

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

In the Matter of:)	
)	
JOHN M. DOWNS)	OAH No. 10-0501-REC
_____)	Agency Case No. 2010-000433

DECISION

I. Introduction

John M. Downs applied for a real estate salesperson’s license on June 9, 2010. On September 9, 2010, the Alaska Real Estate Commission preliminarily denied his application “for public safety reasons” because of allegations of fraud. Mr. Downs requested a formal hearing, which was held on February 15, 2011.

At the hearing, Mr. Downs testified, as did Sharon Walsh, Real Estate Commission Executive Administrator and Michele Wall-Rood, Investigator III in the Division of Corporations, Business and Professional Licensing. The agency record, pages 1-156, was admitted without objection and page 157 was added during the hearing. The administrative law judge requested one additional exhibit, which was submitted with the Division’s Closing Argument as Appendix A, pages 1-5, and is admitted.

Based on the evidence in its entirety and after careful consideration, John M. Downs has not carried his burden of demonstrating that he should receive a real estate license at this time.

II. Findings of Fact

John M. Downs has been employed in the real estate industry for approximately twenty years.¹ He has had several employers, but the bulk of his time has been spent working in the mortgage department of First National Bank Alaska (First National), and subsequently at Homestate Mortgage, where he was a mortgage originator for approximately ten years.² Mr. Downs resigned from Homestate Mortgage in 2010 to pursue a real estate salesperson’s license.

Mr. Downs has previously held a real estate salesperson license in Alaska. License No. 11878 was issued to him on December 20, 1988 and expired on January 31, 1990.³ He did not use the license because at the time he received it his employer, First National, gave him a raise in pay so he decided to continue working in the mortgage department there.

¹ Testimony of John Downs.
² *Id.*
³ R. 157; testimony of Sharon Walsh.

The most significant facts in this appeal center around several financial transactions that took place in 2003-2004 regarding Mr. Downs' personal residence, a Chapter 7 bankruptcy he filed in 2007, and his 2010 application for a real estate salesperson's license.

A. 2003-2004: John M. Downs' Personal Real Estate Transactions

Mr. Downs and his wife, Maria, purchased their 3-bedroom, 2-bathroom home in Wasilla for \$114,000 in 1998.⁴ They remodeled it in several phases and financed the home improvement projects through various loans over the years. Their financing culminated in a construction loan of \$415,000 that they obtained from First National Bank Alaska (First National) in December 2003.⁵ Mr. Downs and his wife needed an additional infusion of funds for further home improvements and to pay some bills, so they borrowed \$135,000 from Mr. Downs' friend, real estate broker Alan B. Carlson, and his wife, Beverlee, on January 23, 2004.⁶ The loan from the Carlsons was secured by a Deed of Trust on the Downses' home and the transaction was recorded on February 5.⁷ A few months later, the Downses borrowed another \$50,000 from the Carlsons, so the initial Deed of Trust was modified to \$185,000 and recorded on May 5.⁸

In the fall of 2004, Mr. Downs began the process of refinancing his home. Alyeska Title Guarantee Agency (Alyeska Title) ordered a preliminary commitment for title insurance from McKinley Title, which in turn prepared a title report.⁹ The title report listed three deeds of trust on the Wasilla property, one of which was the Downses' \$135,000 Deed of Trust to the Carlsons and the subsequent modification that was recorded on May 5.¹⁰ Alyeska Title sent the preliminary commitment for title insurance and the title report to Mr. Downs' attention at Homestate Mortgage on November 8.¹¹

Mr. Downs testified that he submitted loan applications to both Homestate and Alaska USA, but there are no Homestate documents in the record. Alaska USA Federal Credit Union (Alaska USA) received an unsigned loan application from him for the amount of \$490,000 for the purpose of refinancing his home in Wasilla.¹² Alaska USA received the application on

⁴ Testimony of John Downs.

⁵ *Id.*, R. 35.

