

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

|  |   |                     |
|--|---|---------------------|
| In the Matter of the Surety Fund Claim of: | ) |                     |
|  | ) |                     |
| FRANK & AMIE KEIRN                         | ) |                     |
|  | ) |                     |
| Claimants,                                 | ) |                     |
|  | ) |                     |
| v.   | ) |                     |
|  | ) |                     |
| CONNIE GIDDINGS                            | ) |                     |
|  | ) |                     |
| Respondent.                                | ) | OAH No. 09-0691-RES |
| _____                                      | ) | Agency No. S-10-004 |

**DECISION**

**I. INTRODUCTION**

On December 9, 2008, Frank and Amie Keirn filed a Real Estate Surety Fund claim against Connie Giddings.<sup>1</sup> Ms. Giddings disputed that claim. The dispute revolved around a failed real estate transaction in which the Keirns were trying to sell their home. Kevin Cross was the listing licensee representing the Keirns and Ms. Giddings was the buyer's licensee. The prospective buyer was Jeffrey Matkin, who is not a party to this matter and was not present at the hearing. Mr. Matkin provided a check in the amount of \$3,000 as an earnest money deposit. That check was returned by the bank for non-sufficient funds (NSF), but Ms. Giddings did not inform the sellers of this fact until the check was returned a second time.

The Keirns claim they suffered damages as a result of the delay in being notified of the returned check. The claimed damages include lost wages, cost of airline tickets, and value lost when they sold personal property in anticipation of their move. The Keirns also assert that by not informing them of the NSF check, Ms. Giddings and her broker became guarantors of that amount and seek payment of the \$3,000 in earnest money they should have received from Mr. Matkin's breach of the purchase agreement.

On February 18, 2010, a hearing was held in this matter. All parties were present and represented themselves. In addition to the testimony of the parties, testimony was taken from Mr. Cross and from Ms. Giddings' broker, Mark Korting.

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<sup>1</sup> The name of this fund and the procedure for making claims against it were substantially changed in 2008. Those changes are effective March 1, 2010. §§ 11 & 27 ch. 113, SLA 208.

As discussed below, Ms. Giddings was obligated to promptly inform the Keirns that the earnest money check had been returned NSF. The Keirns have not established that they suffered any loss from not being informed of this fact on July 15, 2009. Accordingly, they are not entitled to a recovery from the Surety Fund.

## II. FACTS

In response to the Surety Fund claim, Ms. Giddings submitted several documents, including a time line of the events leading up to this claim. Both parties relied on this document and along with the testimony at the hearing it is the source for many of the facts set out here.<sup>2</sup>

Ms. Giddings' client, Jeffrey Matkin, wanted to purchase a home in Anchorage. He said he was planning to make a cash purchase from his trust fund.<sup>3</sup> She spent time with Mr. Matkin and his partner, showing them various homes. Ms. Giddings testified that Mr. Matkin was driving an expensive car and during their time together she formed the impression that he was in fact a qualified buyer.

On July 2, 2009, Mr. Matkin made an offer to purchase the Keirns' home. The Keirns accepted his offer on July 3 pending verification of receipt of the earnest money and proof that Mr. Matkin had sufficient funds to purchase the home.<sup>4</sup> The Purchase and Sale Agreement listed a recording date of July 31, 2009.<sup>5</sup> On July 6, Mr. Matkin provided an earnest money check in the amount of \$3,000. This check was drawn on a Bank of America account in California.<sup>6</sup> A letter from Chase Manhattan Bank in New York confirming that Mr. Matkin had sufficient funds was faxed to Ms. Giddings that afternoon.<sup>7</sup>

During the home inspection on July 9, Mr. Matkin stated to Ms. Giddings that he was upset because Chase Manhattan Bank had frozen all of his funds rather than just the \$270,000 needed to make this purchase. Ms. Giddings testified that she understood this to mean that he had more than \$270,000 in that account and Mr. Matkin's access to all of those funds had been frozen. Subsequent to the home inspection, an amendment to the Purchase and Sale Agreement was signed indicating that Mr. Matkin would make certain repairs to the property.<sup>8</sup>

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<sup>2</sup> This document is included in the record as Attachment 4 to the Keirns' filing dated January 26, 2010.

<sup>3</sup> Ms. Giddings can properly testify as to what Mr. Matkin said to her. This is permitted not to establish that what Mr. Matkin said was true – much of it was not – but to explain Ms. Giddings own response to those statements.

<sup>4</sup> Purchase and Sale Agreement attached to Surety Fund Claim; e-mail from Mr. Cross dated July 6 transmitting Purchase and Sale Agreement attached to Surety Fund Claim.

