part of a real estate licensee." AS 08.88.465(d).

[3] *McAlpine v. Manson*, Case No. OAH-08-0562-RES (January 22, 2010) at 6 n.8.

[4] *Lightle v. State, Real Estate Comm'n*, 146 P.3d 980, 982 (Alaska 2006)(Real Estate Commission's interpretation of law reviewed de novo); *Dept. of Pub. Safety, Div. of Motor Veh. v. Fann*, 864 P.2d 533, 536 (Alaska 1993).

[5] *Wein Air v. Alaska Dept. of Revenue*, 647 P.2d 1087, 1090 (Alaska 1982).

[6] *Id.*

[7] *Saltz v. Dept. of Pub. Safety, Div. of Motor Veh.*, 126 P.3d 133, 136 (Alaska 2005).

is "such relevant evidence as a reasonable mind might accept as adequate to support the conclusion."[8]

B. The Surety Fund Was Not Intended To Protect Licensees.

Mr. McAlpine argues that the statutory language regarding claims against the Surety Fund allows licensees, as well as consumers, to recover losses incurred as a result of another licensee's fraud, misrepresentation, deceit, or conversion of trust funds. The issue is novel in Alaska, but the question whether a licensed real estate salesperson is entitled to recover from a real estate broker's surety for misappropriated commissions has been considered in a number of other jurisdictions. The basic issue confronted by these courts was whether the statute establishing the bonding requirement or surety fund was intended for the protection of those in the real estate business as well as the public.[9] If so, the salesperson may be regarded as a "person" within a statutory provision giving to any person injured by the broker's misconduct an action on the bond or surety fund. The majority of courts that have considered the question have concluded that the relevant statutes are intended to protect the public only and do not give real estate licensees recourse against the bond or surety fund.[10] But some have concluded otherwise.[11]

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[8] *Lightle*, 146 P.3d at 982.

[9] *See* Misappropriation of Commissions, 17 A.L.R.2d 1012 § 9 (2010).

[10] *See Collier v. Hartford Accident & Indemnity Co.*, 180 A.2d 846, 847 (D.C. Mun. App. 1962)("[A] broker cannot maintain an action on the bond of one of his salesman."); *Gilewics v. Home Indemnity Co.*, 150 A.2d 627 (D.C. Mun. App. 1959)(licensed broker was neither a "person aggrieved" under District of Columbia Code nor a member of the "public" under Maryland statute, and therefore not entitled to recover on broker's D.C. or Maryland bond); *Eberman v. Mass. Bonding & Ins. Co.*, 41 A.2d 844 (D.C. Mun. App. 1945)(real estate statute limits recovery on broker's bond to the general public for whom the broker acts in his representative capacity and does not include broker's salesperson who dealt with him as employer or business associate); *Cannon v. Florida Real Estate Comm'n*, 221 So.2d 240, 241 (Fla. App. 1969)(recognizing that other jurisdictions "generally agree that a salesperson, employed by a broker, is not within the class of persons protected"; statutory protections not available to a salesperson in an internal

Because neither Alaska's Real Estate Surety Fund statutes nor the relevant legislative history indicates an intent to include licensees within the protection of the Surety Fund, the court affirms the Commission's decision.

1. Statutory Provisions Limit the Scope of Coverage to Members of the General Public.

Although the language of Alaska's Surety Fund statutes is somewhat ambiguous regarding the scope of coverage, several provisions indicate that the Fund was not intended to protect licensees in their dealings with one another. The OAH reached the same conclusion based on the limiting language in AS 08.88.465(d), which established the burden of proof in a claim against the Surety Fund at the time this case originated.[12] Alaska Statutes 08.88.465(d) provides:

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dispute between broker and salesperson over payment of an earned commission); *Phoenix Assurance Co. of N.Y. v. Young*, 121 S.E.2d 70 (Ga. App. 1961)(real estate broker's bond intended to protect the public and not to protect a salesman against loss resulting from broker's failure to comply with a contractual obligation to pay commissions under an employment contract); *Ferguson v. Scheunemann*, 334 P.2d 668, 671 (Cal. App. 1959)("[T]he law relating to licensing of real estate brokers has as its purpose the protection of the buying and selling public….").

[11] *Sigler v. Mass. Bonding Ins. Co.*, 50 N.E.2d 390 (1941)(where commission earned by a real estate salesman comes into the possession of the real estate broker with whom he is associated, failure of the broker to account for or remit the same to such salesman constitutes a violation of the act and the bondsman of the broker under the act is liable to the salesman for the damage caused by the violation); *Nat'l Surety Corp. v. Kneeland*, 294 P.2d 310 (Okla. 1959)(failure of broker to pay over to salesman the commissions collected and belonging to him constitutes a violation of the bond and the bondsman is liable to plaintiff for such violation); *see also Eberman*, 41 A.2d at 848 ("I cannot agree that the only purpose of the legislature was the protection of members of the general public, if that term means only actual clients of brokers.")(Cayton, J. dissenting).