⁶ The record does not contain a copy of the Downses' original Deed of Trust to the Carlsons, but it is listed in a title report subsequently prepared by McKinley Title & Trust, Inc. (McKinley Title). *See* R. 35.

⁷ R. 35.

⁸ R. 35.

⁹ R. 29-35.

¹⁰ R. 35.

¹¹ R. 29-35.

¹² R. 37-41.

November 18, 2004.¹³ The schedule of liabilities and pledged assets in the loan application did not list the \$185,000 Carlson Deed of Trust.¹⁴ This is because on November 16, just two days earlier, the Carlsons executed a Request for Full Reconveyance of their Deed of Trust, pronouncing that “all sums secured” by the Downses’ original Deed of Trust and the subsequent modification “have been fully paid.”¹⁵ But the Downses had not been paying off their debt to the Carlsons. In fact, when the latter couple signed the reconveyance, most, if not all, of the Downses’ debt secured by the Deed of Trust remained unpaid.¹⁶

The loan application to Alaska USA for \$490,000 did not ultimately lead to a loan in that amount. At one time a loan amount of \$150,000 was possibly considered because someone – probably at the credit union – crossed out the amount of \$490,000 and wrote next to it the amount of \$150,000.¹⁷

Mr. Downs insisted at the hearing that he did not intend to hide his debt to the Carlsons from Alaska USA. This testimony is not credible. Even while his loan request was being processed, Mr. Downs represented to Alaska USA that the Carlson deed of trust had been paid in full when he knew it had not been paid. On December 2, he faxed the McKinley Title preliminary commitment for title insurance and the title report that were prepared earlier to Valerie LeDay at Alaska USA, along with the Carlson’s reconveyance of the Deed of Trust.¹⁸ The cover sheet, titled at the top “A Fax from John Downs,” reads as follows:

Hello,

Please find following this fax cover sheet the title report, *misc reconveyance information*, and the hud settlement statement on the first. The last paystub will be provided to you tomorrow.

Please call me with any questions you may have.

Cordially,
John Downs^[19]

The “misc reconveyance information” referred to the Carlsons’ reconveyance of the Deed of Trust.

¹³ See R. 22 at para. 7.
¹⁴ R. 40-41.
¹⁵ R. 36.
¹⁶ Testimony of John Downs.
¹⁷ See R. 37.
¹⁸ R. 28-36.
¹⁹ R. 28 (emphasis added).

On November 19, after the Alaska USA loan application had been submitted to the credit union, the Downses executed a new Deed of Trust to Alan and Beverlee Carlson in the amount of \$185,000.²⁰

Alaska USA eventually approved a loan to the Downses in the amount of \$135,000. Closing occurred on December 3, when he and his wife executed a Deed of Trust to Alaska USA in that amount.²¹ Mr. Downs also signed a Mortgagor's Affidavit of Ownership and Good Title which states in part:

There is no lien or encumbrance on the Property nor has any lien or encumbrance upon the Property been given or executed or contracted or agreed to be given or executed by the Mortgagor to any person except for the [first mortgage] disclosed below[.]^[22]

The affidavit did not disclose the Downses' \$185,000 debt to the Carlsons or the Deed of Trust they had executed re-securing that debt just two weeks earlier.²³

Mr. Downs received the \$135,000 loan from Alaska USA on December 8.²⁴ He caused two checks to be written from the loan proceeds, one to Alan Carlson for \$50,000 and one to himself for \$70,000.²⁵

The Deed of Trust to Alaska USA was recorded on December 8. Two days later, on December 9, the Downses' second \$185,000 Deed of Trust to the Carlsons was recorded.²⁶ The Downses executed this second deed of trust to the Carlsons on November 19, as seen above the notary's stamp on the last page,²⁷ but the date on the top of the deed of trust, written by hand, says the deed was made on December 9.²⁸

B. 2007: John M. Downs' Chapter 7 Bankruptcy

Sometime in 2007, John M. Downs filed a Chapter 7 bankruptcy petition.²⁹ On September 27, 2007, Alaska USA filed a complaint in the bankruptcy action to dispute the

²⁰ R. 46.

