

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

In the Matter of the Surety Fund Claim of:)
)
JOAN D. HUMPHREY)
)
Claimant,)
)
v.)
)
WESLEY MADDEN)
)
Respondent.)
_____)

OAH No. 09-0679-RES
Agency No. S-10-003

DECISION

I. INTRODUCTION

On November 2, 2009, Joan Humphrey filed a Real Estate Surety Fund claim against Wesley Madden.¹ Mr. Madden disputed her claim. Ms. Humphrey's claim revolves around a real estate transaction in which she was the prospective buyer of a home in Fairbanks, Alaska. Mr. Madden was the real estate licensee representing the sellers of that home. Ms. Humphrey was represented by real estate licensee Joan Stepovich. In her Surety Fund claim, Ms. Humphrey alleged that Mr. Madden engaged in fraud, deceit, and misrepresentation. Ms. Stepovich is not a party to this claim.

A telephonic hearing in this matter was held on April 14, 2010. Both parties represented themselves, testified under oath, and cross-examined the opposing party. No other witnesses were presented. Prior to the hearing the parties exchanged exhibits. Ms. Humphrey's exhibits are identified by numbers and Mr. Madden's exhibits are identified by letters.²

As discussed below, the statements made by Mr. Madden did not amount to fraud, a wrongful misrepresentation, or deceit. Accordingly, Ms. Humphrey is not entitled to any payment from the Surety Fund.

¹ The name of this fund and the procedure for making claims against it were substantially changed in 2008. Those changes became effective March 1, 2010. §§ 11 & 27 ch. 113, SLA 208. This claim is decided under the prior version of the law and cites to the Real Estate Surety Fund statute are to the version in effect prior to March 2010.

² Some documents were submitted multiple times with different exhibit numbers.

II. FACTS³

A. The Contract.

On April 29, 2009, Ms. Humphrey offered to purchase a home in Fairbanks from Mr. and Mrs. Martin.⁴ An important element of that offer was the right to place her honeybees on the property prior to closing.⁵ She provided a \$5,000 earnest money deposit with her offer,⁶ and the closing date was set for June 30, 2009.⁷ The Martins counter-offered with a selling price of \$262,900 and a specification that the earnest money deposit would become non-refundable after June 1, 2009.⁸ Ms. Humphrey accepted this offer on May 1, 2009.⁹

After the home inspection, the parties agreed to a repair addendum.¹⁰ On May 20, 2009, the parties agreed to a second addendum postponing any transfer of the earnest money until after the required appraisal was agreed on by the parties.¹¹

An addendum concerning the boiler for the home was proposed by Ms. Humphrey on May 21.¹² This addendum specified that the buyer would receive \$2,000 from the seller at closing in lieu of making necessary repairs to the boiler. On May 22, the Martins countered this May 21 proposal with two additional conditions: Advancing the recording date to June 9 and specifying that the honeybees could not be placed on the property until after recording.

Ms. Humphrey did not accept these additional conditions. Mr. Madden testified that he received a verbal rejection. On May 26, 2009, the Martins signed another copy of Ms. Humphrey's May 21 proposal without the additional conditions.¹³ By then, however, Ms. Humphrey no longer agreed to the May 21 addendum that she had proposed.

B. The Appraisal.

On May 20, Ms. Stepovich notified Mr. Madden that the appraisal had been ordered.¹⁴ On June 11, the appraisal came back with a value of \$260,000, approximately \$3,000 under the

³ Except where otherwise indicated, the facts discussed here are based on the parties' testimony.

⁴ Exhibit D, page 5 – 22.

⁵ Exhibit D, page 21; testimony of Ms. Humphrey. The contract specified "Buyer would like to put 2 boxes of honey bees in the gated fence area prior to closing and after any reports that are done are agreed upon."

⁶ Exhibit D, page 17.

⁷ Exhibit D, page 18.

⁸ Exhibit D, page 14.

⁹ Exhibit D, page 14.

¹⁰ Exhibit D, page 10.

¹¹ Exhibit D, page 8.

¹² Exhibit D, page 7.

¹³ Exhibit D, page 4.

¹⁴ Exhibit 8, page 5.

contract price.¹⁵ Mr. Madden reviewed the appraisal and found an error. He contacted the appraiser who agreed to issue a corrected appraisal indicating that the value of the home was \$263,000.

