



any commissions on sales made by Mr. Manson; the remaining forty percent would go to McAlpine Investments.

Several months after Mr. Manson started working for McAlpine Investments, the relationship began to deteriorate. Both parties agreed that Mr. Manson would no longer work with McAlpine past November of 2006. After the relationship terminated, Mr. Manson left McAlpine Investments and filed a lawsuit claiming that Mr. McAlpine did not pay him the \$3,000 consulting fee for the month of November 2006. Mr. Manson added to his complaint a claim for a \$10,000 commission he believes he was owed. Mr. McAlpine denied that he owed Mr. Manson compensation for November, and he countersued claiming punitive damages for Mr. Manson's actions and for damages he incurred in having to defend a title company against Manson's claims for the \$10,000 commission. Mr. McAlpine also claimed that Mr. Manson took commissions on the sales of two properties to which he was not entitled in the amount of \$27,000. Money that Mr. Manson took from the trust fund of McAlpine Investments to cover these two commissions is the basis for Mr. McAlpine's claims against the Surety Fund.

In its analysis of this dispute, the district court found that

This dispute between McAlpine and Manson is essentially a contract dispute. The court must determine, based upon the written agreement, why Manson was being paid \$3,000 and whether he performed the duties in November 2006 entitling him to that fee. The court must also determine whether Manson "made sales" entitling him to commissions on three pieces of property.

At the heart of this dispute, is the contract, or the letter of intent. The general elements for formation of a valid contract are: (1) an offer encompassing all essential terms; (2) acceptance; (3) consideration, and (4) an intent to be bound.

The court finds that the letter of intent is a valid contract. The contract specifies the duties of Manson for McAlpine Investments; both parties accepted the contract and provided consideration, and both parties intended to be bound to this contract.<sup>[2]</sup>

The court addressed the issue regarding Mr. Manson's monthly fee and a commission for a sale that is not the subject of this claim. The court then went on and addressed the two commissions that are the subject of this claim, the commissions for sale of the Beal property and for sale of the Stephenson property.

The buyer in both of these sales was Dean Weidner. Mr. McAlpine had known Mr. Weidner for many years and knew that he was interested in the two parcels, both of which were adjacent to or near land that Mr. Weidner already owned. Mr. McAlpine also knew one of the owners, Dr. David Beal. Mr. McAlpine had actually lived on the Beal property at one time, and

had conveyed the property to Dr. Beal in satisfaction of a loan. Dr. Beal knew that Mr. Weidner was interested in the property, and that Mr. McAlpine knew Mr. Weidner. Thus, when Dr. Beal needed to sell the property because of a pending divorce, he called Mr. McAlpine and asked him to approach Mr. Weidner. A deal was reached and Mr. Weidner bought Dr. Beal's property for \$800,000 with a 5% commission.

The second transaction was between Mr. Weidner and Chinsun Stephenson, who owned the other nearby parcel. Mr. McAlpine knew that Mr. Weidner would also buy the Stephenson property if it was offered for sale, but he did not know Ms. Stephenson. Mr. McAlpine directed Mr. Manson to cold call Ms. Stephenson to see if she would be interested in selling. Mr. Manson did so, and the result was that Ms. Stephenson listed the property with McAlpine Investments and Mr. Weidner bought it. The commission for this sale was \$52,000.

The District Court found that the letter of intent that Mr. Manson and Mr. McAlpine had signed was the basis of their contractual relationship. The letter of intent had called for Mr. Manson to receive sixty percent of any sales he made. The Beal property produced a \$40,000 commission. Mr. Manson determined that he was entitled to sixty percent of the half of this commission attributable to the procuring agent, or \$12,000. Towards this amount, he wrote himself a check from the McAlpine Investments trust account for \$10,000, which was the total in the trust account at that time.

The Stephenson transaction produced a commission of \$52,000. Mr. Manson determined that he was entitled to his sixty percent share of one half of the commission for being the procuring agent in this deal, or \$15,600. Mr. Manson wrote himself a check for \$17,600 from the company's trust fund to cover this amount plus the remaining \$2,000 that he had determined he was owed from the Beal transaction. Mr. Manson did not transfer these funds to the company's business account for disbursement, but rather wrote the checks directly from the trust account to Gold Panner, Inc. a corporation that Mr. Manson owned and used for his own business.