²¹ R. 50-54.

²² R. 55.

²³ *Id.*

²⁴ Downs maintained at the hearing that the loan amount was actually \$138,000, but there is no evidence of that in the record. The Deed of Trust securing that loan states the principal amount was \$135,000, so that figure will be used throughout the decision. *See* R. 50.

²⁵ R. 56-57.

²⁶ R. 42.

²⁷ R. 46.

²⁸ R. 43.

²⁹ R. 16.

dischargeability of Mr. Downs' \$135,000 home equity loan to the credit union.³⁰ The complaint alleges that Mr. Downs fraudulently induced the credit union into loaning him the \$135,000 by concealing the debt he and his wife owed to the Carlsons. Alaska USA asserted that if it had known the Downs still owed the Carlsons \$185,000, the credit union never would have loaned him the money.³¹

Mr. Downs did not litigate Alaska USA's complaint. Ultimately he settled the lawsuit with the credit union by means of agreeing to have judgment entered against him. On December 27, 2007, he signed a Confession of Judgment After Action in favor of Alaska USA in the principal sum of \$133,601.41, plus interest, costs and fees, for a total of \$157,515.56.³² In the confession of judgment, Mr. Downs acknowledged that:

this Judgment is nondischargeable under Sections 523(a)(2)(A) and 523(a)(6) of the [Bankruptcy] Code.”^{33]}

The first citation to the bankruptcy code in the confession of judgment, at 11 USCA §523(a)(2)(A), provides that a debtor is not discharged from any debt “for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud” The second subsection of the code, 11 USCA §523(a)(6), states that a bankruptcy discharge “does not discharge an individual debtor from any debt . . . for willful and malicious injury by the debtor to another entity or to the property of another entity.”

Mr. Downs stated at the hearing that he did not intend his signing of the confession of judgment to be an acknowledgment that he had committed fraud in inducing Alaska USA to grant him the \$135,000 loan. He steadfastly denies the allegations of fraud and claims that his reasons for entering into the confession of judgment were to reaffirm the debts he owed on the house to Homestate, Alaska USA and the Carlsons so he could keep his home, and to avoid extended litigation that could ultimately cost him \$50,000-\$60,000 in attorney fees.

The bulk of Mr. Downs' debts were discharged in his 2007 bankruptcy, including his \$185,000 loan from the Carlsons.

³⁰ R. 21-27.

³¹ R. 25.

³² R. 16-18.

³³ R. 17.

C. 2010: John M. Downs' Application for a Real Estate Salesperson License

On June 9, 2010, Mr. Downs submitted his application for a Real Estate Salesperson License to the Division of Corporations, Business and Professional Licensing.³⁴ He had the form notarized, swearing:

- “that the information contained in this application is true to the best of my knowledge”;
- that “I am not omitting any information which might be of value to this commission in determining my qualifications;” and
- “that any falsification, omission, or withholding of information of [sic] facts concerning my qualifications as an applicant shall serve as sufficient grounds for the suspension, cancellation, or revocation of my broker certificate, even though it is not discovered until after issuance.”³⁵

Mr. Downs' employing broker, Butch Jacques of Keller Williams Realty, signed the application on his behalf.³⁶

Section B of the license application concerns the applicant's license and certificate history. It directs the applicant to “[l]ist all states or jurisdictions in which you are currently, or ever have been, licensed/certified in the Real Estate profession.”³⁷ Mr. Downs left that section blank, signifying that he had not held any prior real estate licenses.³⁸

Mr. Downs' non-answer conveyed erroneous information. At the hearing, he divulged, when discussing his years of experience in the real estate industry, that in 1988 he was issued an Alaska salesperson's license that he did not utilize because he chose to remain in the mortgage department at First National Bank. The license expired of its own accord on January 31, 1990.³⁹ Mr. Downs explained he failed to report his prior license because he had forgotten it – it “didn't come to mind” while he was preparing his 2010 application.