Ms. Humphrey was concerned that the appraisal amount had been changed. She also did not agree with the comparables used to calculate the home's value. During the hearing, however, Ms. Humphrey conceded that she would not have backed out of the purchase based on these concerns. The record in this case is unclear as to whether Ms. Humphrey ever agreed to the appraisal pursuant to the May 20 addendum.¹⁶

C. Other Issues.

Ms. Humphrey met Mr. Martin on two occasions. She felt that he was rude to her both of those times. A number of e-mails from her licensee, Ms. Stepovich, reinforce her belief that the Martins were inconsiderate or difficult to deal with.¹⁷ This, along with the counter offer to her May 21 addendum¹⁸ and the changes to the appraisal caused Ms. Humphrey to question the trustworthiness of the various parties she was dealing with.

Ms. Humphrey had a planned vacation, and would be out of town starting the evening of May 27 and for most of June. She wanted to move her bees to the property prior to her vacation so they would be able to gather pollen from a nearby flowering tree. The only time available for her to do this was the three day Memorial Day weekend, May 23 – 25, 2009.¹⁹

With regard to Ms. Humphrey's proposed May 21 addendum, Mr. Madden understood that the Martins had rejected it when they submitting their counter-proposal. When he resubmitted that addendum on May 26 without the additional conditions, he believed that it would not be effective unless Ms. Humphrey still agreed to it. He believed that Ms. Humphrey was still in agreement with this addendum – Exhibit D, page 4 – because on May 27 Mr. Madden was told they were going ahead with the purchase and he should schedule the appraisal.²⁰

During the May 22 to May 26 timeframe, Ms. Humphrey wanted to cancel the transaction, and expressed this desire to Ms. Stepovich. She believed the Martins breached the

¹⁵ Exhibit 8, page 7.

¹⁶ Exhibit D, page 8.

¹⁷ See exhibit 4, page 3. Other e-mails in Exhibit 4 contain similar statements but were not received by Ms. Humphrey until after this transaction failed.

¹⁸ Particularly the term that proposed removing the contract term concerning placement of the bee hives.

¹⁹ Exhibit 5, page 7. The Administrative Law Judge is taking Official Notice of the fact that Memorial Day fell on May 25, 2009. If either party objects to this finding he or she may request a hearing on this issue within ten days of receiving the proposed decision. Alaska Regulation 2 AAC 64.300.

²⁰ Exhibit 7, page 13.

purchase contract when they submitted their counter proposal to her May 21 addendum, because the counter-proposal changed the original contract's condition concerning the bees. She understood from her discussions with Ms. Stepovich that she was entitled to a refund of the earnest money. A rescission agreement was prepared and sent to Mr. Madden on May 26.²¹ Mr. Madden objected.²² According to Ms. Humphrey, on May 27 Ms. Stepovich told her that Mr. Madden had said there was "no way" Ms. Humphrey would get her earnest money back. Only then did Ms. Humphrey agree to go forward with the purchase of the house because she could not afford to lose \$5,000 and because she did like the house.

III. DISCUSSION

A. Overview.

Alaska law establishes a Real Estate Surety Fund.²³ Individuals who believe they have suffered a loss during a real estate transaction may make a claim against this fund.

[A] person seeking reimbursement for a loss suffered in a real estate transaction as a result of fraud, misrepresentation, deceit, or the conversion of trust funds . . . shall make a claim to the commission for reimbursement on a form furnished by the commission.²⁴

When a claim is made,

[t]he 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 . . . and the extent of those losses.²⁵

In this case, Ms. Humphrey asserts two categories of fraud, misrepresentation, or deceit. First, she claims that the circumstances surrounding the May 21 addendum were improper. She also claims she was manipulated into going forward with the purchase when Mr. Madden told her, through Ms. Stepovich, that the earnest money would not be refunded.

As used in the Real Estate Surety Fund statute, fraud, misrepresentation, and deceit are all acts that require wrongful intent. A claimant may not recover under the surety fund for negligent or innocent misrepresentations.²⁶

Much of the testimony in this case revolved around whether there was a binding contract to purchase the property, and whether any binding contract had been breached. In deciding this Surety Fund claim, it is not necessary to decide these issues. Nor is it necessary to decide who

²¹ Exhibit 7, page 6.

²² Exhibit 7, page 12.

²³ Alaska Statute AS 08.88.450.

²⁴ AS 08.88.460(a).

²⁵ AS 08.88.465(d).