<sup>5</sup> The recording date was later extended to August 10, 2009. Amendment to Purchase and Sale Agreement dated July 13, 2009, attached to Surety Fund Claim.

<sup>6</sup> Keirns' Attachment 2.

<sup>7</sup> Keirns' Attachment 3.

<sup>8</sup> July 13, 2009 Amendment attached to Surety Fund Claim.

On July 15, Ms. Giddings learned that the earnest money check had been returned for non-sufficient funds (NSF). Mr. Matkin told her that funds had recently been transferred in to that account, and asked that the check be resubmitted.

Ms. Giddings did not inform Mr. Cross, the Keirns' licensee, that the check had been returned. She testified that there were many reasons why a check might be returned, and that she did not think this was significant. She testified that she did not consciously or intentionally withhold this information from Mr. Cross, but they had no contact over the next few days and there was no opportunity for this to be a topic of conversation.

On July 23, the earnest money check was again returned NSF. Ms. Giddings called Mr. Matkin's bank in California and confirmed that this account was active. She then called Chase Manhattan Bank and learned that the letter purportedly from Chase Manhattan confirming the availability of funds had been forged. Ms. Giddings informed Mr. Cross that the check had been returned. Mr. Cross put the property back on the market.

Over the next several days, Ms. Giddings made frequent efforts to have Mr. Matkin provide the earnest money funds and complete the purchase of this property, or terminate the contract and pay the Keirns the \$3,000 earnest money due to them for his breach of the purchase contract. She was unsuccessful.

On July 6, in anticipation of the sale of their home, Ms. Keirn submitted her 30 day notice of resignation.<sup>9</sup> She testified that after they learned of the NSF check she asked to rescind her resignation but her employer said that she had waited too long. The Keirns also purchased airline tickets for their move out of state. These reservations were made on July 10, 2009.<sup>10</sup> The Keirns also testified about the sale of personal property in anticipation of the sale of their home, though they did not testify as to the specific dates of those sales.

### **III. DISCUSSION**

#### **A. The Dispute**

Alaska law establishes a Real Estate Surety Fund.<sup>11</sup> 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 . . .

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<sup>9</sup> Keirns' Attachment 5.

<sup>10</sup> Exhibit 7.

<sup>11</sup> Alaska Statute AS 08.88.450.

shall make a claim to the commission for reimbursement on a form furnished by the commission.<sup>12</sup>

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.<sup>13</sup>

In this case, Mr. and Ms. Keirn assert that the failure to inform them of the NSF check on July 15 amounts to a misrepresentation by omission. There is no claim of fraud, deceit, or conversion of trust funds.

Mr. Cross testified that cash transactions are suspect and frequently do not result in a final sale of the property. The Keirns note that Ms. Giddings should have had a heightened awareness of the possibility that this transaction might have problems after Mr. Matkin's July 9 statement that his funds had been frozen. They assert that they should have been informed within 72 hours that the check had been returned.<sup>14</sup> They also assert losses as a result of the delay in being informed of the NSF check.

In her defense, Ms. Giddings notes that she is not obligated to conduct an independent investigation of her client's financial condition. She asserts that she fully complied with her legal and ethical responsibilities under Alaska law.<sup>15</sup> Mr. Korting testified that it is common practice in Anchorage not to disclose an NSF check to the other party unless the check has been returned as NSF twice.

## **B. Misrepresentation**

The duties owed by licensees were modified in 2004 when the legislature abrogated portions of the common law of agency:

The common law of agency related to real estate licensee relationships in real estate transactions is expressly abrogated to the extent inconsistent with AS 08.88.600 – 08.88.695.<sup>16</sup>

The 2004 changes also imposed a statutory scheme defining the duties owed by real estate licensees in various situations. AS 08.88.615 states, in part:

[A] real estate licensee owes the following duties to each person to whom the licensee provides specific assistance:

(1) the exercise of reasonable skill and care;

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<sup>12</sup> AS 08.88.460(a).

<sup>13</sup> AS 08.88.465(d).

<sup>14</sup> Keirns' January 26, 2010 filing.

<sup>15</sup> Giddings' January 26, 2010 filing.

<sup>16</sup> AS 08.88.675.

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(5) accounting in a timely manner for all money and other property received from or on behalf of the person.<sup>17</sup>

AS 08.88.630 lists duties that are specifically not owed by a licensee. This statute specifies that a licensee is not required to conduct an independent investigation of a person's financial condition or to independently verify the accuracy of statements made by others.<sup>18</sup>

The Keirns rely primarily on the requirements in AS 08.88.615 that a licensee exercise reasonable skill and care, and account for all money received in a timely manner. This statute is not applicable here, however, because it only applies if there is a licensee relationship; it does not impose any duties where there is no licensee relationship. The various types of licensee relationships are described in AS 08.88.600. None of these describe the relationship between Ms. Giddings and the Keirns. Ms. Giddings had no statutory licensee relationship with the Keirns related to this transaction.