The license application also contains six biographical information questions that are used for screening purposes. Question No. 6 asks, “Have you had a lawsuit filed against you alleging deceit, fraud, misrepresentation or conversion of funds?” Mr. Downs checked the box marked

³⁴ R. 10-11.

³⁵ R. 11.

³⁶ *Id.*

³⁷ R. 10.

³⁸ *Id.*

³⁹ R. 157.

“Yes” and next to it wrote “see documentation”.⁴⁰ However, there was no documentation attached to his application.⁴¹

A “Yes” answer to any one of the biographical information questions leads to further review by the licensing division’s investigative unit.⁴² On June 11, Licensing Examiner Beata Smith contacted Mr. Downs via email to inquire why he did not submit any documentation regarding the lawsuit he referred to in his application.⁴³ He responded by email with this explanation a few days later:

A little over 3 years ago I had filed a chapter 7 bankruptcy. The chapter 7 bankruptcy was disputed by Alaska USA FCU which held my second mortgage on my home. They had alleged that there was undisclosed debt on my mortgage application. I wanted to keep my home and did not want to waste time or money with litigation so I settled it with AKUSA, therefore the litigation never moved forward. I agreed that I would pay them regardless of whether I held the property in the future and that they could collect it from me if I failed to pay. Meanwhile the chapter 7 was discharged for all other debts.^[44]

On June 22, Investigator Michele Wall-Rood wrote to Mr. Downs by email and requested “copies of all the legal documentation” relevant to the lawsuit.⁴⁵ On July 22, Mr. Downs submitted copies of documents from his 2007 bankruptcy, filed in U.S. Bankruptcy Court, Case No. A07-000299 DMD.⁴⁶ The documents included a copy of a Complaint to Determine Dischargeability filed by Alaska USA FCU against Mr. Downs, a Stipulation for Payments and the Confession of Judgment After Action.⁴⁷

On August 6, Wall-Rood prepared a memorandum for the Commission outlining the Division’s actions relative to Mr. Downs’ application for a real estate salesperson’s license.⁴⁸ The memorandum and his application were submitted to the Commission for its September 2010 meeting. On September 9, the Commission denied his application, citing “public safety reasons” because of the allegations of fraud in Alaska USA’s complaint against Mr. Downs in his 2007 bankruptcy.

⁴⁰ R. 10.
⁴¹ R. 15.
⁴² R. 9.
⁴³ R. 15.
⁴⁴ R. 15.
⁴⁵ R. 144.
⁴⁶ R. 14, 16-59.
⁴⁷ R. 16-27.
⁴⁸ R. 14.

Mr. Downs appealed and requested a formal hearing, which was held on February 15, 2011. At the close of the hearing the Division orally moved to amend its statement of issues to include a charge that Mr. Downs was formerly licensed and did not reveal it. The motion was granted and the Division's Amended Statement of Issues was received on February 23, 2011.

III. Discussion

Proceedings before the Alaska Real Estate Commission are subject to AS 44.62, the Administrative Procedure Act (APA).⁴⁹ Because he was initially denied licensure, Mr. Downs has the burden of proving by a preponderance of the evidence that he satisfies the requirement for a real estate salesperson's license.⁵⁰ To prove something by a preponderance of the evidence is to establish that it is more likely than not true, or that there is a greater than fifty percent chance it is true.⁵¹

A. *The Commission Has the Discretion to Grant or Deny Mr. Downs' Application*

The qualifications for a real estate salesperson's license are listed in AS 08.88.171(c). It states that a natural person qualifies for a real estate salesperson license if

- the person passes the real estate salesperson examination,
- applies for the license within six months after passing the examination,
- submits satisfactory proof of successful completion of the education requirements of AS 08.88.091,
- is at least 19 years of age,
- furnishes satisfactory proof that errors and omissions insurance required under AS 08.88.172 has been obtained,
- is not under indictment for a felony or other crime that, in the judgment of the commission, affects the individual's ability to practice as a real estate salesperson competently and safely or
- under indictment for forgery, theft, extortion, conspiracy to defraud creditors, or fraud, or, if convicted of such an offense, seven years have elapsed since the person completed the sentence imposed upon conviction

There is no dispute that Mr. Downs meets all of the requirements listed in the statute. His licensing application file shows that he passed the real estate salesperson examination, completed the education requirements, obtained the necessary errors and omissions insurance and submitted

⁴⁹ AS 08.01.090.