²⁶ *State, Real Estate Commission v. Johnston*, 682 P.2d 383, 386 – 387 (Alaska 1984).

should have received the earnest money when the transaction was not completed. The only questions in a Surety Fund claim is whether there was fraud, misrepresentation, deceit, or conversion of trust funds²⁷ and, if so, what damages resulted.

B. May 21, 2009 addendum.

As discussed above, the May 21 addendum was first proposed by Ms. Humphrey.²⁸ The buyers made a counteroffer to include additional terms. When Ms. Humphrey did not agree to those additional terms, the sellers, and Mr. Madden, attempted to revert to Ms. Humphrey's original proposal.²⁹ Ms. Humphrey testified that she was not aware that they had done this. Even if she was aware, the May 21 addendum was not finalized until May 26. This was after Ms. Humphrey's opportunity to place the bees on the property. Because of her vacation plans, she was no longer able to take advantage of an important provision agreed to in the original purchase agreement: placing bees on the property before closing.

The May 21 addendum was submitted to the mortgage company as part of the loan approval process.³⁰ If Mr. Madden was aware that Ms. Humphrey no longer agreed to the addendum she had proposed, her claim that his actions constituted fraud, deceit, or misrepresentation would be stronger.³¹ Mr. Madden, however, testified that he believed Ms. Humphrey had agreed to the May 21 addendum. His testimony on this issue was credible. The May 21 addendum, as proposed by Ms. Humphrey, dealt with the boiler. It had nothing to do with placement of bees on the property, and Ms. Humphrey did not establish that Mr. Madden knew that placing the bees on the property on a specific weekend was essential to her. Accordingly, Mr. Madden had no reason to believe that Ms. Humphrey was no longer willing to agree to the terms she had proposed regarding the boiler. It is more likely true than not true that he honestly believed that Ms. Humphrey was still willing to proceed with the sale. Whether this belief was negligent or unreasonable is not at issue in this case. To establish fraud, misrepresentation, or deceit, Ms. Humphrey must show that Mr. Madden had actual knowledge

²⁷ Ms. Humphrey did not claim conversion, but she did claim that the earnest money amount was part of her damages.

²⁸ Exhibit 5, page 6.

²⁹ Exhibit 5, page 14.

³⁰ Exhibit 6, page 3.

³¹ For the purposes of this decision, it is not necessary to rule on whether those circumstances would have established fraud, misrepresentation, or deceit.

that the addendum did not accurately reflect Ms. Humphrey's approval.³² She has not met her burden of proof on that issue.

C. Manipulation.

Ms. Humphrey believes that Mr. Madden, in conjunction with Ms. Stepovich, manipulated her into agreeing to go forward with the purchase after she had told Ms. Stepovich that she did not want to purchase the home. The statement that convinced Ms. Humphrey to continue with the purchase was that there was "no way" the earnest money would be refunded to her. Ms. Humphrey believes this was a knowingly deceitful statement or misrepresentation because Mr. Madden would have known that there are situations where the earnest money is refunded to the buyer even if the buyer breaches the contract. At the time, Ms. Humphrey believed his statement to be an absolute statement of fact and only later did she start to think that the statement may not have been correct.

At the time of this statement, Ms. Humphrey was under a lot of pressure. She was about to leave for a month long vacation. She had missed her opportunity to place the bees on the property, and her own representative, Ms. Stepovich, was pressuring her into moving forward with the purchase. She liked the house, but at the same time she no longer trusted other people involved in the transaction. Under the circumstances, it is not surprising that Mr. Madden's statement changed her mind. At the same time, this statement is not a misrepresentation of fact, and it is not fraudulent or deceitful. Mr. Madden's statement can only be interpreted as his opinion as to how the earnest money would be disbursed, as an objection to agreeing that Ms. Humphrey should receive the earnest money, or both. As the licensee representing the seller, it was proper for Mr. Madden to inform the buyer that he would resist refunding the earnest money if she backed out of what he believed was a binding contract.

IV. CONCLUSION

Ms. Humphrey has not met her burden of proving fraud, misrepresentation, or deceit. Accordingly there is no basis for a recovery from the Real Estate Surety Fund.

DATED this 20th day of April, 2010.

By: Signed
Jeffrey A. Friedman
Administrative Law Judge

³² See *Devlin v. Radvansky*, OAH No. 07-0531-RES (discussion of fraudulent misrepresentation and deceit); *Grinnell v. Erkins*, OAH No. 07-0240-RES (same).

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 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.]