That there were no statutory duties owed does not end the analysis, however. The common law of agency has only been abrogated "to the extent inconsistent with" AS 08.88.600 – 695.<sup>19</sup> Ms. Giddings was acting as the representative or agent of Mr. Matkin who was one party to a business transaction with the Keirns. The Alaska Supreme Court has relied on the Restatement (Second) of Torts in holding that the obligation to disclose material facts during a business transaction may arise under several different situations. The section applicable to this case states:

(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,

\* \* \*

(c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so.<sup>20</sup>

When Ms. Giddings received Mr. Matkin's earnest money check she promptly informed the Keirns, through their licensee, that her brokerage was holding that money in trust.<sup>21</sup> The home was taken off the market based on the receipt of that money. The sellers made other decisions based on the receipt of this money assuming that if the buyer breached the purchase

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<sup>17</sup> AS 08.88.615(a).

<sup>18</sup> AS 08.88.630(2) & (3).

<sup>19</sup> AS 08.88.675.

<sup>20</sup> Restatement (Second) of Torts §551(2), relied on in *Matthews v. Kincaid*, 746 P.2d 470, 471 (Alaska 1987) and *Turnbull v. LaRose*, 702 P.2d 1331, 1334 (Alaska 1985) (Applying §551(2)(c).)

agreement, they would be entitled to recover this deposit. The existence of this earnest money deposit was a necessary condition of the purchase agreement. When the check was returned NSF, Ms. Giddings earlier statement was no longer true. As the person acting on behalf of Mr. Matkin in this transaction, Ms. Giddings had an obligation under Alaska law to inform the Keirns of this fact.<sup>22</sup>

Imposing an obligation to inform all parties to a real estate transaction when an earnest money check is returned for non-sufficient funds is not inconsistent with the statutory duties imposed by AS 08.88.600 – 695. Instead, it is entirely consistent with the requirement, applicable in all licensee relationships, of timely accounting for money received.<sup>23</sup> This obligation does not require that a licensee investigate another person’s finances or verify another person’s statements. This obligation only arises when a licensee learns that the licensee’s own prior statement concerning a fact material to the transaction is no longer true.

A misrepresentation can occur with either an affirmative misstatement or the failure to say something when the party has an obligation to disclose information.<sup>24</sup> Ms. Giddings did have an obligation to disclose that Mr. Matkin’s check had been returned NSF. Just as she was prompt in reporting the original deposit of that check, she was required to be prompt in disclosing that her earlier statement was no longer true. Ms. Giddings was obligated to use “reasonable care to disclose to the [Keirns] before the transaction [was] consummated.”<sup>25</sup> Because it is not required for resolution of this claim, no determination is made as to whether Ms. Giddings July 23 disclosure was sufficiently prompt to fulfill her obligation. As discussed in section C, below, even if it is assumed that Ms. Giddings should have informed the Keirns immediately after receiving notice of the NSF check on July 15, any delay in disclosing this information did not harm the Keirns.<sup>26</sup>

### C. Damages

The Keirns initially presented their case as a claim for the \$3,000 Earnest Money deposit.<sup>27</sup> Earnest money is available to pay liquidated damages to a seller when a buyer

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<sup>21</sup> Keirns’ Attachment 4, page 1.

<sup>22</sup> Restatement (Second) of Torts §551(2)(c).

<sup>23</sup> AS 08.88.615(a)(5).

<sup>24</sup> *Matthews v. Kincaid*, 746 P.2d at 471.

<sup>25</sup> Restatement (Second) of Torts §551(2)(c).

<sup>26</sup> The Keirns have suggested that Ms. Giddings should have told them within 72 hours of the NSF check, which means they would have been told on July 18. Using this later date would make their claim for damages even harder to prove.

