BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE ALASKA REAL ESATE COMMISSION

JEANNE MUNGLE,	)	
Claimant,	)	
	)	
v.	)	
	)	
SHAWN PAUL,	)	
Respondent.	)	OAH No. 09-0505 RES
_____	)	REC No. S-10-001

DECISION

I. Introduction

This is a real estate surety claim case under Alaska Statute 08.88.450 – 495.[1] The claimant, Jeanne Mungle, alleges misrepresentation on the part of Associate Broker Shawn Paul. Ms. Mungle's complaint included attached appendices numbered 1 through 15, and those documents are referred to by the appendix number assigned to them by Ms. Mungle. At the Case Planning Conference, the parties agreed that the case could be decided on the written record with oral argument to explain that record. Both parties participated by phone in the oral argument held on November 23, 2009. During that oral argument, the administrative law judge informed the parties that he would take up the question of misrepresentation first. If a misrepresentation was found, he would then give the parties an opportunity to address the question of whether the misrepresentation caused any loss.

Ms. Mungle's claim on the surety fund is denied because she did not establish a misrepresentation of fact or opinion, or the failure to disclose material factual information.

II. Facts

Ms. Mungle and her former husband had a waterfront lot with a building on Front Street in Hoonah that they wished to sell.[2] They hired Mr. Paul as their broker to sell that property. A potential buyer, Mark Perry, made an offer on the property. The buyer was interested in using the property for residential purposes, but the sellers had been using it as commercial property. After some negotiations, contract terms were agreed upon. The sellers signed the agreement on

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[1] Substantial changes in these statutes took effect on March 1, 2010. Those changes are not applicable to this matter.

[2] Memo, City Administrator to J. Curry, 9/1/2006.

June 23, 2008. Mr. Perry's representative apparently had trouble reaching him, and the contract was not fully executed until July 30, 2008.

The real estate contract included a 60 day feasibility study period, beginning on the date of "mutual acceptance."[3] During that time the buyer could investigate the suitability of the property for the buyer's intended purpose. The real estate contract provided that at the end of the study period, if the buyer did not notify the sellers that the property was suitable, the contract would terminate and the earnest money returned to the buyer.

During the summer, the buyer investigated the possibility of moving the building on the property "further out on the pilings" and the status of permits related to the property.[4] On July 28, before the contract documents had been signed by the buyer, Mr. Paul forwarded to the sellers an email exchange between the buyer and his agent in which the agent describing what she had learned, and the buyer stated, "we are still interested." Mr. Paul commented on the exchange, "For people who don't actually have a property under contract they are sure doing a lot of work!"[5] In mid-August, Mr. Paul sent the sellers an email, noting that the buyer had requested an extension of the time for the feasibility study, because he was unable to come up to Hoonah with his engineer to look over the property.[6] Mr. Paul also informed the sellers that with the request for an extension, the buyer had provided a signed rescission agreement, and that the buyer's agent had suggested that "if you have another person interested…, [l]et us know and [the buyer] will make a move to close or not."[7] In view of the time that had already passed, the sellers declined to extend the study period.[8] They did not countersign the rescission agreement.

At the end of the study period (September 28), the buyer still had not indicated whether he intended to go forward with the purchase. Mr. Paul sent an email to the sellers, noting that "we do need some resolution" and adding: "If he wants [the property] then he should wire the money. If he doesn't want it then he should say so."[9] He suggested that if they did not have a closing scheduled within the next few days, that the sellers should sign a rescission agreement, "[a]nd hope he signs it."[10] A week later, Mr. Paul sent an email to Ms. Mungle, stating, "As I

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[3] There was also a 54 day inspection period. *See*, Appendix 5. Some of the correspondence appears to confuse the 60 day feasibility study period with the 54 day inspection period. The apparent confusion between these two provisions is not material to this decision.

[4] Appendices 7, 8.

[5] Appendix 8.

[6] Appendix 10.

[7] Appendix 10.

[8] Appendix 11.

[9] Appendix 11.

[10] Appendix 11.

had told Michael before I never took [the property] out of the MLS because I was always skeptical at least a little about this buyer."[11]

As a result of these events, the contract terminated and the earnest money was returned to Mr. Perry. While the transaction was pending, Ms. Mungle and her former husband did not continue to pay on the note they owed on the property, which fell due on November 15, and they lost their ownership of the property.

III. Discussion

In a real estate surety case, the claimant must show more than simple mistake or negligence. The claimant must show fraud, misrepresentation, deceit, or conversion of trust funds.[12] Ms. Mungle contends that Mr. Paul's failure to inform her of his skepticism amounts to misrepresentation by omission. Mr. Paul contended at oral argument that the delays in getting documents signed by the buyer and other problems with this transaction would have caused anyone to be skeptical and that he believes Ms. Mungle was in fact skeptical of the buyer from the beginning.