After review of the Beal transaction, Mr. McAlpine's long relationship with Dr. Beal, and the relative roles of Mr. McAlpine and Mr. Manson, the district court found that Mr. McAlpine had been both the procuring and selling agent in Beal transaction, and that Mr. Manson was not entitled to any commission on this deal. The court therefore ordered Mr. Manson to return the \$12,000 Mr. Manson had taken for this deal.

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<sup>2</sup> *Id.* at 16 (cites omitted).  
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After a similar review of the Stephenson transaction, the court found that Mr. McAlpine and Mr. Manson had both played equal and essential roles as procuring agent. The court found that of the \$15,600 Mr. Manson had taken as sixty percent of the procuring agent's half of the commission, half, or \$7,800, should be returned to Mr. McAlpine for his partial role as procuring agent. Thus, for these two transactions, the court ordered Mr. Manson to repay Mr. McAlpine a total of \$19,800. After an offset of \$3,000 that the court determined Mr. McAlpine owed Mr. Manson for his monthly fee, the court entered a judgment for \$16,800 in favor of Mr. McAlpine.

Mr. McAlpine asked the court for punitive damages. The court denied the claim, stating that "the court does find that Manson acted unlawfully by writing commission checks directly to himself from the trust account instead of from the business account, but this breach, under the circumstances was not egregious, willful or gross."<sup>3</sup> Mr. McAlpine also claimed for conversion of money in the trust account and a related breach of fiduciary duties. The court denied this claim also, stating that "the court agrees with McAlpine that Manson violated fiduciary duties with regard to the trust account and taking money to which he was not entitled. However, under the circumstances, McAlpine has not shown damages beyond the conversion of funds to which Manson was not entitled; therefore, the damages assessed previously for the claims for commission are the same as for the breach of any fiduciary duty."<sup>4</sup>

### **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.<sup>5</sup>

This claim upon the surety fund presents an unusual situation in which the claimant is not a non-licensee member of the public making a claim as a party to a real estate transaction. Rather, this case involves a contractual dispute between two licensees over commissions, when neither licensee was a buyer or seller in the transactions that produced the commissions.

#### **i. Mr. McAlpine did not suffer losses in a real estate transaction.**

The court found that the dispute between Mr. McAlpine and Mr. Manson was "essentially a contract dispute." The court did not find instances of fraud, misrepresentation, or

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<sup>3</sup> *Id.* at 25.

<sup>4</sup> *Id.*

<sup>5</sup> AS 08.88.465(d).

deceit. The court's decision, which the parties have agreed shall be the basis for this decision, indicates that Mr. Manson openly took sixty percent of one half of the commission for each transaction, asserting that he was entitled to this share under the pre-existing contract he and Mr. McAlpine had entered into. The court specifically found that Mr. Manson's conduct "was not egregious, willful or gross."

Mr. McAlpine asserts that he is entitled to recovery from the surety fund because Mr. Manson converted funds from a trust account. As the court acknowledged, there is an argument to be made that Mr. Manson converted funds from the trust account. However, Mr. McAlpine fails to read the applicable statute, AS 08.88.465(d), in its fullness: "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...(emphasis added).

"Real estate" means "an interest or estate in land, corporeal or incorporeal, except that it does not include a unit in a hotel, motel, boarding house, rooming house, or other transient lodging facility, or a unit in warehouse, mine-storage facility, or other facility the function of which is limited to warehouse purposes."<sup>6</sup> A "real estate transaction" in the context of sales means "the transfer or attempted transfer of an interest in a unit of real property, an act conducted or 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."<sup>7</sup>

The district court correctly perceived that the dispute in this case was contractual, and that the basis of the contract was the letter of intent the parties signed when Mr. Manson began working for McAlpine Investments. This contract could be characterized as an employment contract or a contract for services, but it did not involve any interest in real property. While the contract apportioned commissions to be earned in the future for acts done by both parties in their attempts to obtain contracts to market real property, the contract did not require either party to attempt to obtain such contracts, nor did it address attempts to obtain a contract to market any specific parcel of real estate. This contract, which is the basis for Mr. McAlpine's losses, is distinct from the contracts for the purchase and sale of the Beal and Stephenson properties. While those contracts were for real estate transactions, neither Mr. Manson nor Mr. McAlpine

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<sup>6</sup> AS 08.88.990(11).