[12] The legislature repealed AS 08.88.465(d) in 2008 with a bill that changed the Surety Fund to a recovery fund, available to satisfy court judgments against a licensee, thereby eliminating a claimant's ability to establish a claim through the administrative process alone. § 24 Ch. 113 SLA 2008.

> 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…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.[13]

This burden of proof limits the scope of coverage. Only claimants who suffer losses "in a real estate transaction" are eligible to recover from the Surety Fund. "Real estate transaction" is given a three-part definition:

> In this chapter…"real estate transaction"…means the transfer or attempted transfer of an interest in a unit of real property, an act conducted as a result of or in pursuit of a contract to transfer an interest in a unit of real property, or an act conducted in an attempt to obtain a contract to market real property[.][14]

Mr. McAlpine argues that he suffered losses "in a real estate transaction" because Mr. Manson misappropriated commissions from transactions brokered by McAlpine. Arguably, the misappropriation could be characterized as "an act conducted as a result of a contract to transfer an interest in a unit of real property." But such an interpretation distorts the nature of the misappropriation. Mr. Manson drew his commission, albeit wrongfully, pursuant to his service contract with McAlpine. That contract was independent of any transfer of real property and had no bearing whatsoever on the land transactions themselves. The OAH reasoned that to suffer losses "*in* a real estate transaction,"[15] a claimant must have been a party to the actual real property

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[13] AS 08.88.465(d) (2006).

[14] AS 08.88.990(11)(2006). The text of this definition has not changed since 2006, but has since been renumbered as 08.88.990(13).

[15] The governing statutes elsewhere authorize the Commission to discipline licensees who, "with respect to" real estate transactions, engage in fraud, misrepresentation, deceit or other violations of the real estate statutes. AS 08.88.071(a)(3)(A) (2006). Licensees obviously engage in a host of activities "with respect to" real estate transactions. But recovery from the Surety Fund must be predicated on losses actually incurred "in" a real estate transaction.

transaction. Because the governing statutes contemplate that licensees who are not gaining or conveying an interest in the real property are not to be regarded as parties to the real estate transaction,[16] they are not eligible to recover from the Surety Fund based on those transactions. The reasoning is persuasive, especially in light of other statutory provisions.

Statutory provisions limiting the scope of the Fund's coverage in the context of community association management also demonstrate that the legislature did not contemplate licensees recovering misappropriated commissions from the Surety Fund. The legislature amended the governing statutes in 1998 with HB33.[17] The bill's sponsor, Norman Rokeberg, indicated that "the major thrust of the bill was originally to incorporate community associations."[18] Until that time, professional community association managers were not licensed or regulated by the state. HB33 brought them within the state's real estate licensing scheme and provided their clients with Surety Fund protection. But the amendments limited the scope of Surety Fund coverage. Alaska Statutes 08.88.460(e) provided:

> If the claim is for a loss incurred as a result of acts or omissions occurring in the course of a licensee's practice of community association management, only the owners' association for which the real estate licensee practices community association management may file a claim [against the Surety Fund] under this section.[19]

Real estate licensees were clearly precluded from recovering from the Surety Fund if they suffered losses as a result of acts or omissions occurring in the course of another

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[16] *See* AS 08.88.600(b) (2006)(providing that a licensee may be a party to the transaction only with the written consent of the other parties.)

[17] Ch. 45 SLA 1998.

[18] House & Labor Committee Minutes, March 24, 1997.

[19] AS 08.88.460(e) (2006).

licensee's practice of community association management. But their exclusion is unremarkable. It does not represent some new restriction on a licensee's access to the Surety Fund in this narrow context. Rather, the restriction limits the universe of injured *consumers* eligible to recover from the Surety Fund. Under section 460(e), individual homeowners within a community association may not make a claim against the Surety Fund. That claim must be made by the owners' association itself. It would be odd if licensees were inadvertently swept up in this restriction, but nowhere else in the Surety Fund provisions. The court concludes that the Surety Fund provisions simply do not contemplate licensees ever seeking to recover their losses from the Surety Fund, in the community association context, or otherwise.

Moreover, opening the Surety Fund to claims based on licensees' commission disputes undermines the Fund's obvious and overriding goal of protecting the general public. Under AS 08.88.470, "[n]ot more than $15,000 may be paid for each transaction regardless of the number of persons injured." If the Surety Fund is available to reimburse losses from misappropriated commissions, then consumers face a concomitant loss of protection on any of those transactions. It is not difficult to envision a scenario where both a consumer and a licensee would be harmed by another licensee's fraud or deceit. It seems unlikely that the legislature intended the consumer protection afforded by the Surety Fund to be tempered by a licensee's losses.