A misrepresentation can occur with either an affirmative misstatement or the failure to disclose facts that the party has an obligation to disclose.[13] The Alaska Supreme Court has relied on the Restatement (Second) of Torts in holding that the obligation to disclose factual information may arise under several different situations, including these:

> (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
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> (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and
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> …
>
> (c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be true; and
>
> …
>
> (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.[14]

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11 Appendix 12.
12 Alaska Statute AS 08.88.460(a).
13 Matthews v. Kincaid, 746 P.2d 470, 471 (Alaska 1987).
14 Restatement (Second) of Torts §551(2). *See, e.g.*, Turnbull v. Rose, 702 P.2d 1331, 1334 (Alaska 1985).

Mr. Paul has conceded that he always had some skepticism about the buyer. But Mr. Paul's failure to disclose that skepticism was not contrary to subsection (a). Subsection (a) requires disclosure of matters that must be disclosed because of a fiduciary or other trust relationship, such as a conflict of interest or other factual matters that need not be disclosed in an ordinary commercial transaction. If Mr. Paul had known that the buyer would not proceed, and failed to disclose that fact, he could be found liable for a misrepresentation by omission.[15] But Mr. Paul did not know what the buyer was going to do. The general rule is that the expression of an honest opinion as to a future occurrence does not give rise to liability for misrepresentation,[16] and it follows that the non-expression of an opinion does not, either. Assuming, without deciding, that the failure to disclose a professional opinion could be grounds for a misrepresentation by omission under subsection (a), the evidence in this case does not establish that Mr. Paul had a firm opinion regarding the likelihood that the sale would close, one way or another. What he said is that he was "always skeptical at least a little about this buyer." That he harbored such a vague sentiment does not mean that his failure to disclose it was a misrepresentation by omission of his professional opinion.

Furthermore, Ms. Mungle has not shown that Mr. Paul failed to disclose any "facts basic to the transaction," as mentioned in subsection (b). Rather, the preponderance of the evidence is that Mr. Paul knew nothing about the buyer or the progress of this real estate transaction that Ms. Mungle did not also know: the buyer was from another state, had never seen the property, and was hard to contact; the buyer had asked for an extended period of time to determine whether the property was suitable and had made inquiries regarding the status of permits covering the property; and the property, which was zoned commercial, had not previously been used as a residential property, which was the buyer's intended use. Most importantly, Mr. Paul informed the sellers that the buyer had provided a signed rescission agreement and had expressly advised that if another person was interested the buyer would make up his mind one way or the other. What Mr. Paul withheld was not factual information, but his own mild skepticism ("at least a little") that the sale would actually close, based on all of the information that he had already disclosed.

Nor is this a case where Mr. Paul was required to inform Ms. Mungle of his skepticism in order to correct or clarify prior statements, as described in subsection (e). During oral argument,

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[15] *See, e.g.*, Turnbull v. Rose, *supra.*

[16] *See, e.g.*, Webb v. Leclair, 933 A.2d 177, 183 (Vt. 2007); Darst v. Illinois Farmers Ins. Co., 716 N.E.2d 579, 581-582 (Ind. App. 1999); Brady v. Dandridge, 379 S.E. 2d 429, 430 (Ga. App. 1989).

Ms. Mungle referred to the July 28 email in which Mr. Paul mentioned that the buyer was doing a lot of work for someone who does not yet have a signed contract. This email did not express an opinion or belief that the deal would go through, and so Mr. Paul was under no obligation to supplement it by disclosing his subjective skepticism of the buyer.

Ms. Mungle's complaint also alleges that Mr. Paul did not take adequate steps to ensure that the earnest money deposit would go to her rather than be returned to the buyer. Ms. Mungle is not alleging a conversion of trust funds; only that her contract with Mr. Perry did not sufficiently protect her from Mr. Perry's decision to back out of the agreement. This is not an allegation that Mr. Paul made a factual misrepresentation, and it is therefore not a ground for a claim against the surety fund.

Concerns were also raised as to whether Mr. Paul was actually representing both the buyer and the seller despite a signed disclosure pamphlet indicating that Mr. Paul only represented the seller.[17] There is no evidence in the record that Mr. Paul did anything that would constitute representing the buyer in this transaction.

IV. Conclusion

Ms. Mungle has not established a misrepresentation by an affirmative statement of fact or opinion, or by the omission of material factual information. Accordingly, her request for payment from the surety fund is denied.

DATED this 12th day of April, 2010.

By: *Signed*
Andrew M. Hemenway
Administrative Law Judge

[17] *See*, Appendix 5.

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 22nd day of June, 2010.

By: *Signed*
Signature
Bradford Cole
Name
Chairman – AREC
Title

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