<sup>7</sup> AS 08.88.990(12).

was a party to those transactions.<sup>8</sup> Both of those real estate transactions were successfully concluded with no losses: prices and terms were agreed upon, the buyers paid the prices, and the sellers conveyed their respective properties to the buyers as agreed. There was no loss suffered in either real estate transaction.

Further, the contract between Mr. Manson and Mr. McAlpine is separate from the contracts that the parties to the real estate transactions entered into with McAlpine Investments to market their real estate or otherwise facilitate the real estate transactions that did occur. These contracts between McAlpine Investments and the parties to the real estate transactions were also fully performed without loss. The parties employed McAlpine Investments to facilitate the sales, McAlpine Investments did so, and the parties paid the agreed commissions upon closing of the transactions. The transaction giving rise to the dispute in this case is a contractual dispute between two parties within McAlpine Investments, and is thus one further step removed from the real estate transactions than the listing agreements were. The parties to the real estate transactions, who are protected by the Surety Fund, have absolutely no interest in the dispute in this case.

**ii. To the extent a conversion occurred from the trust fund, the conversion was a matter of contract not tort and was not a loss compensable by the Real Estate Surety Fund.**

The tort of conversion is

“an intentional exercise of dominion and control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.” To establish a conversion claim, a plaintiff must prove that it had a possessory interest in the property, that the defendants intentionally interfered with the plaintiff’s possession, and that the defendants’ acts were the legal cause of the plaintiff’s loss of property.<sup>[9]</sup>

Because conversion is a tort, it generally does not apply to cases in which the dispute arises out of a contract. In *K&K Recycling v. Alaska Gold Company*, the Supreme Court held that

K&K's allegations are basically that Seuffert and AGC obstructed K&K's removal of the dredge and that Seuffert refused to turn over all of the dredge equipment and facilities. These claims concern contractual breaches and disputes and thus “sound in contract, rather than tort.” We have held that “promises set forth in a contract must be enforced by an action on that contract.” If K&K's claims could stand, then any contract case

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<sup>8</sup> 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. AS 08.88.600(b) provides that a licensee may be a party to the transaction only with the written consent of the other parties.

<sup>9</sup> *K&K Recycling, Inc. v. Alaska Gold Company*, 80 P.3d 702, 717 (Alaska 2003)(cites omitted).

involving the transfer of goods or realty would also contain a trespass, conversion, or wrongful withholding claim. But every contract breach cannot be turned into a tort.<sup>[10]</sup>

In a Real Estate Surety Fund claim, a claim of damages arising from a breach of contract generally does not give rise to a claim for damages for conversion. In the commission's decision in *Henry v. Johnson*,<sup>11</sup> when a transaction failed the licensee disbursed earnest money in a trust account to his client instead of the other party. The decision in that case stated that "while a licensee who disposes of the earnest money to the wrong party may be liable for breach of contract, breach of contract is generally not sufficient to establish a claim for conversion." The decision concluded that "assuming the licensee made payment to the wrong party and is liable for breach of contract, the licensee's conduct was not a conversion of trust funds for purposes of a claim against the Real Estate Surety Fund."<sup>12</sup>

The District Court correctly characterized Mr. McAlpine's claims against Mr. Manson as a matter of contract. Mr. McAlpine is entitled to remedies on the contract, and he has in fact already obtained a judgment against Mr. Manson. Mr. McAlpine is not entitled to a claim against the Surety Fund for conversion of trust funds.

#### **IV. Conclusion**

Although Mr. McAlpine has suffered losses due to Mr. Manson's breach of contract, the losses did not arise in a real estate transaction. The losses were not the result of the conversion of trust funds for the purposes of a claim against the Real Estate Surety Fund. Mr. McAlpine's claim is denied.

DATED this 22<sup>nd</sup> day of January, 2010.

By: *Signed* \_\_\_\_\_  
DALE WHITNEY  
Administrative Law Judge

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<sup>10</sup> *Id.*(cites omitted).

<sup>11</sup> *Stephen Henry & Cheryl Henry v. Joel Johnson & Joel Johnson Realty*, OAH case number 07-0267-RES (June 19, 2008).

<sup>12</sup> *Id.*

## 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 17<sup>th</sup> day of March, 2010.

By: Signed  
Signature  
Bradford Cole  
Name  
Chairman  
Title

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