2. Relevant Legislative History Reveals No Legislative Intent to Protect Licensees Through the Surety Fund.

The legislative history behind the establishment and administration of the Surety Fund supports the conclusion that the Fund was intended for public protection alone. The legislature created the Real Estate Surety Fund in 1974.[20] The legislative history surrounding its original passage is sparse. But the legislature amended the statute

[20] §1 Ch. 143 SLA 1974.

in 1980 with SB212.[21] The legislative record regarding SB212 reveals a general understanding that the Surety Fund was a consumer protection measure. For example, prior to the amendments of SB212, the Surety Fund had to be maintained between the statutory minimum of $250,000 and the statutory maximum of $300,000. The Alaska Real Estate Commission prepared comments explaining the need to broaden these limits in order to protect the public:

> Now that the fund has been in effect for four years, the use of the fund has dramatically increased and, at the same time, the predictability of the fund over a six month period has dramatically decreased. The Commission feels that it is necessary to broaden the margin between the mandatory minimum and the mandatory maximum limits of the fund so that appropriations and judgments can be made which will not result in the fund being depleted *and the public going for some period of time without adequate protection under the fund*.[22]

Presumably in response to these comments and the Commission's concerns, the legislature raised the statutory maximum to $500,000.[23] The Commission also proposed a budget to carry out its responsibilities under the newly amended statute.[24] It explained in the proposal that "the Real Estate Commission will be responsible for hearing claims for payment from the Real Estate Surety Fund and making determinations and awards from the Surety Fund to *aggrieved members of the public*."[25] In explaining its budget proposal, the Commission commented

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[21] Ch. 167 SLA 1980.

[22] Alaska Real Estate Commission, Explanatory Comments Regarding CSSB 212, March 28, 1980.

[23] § 34 Ch. 167 SLA 1980.

[24] James L. Magowan, Explanation of the Proposed Budget to Support the Alaska Real Estate Commission Created Under [] SB 212, May 2, 1980.

[25] *Id*. at 8–9.

> What we have designed here is a set of policies, carried out by a program-budget which will achieve the goals of the Real Estate Commission and the legislature *as expressed during the Sunset Hearings on Real Estate Commission and as implied in the letters from the House Commerce Committee and the Senate Commerce Committee*….These goals generally stated are: 1. Effective prosecution of those willfully injuring the public.[26]

Every indication in the legislative history is that the Surety Fund was intended to protect the public. There is no indication of legislative intent to similarly protect licensees from the fraud of their colleagues.

The governing statutes were also amended in 1998 with HB33.[27] The minutes of the House Labor and Commerce Committee at that time clearly express legislative intent that the Surety Fund exists as a measure of consumer protection. By contrast, there is no indication of intent that licensees be similarly protected. Committee chairman, Norman Rokeberg, indicated that "[t]he primary reason for this bill was in the interest of consumer protection."[28] Real Estate Commission's executive administrator Eleanor Oakley testified before the committee that "The rational behind [adding Errors and Omissions insurance] is that the surety fund is a protection for consumers to be reimbursed for losses."[29] Real estate practitioner and former Commission member Kristan Tanner testified that "We saw a number of different violations by practitioners which clearly harmed the public, and yes, the surety fund did pay for that…."[30]

The committee minutes abound with references to consumer protection. The clear understanding of those participating in discussions about the Surety Fund was

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[26] *Id*. at 10. There are six generally stated goals purporting to set forth the intent of the legislature. None of them mentions protection for licensees.

[27] Ch.45 SLA 1998.

[28] House Labor and Commerce Committee Minutes, March 14, 1997.

[29] *Id*.

[30] *Id*.

that the Fund existed to protect the public. But there is no indication whatsoever that the legislature contemplated licensees themselves securing reimbursements from the Surety Fund. Considering this history, together with the limitations inherent in the statutory language itself, the court affirms the OAH's determination that Mr. McAlpine is not eligible to recover from the Surety Fund.

Mr. McAlpine also challenges the OAH's determination that he did not meet his burden to prove losses through the "conversion of trust funds" during a real estate transaction. Because the court concludes that Mr. McAlpine is not eligible to recover misappropriated commissions from the Surety Fund in the first place, it does not reach the question whether Mr. Manson's withdrawal of funds constituted a "conversion of trust funds" within the meaning of the statute.

IV. CONCLUSION

Because neither the statute itself nor the legislative history supports Mr. McAlpine's theory of recovery from the Surety Fund, the decision of the OAH is affirmed.

DATED at Anchorage, Alaska, this 12th day of April, 2011.

Signed

FRANK A. PFIFFNER
Superior Court Judge

I certify that on 4-12-11 a copy
of the above was mailed to each of the
following: L. Rosano, D. Branch
S. Smith,D. Weed

B. Cavanaugh

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