<sup>27</sup> At the ALJ’s request they provided additional information during the hearing about actual losses they incurred as a result of Ms. Giddings failure to timely disclose the NSF check.

breaches a purchase contract. The seller may even be limited to claiming no more than the earnest money when making a claim for damages against a buyer. This is not a claim against the buyer, however. It is a claim against the Surety Fund. The Surety Fund statute specifically says that a claimant who has suffered a loss may seek reimbursement “for the claimant’s loss up to \$15,000.”<sup>28</sup> The amount of loss that can be claimed is not measured or limited by the size of the earnest money deposit. Instead, the loss is the amount the claimants are able to show they lost as a result of the misrepresentation. While there may be cases where the earnest money deposit is in fact the amount of the loss, this is not such a case.<sup>29</sup>

The Keirns have the burden of proving their damages by a preponderance of the evidence.<sup>30</sup> They must show that it is more likely true than not true that they suffered a particular monetary loss. They are required to show both the existence of a loss and the extent of that loss.<sup>31</sup>

The first item of claimed damages is lost wages.<sup>32</sup> Anticipating the sale closing on August 10, Ms. Keirn submitted her 30 day notice of resignation on July 6, 2009.<sup>33</sup> Ms. Keirn testified that she asked to revoke her resignation after they learned about the NSF check. By that time, a job offer to her replacement had already been made and she could not get her job back. Ms. Keirn was told by her employer that she should have said something sooner. Mr. and Ms. Keirn argue that had they been told about the NSF check immediately, Ms. Keirn might have been able to keep her job. While it is possible she may have been able to keep her job if she had asked sooner, it is equally possible that it would have been too late on July 15 when Ms. Giddings learned of the NSF check. The Keirns have not met their burden of proving that Ms. Keirn actually lost wages as a result of the delay in being notified about the NSF check.

The next item of loss is for travel out of state. In anticipation of their move, the Keirns made one-way airline reservations for Ms. Keirn and two children to travel first to Chicago, and then on to Austin, Texas.<sup>34</sup> Based on the hearing testimony, the Keirns were able to use these tickets, though they did have to purchase return tickets since the house did not sell and they did

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<sup>28</sup> AS 08.88.470.

<sup>29</sup> In addition, the Keirns did not lose the earnest money because of the delay in being notified of the NSF check. They lost the earnest money because Mr. Matkin’s check did not clear.

<sup>30</sup> AS 08.88.465(d).

<sup>31</sup> AS 08.88.465(d).

<sup>32</sup> Exhibit 6. Exhibits 6 and 7 were submitted by the Keirns during the hearing.

<sup>33</sup> Keirns’ Attachment 5.

<sup>34</sup> Exhibit 7.

not move out of state.<sup>35</sup> Ms. Keirn testified that they could not afford this trip but for the fact that they were planning to move. The reservations for leaving Alaska were made on July 10, 2009, before Ms. Giddings learned of the NSF check.<sup>36</sup> There was no evidence that the Keirns could have avoided any expenses related to this trip had they learned about the NSF check sooner. Any loss was caused by Mr. Matkin's failure to purchase the home, and not the delay in learning of the NSF check. Accordingly, the Keirns have not met their burden of proving that they suffered a loss related to this trip.

In their Claim for Payment submitted under oath to the commission, the Keirns state that they completed repairs and sold personal items in anticipation of the sale of their home.<sup>37</sup> They further state that the failure to inform them of the NSF check took away "our right to make an informed decision to proceed or protect our interest."<sup>38</sup> At the hearing, The Keirns testified about the sale of their personal items. They sold a couch, an entertainment system, and other items. These items had been purchased, used for different lengths of time, and then sold for less than their original price. They were not able to place a value on the amount lost when they sold the property. The Keirns are still living in the home that was previously under contract with Mr. Matkin. They testified that they had not replaced the couch and some of the other items sold. Based on this evidence, the Keirns have not met their burden of proving it is more likely true than not true that a loss occurred as a result of the delay in being notified of the NSF check. Nor have they established the amount of any such loss if it did occur.

#### **IV. CONCLUSION**

Licensees do have an obligation under Alaska law to inform all parties to a transaction when funds from an earnest money deposit are no longer on deposit, either because the check was returned NSF or for any other reason. The precise timing of this disclosure need not be resolved in this particular matter.

Most, if not all of the Keirns' actions in reliance on the existence of the earnest money deposit occurred before Ms. Giddings learned that the earnest money deposit had not cleared. Any delay in informing the Keirns that the check had been returned did not cause the harm the Keirns suffered from this failed real estate transaction. Accordingly, they are not entitled to any

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<sup>35</sup> Exhibit 7, page 3.

<sup>36</sup> Exhibit 7, page 1.

<sup>37</sup> Surety Fund Claim for Payment, page 2.

<sup>38</sup> Surety fund Claim for Payment, page 2.



recovery from the Surety Fund. The claim against the fund by Frank and Amie Keirn is DENIED.

DATED this 4<sup>th</sup> day of March, 2010.

By: Signed  
Jeffrey A. Friedman  
Administrative Law Judge

## 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 22<sup>nd</sup> 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.]