

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

In the Matter of the Surety Fund Claim of:)
)
 LAURA ODEN)
)
 Claimant,)
)
 v.)
)
 LINDA GARRISON)
)
 Respondent.)
 _____)

OAH No. 10-0080-RES
Agency No. S-10-005

ORDER ON MOTION TO DISMISS

I. INTRODUCTION

On January 8, 2010, Laura Oden filed a Real Estate Surety Fund claim against Linda Garrison.¹ She has claimed improprieties with regard to an earnest money deposit made in connection with a real estate transaction. Ms. Oden was the seller in that transaction, and Ms. Garrison was the broker representing the buyer.

Ms. Garrison, through her attorney, has filed a motion to dismiss. She asserts that the claim is untimely because the occurrence complained of was more than two years prior to the date of the surety fund claim. Ms. Oden opposed the motion.

A motion to dismiss requests a ruling based solely on the pleadings. In a Surety Fund claim, however, the original claim contains statements under oath. In addition, Ms. Oden has submitted additional factual statements and documents as part of her opposition.² Because of the sworn statements as well as additional evidence in the record, Ms. Garrison’s motion to dismiss will be treated as a motion for summary adjudication. Because this claim was filed more than

¹ The name of this fund and the procedure for making claims against it were substantially changed in 2008. Those changes were effective March 1, 2010. §§ 11 & 27 ch. 113, SLA 208. This case was filed prior to those changes.

² The e-mail exchange attached as Exhibit A to Ms. Oden’s opposition is admissible to show the content of those communications as well as the date those communications occurred. Ms. Oden’s statements in her opposition, while not under oath, help explain the prior sworn statements in the original claim as well as the other documents in evidence. See Alaska Regulation 2 AAC 64.290.

two years after the occurrence of any possible fraud, misrepresentation, deceit, or conversion of trust funds, Ms. Oden's claim must be denied.

II. FACTS

Ms. Oden entered into a contract to sell property on January 23, 2006.³ This contract included a provision for a \$5,000 earnest money deposit. The earnest money was deposited on March 10, 2006.⁴ In August of 2007, Ms. Oden attempted to receive the earnest money deposit that was being held by the title company.⁵ The record contains no evidence or explanation as to why this money has not been released by the title company other than the title company's statement that it is awaiting an agreement by the parties as to how the money should be disbursed.⁶ The record also does not contain any evidence of when Ms. Oden first requested that the earnest money be released to her.

III. DISCUSSION

Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.⁷ It is a means of resolving disputes without a hearing when the central underlying facts are not in contention. If undisputed material facts establish that one side or the other must prevail, the evidentiary hearing is not required.⁸

Claims against the Real Estate Surety Fund are limited to claims for reimbursement based on fraud, misrepresentation, deceit, or conversion of trust funds.⁹ This fund may not make payments based on any other type of negligence or improper conduct. This decision does not reach the question of whether there was any fraud, misrepresentation, deceit, or conversion because Ms. Oden's claim is untimely.

Ms. Oden's Surety Fund claim was filed on January 8, 2010.¹⁰ For a claimant to receive reimbursement from the Surety Fund, "the claim form must be filed within two years after the occurrence of the fraud, misrepresentation, deceit, or conversion of trust funds."¹¹ Thus, if the

³ Exhibit B to Ms. Oden's Response to Motion to Dismiss.

⁴ Copy of check attached to Surety Fund Claim.

⁵ Exhibit A to Ms. Oden's Response to Motion to Dismiss; August 2, 2007 e-mail to Matthew Fink attached to Surety Fund Claim.

⁶ Exhibit A, page 3; December 2, 2009 e-mail from Carolyn Smith attached to Surety Fund Claim.

⁷ See, e.g., *Schikora v. State, Dept. of Revenue*, 7 P.3d 938, 940-41, 946 (Alaska 2000).

⁸ See *Smith v. State of Alaska*, 790 P.2d 1352, 1353 (Alaska 1990); 2 Davis & Pierce, *Administrative Law Treatise* § 9.5 at 54 (3d ed. 1994).

⁹ Alaska Statute AS 08.88.460(a).

¹⁰ Exhibit A to Garrison's Motion to Dismiss.

¹¹ AS 08.88.460(a).

occurrence at issue was prior to January 8, 2008, Ms. Oden is not eligible to receive payment from the Fund.¹²

It is not entirely clear what occurrence forms the basis of Ms. Oden's claim. It is potentially the date that the buyer failed to pay the earnest money as required by contract, the date the earnest money was actually deposited, or the date that Ms. Garrison first objected to releasing this money to Ms. Oden. The undisputed facts in the record do establish, however, that any occurrence was prior to January 8, 2008.

In an e-mail attached to the Surety Fund claim, the title company states that there was a dispute in 2006 between Ms. Oden and Ms. Garrison over the earnest money deposit.¹³ On August 2, 2007, Ms. Oden sent an e-mail to Mr. Fink asking him to forward a letter to the title company.¹⁴ This letter concluded with the statement:

It is my position that all of those funds belong to me. I respectfully request that you please issue a check to either myself or Matt Fink, my real estate agent, as soon as possible.

Ms. Oden also exchanged e-mails with the title company concerning this transaction on August 3, 2007.¹⁵ This exchange discusses what would be required to have this money released. At least as of August 3, 2007, any event or action which could form the basis of a Surety Fund claim had already occurred.

Ms. Oden is understandably frustrated with the inability to get any resolution in this matter. There may be sufficient grounds for either a small claims action against the title company or a complaint against Ms. Garrison with the Real Estate Commission.¹⁶ It may also be possible to submit this dispute to arbitration.¹⁷ Because of the relatively short time limitation contained in the Real Estate Surety Fund statute, however, Ms. Oden is not able to obtain relief through that fund.

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¹² The Real Estate Commission has held that the relevant date for starting the two year clock is the date of any occurrence and not the date that any impropriety was discovered. *See, Johnson v. Adams*, OAH No. 08-0329-RES, footnote 18.

¹³ Carolyn Smith e-mail dated December 2, 2009.

¹⁴ Letter attached to Surety Fund Claim in Commission Record.

¹⁵ Ms. Oden's Exhibit A.

¹⁶ Different time limitations may exist for these actions.

IV. CONCLUSION

Ms. Oden filed her claim more than two years after any potential fraud, misrepresentation, deceit, or conversion, her claim is time-barred and must be dismissed.

DATED this 23rd 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 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.]