⁵⁰ AS 44.62.460(e)(2).

⁵¹ See *Dairy Queen of Fairbanks, Inc. v. Travelers Indemnity Co. of America*, 748 P.2d 1169, 1170-72 (Alaska 1988).

a timely application.⁵² Additionally, he is not, nor has he been, under indictment for a felony or other crime, or for forgery, theft, extortion, conspiracy to defraud creditors, or fraud.

Mr. Downs contends that because he meets all of the listed requirements for a real estate salesperson license, he is qualified for and entitled to receive one. He argues that the Real Estate Commission does not have the discretion to deny his application, so therefore it must grant him a salesperson's license.

Mr. Downs' interpretation of the Commission's authority is incorrect. The Commission exercises broad discretion in governing real estate professionals in Alaska.⁵³ In AS 08.88.171(c), the legislature set forth the minimum qualifications, both academic and otherwise, for applicants pursuing a real estate license.⁵⁴ It also directed the Commission to actively decide whether to grant an application for licensure: "[t]he commission *shall determine* whether applicants meet requirements for licenses under this chapter and issue licenses to those who qualify; . . ."⁵⁵ This discretion has long been recognized:

The government regulates many activities and occupations. The rationale for this system of regulation is that the public is exposed to an unacceptable risk of harm if the activity or occupation is performed incompetently, recklessly, dishonestly, or with intent to injure. Under these regulatory schemes, a person must obtain a license to pursue the regulated activity or occupation, and the government possesses the power to revoke the license of someone whose occupation demonstrates his or her unfitness to continue in that activity or occupation.^[56]

An integral element of the Commission's authority includes the ability found in AS 08.88.071(a)(3) to discipline various types of improper behavior by a licensee that could warrant discipline up to and including suspension or revocation of the person's license.⁵⁷ Most of the prohibited conduct in the statute is in respect to real estate transactions.⁵⁸ However, AS 08.88.071(a)(3) has a catch-all provision that clearly authorizes the Commission to discipline a licensee for conduct that may have occurred outside the real estate profession and that comes to the Commission's attention after licensing. This provision states that the Commission may discipline a licensee who has:

engaged in conduct of which the commission did not have knowledge at the time

⁵² R. 8-13.

⁵³ See AS 08.88.071.

⁵⁴ AS 08.88.171(c).

⁵⁵ AS 08.88.071(a)(1) (emphasis added).

⁵⁶ *State v. Zerkel*, 900 P.2d 744, 753 (Alaska App. 1995).

⁵⁷ See AS 08.88.071(a)(3).

⁵⁸ See AS 08.88.071(a)(3)(A)-(I).

the licensee was licensed demonstrating the licensee's unfitness to engage in the business for which the licensee is licensed,^[59]

To supplement the statutory guidelines, the Commission has promulgated a regulation also listing conduct that is grounds for revocation or suspension of a license.⁶⁰ Similar to the statute, 12 AAC 64.130 identifies prohibited conduct that primarily involves real estate activities, but also includes a provision allowing for revocation or suspension of a license where the licensee has been convicted of one of various criminal offenses.⁶¹

As a complement to the statutory language found in AS 08.88.071(a)(3), the regulation is a statement of the commission's policy regarding unacceptable behavior for a real estate professional. "While the [regulation] contemplates actions by a licensee, *i.e.* after a license has been issued, the behavior identified is equally applicable to an applicant for a license. If a particular behavior is grounds for revocation of a license after it has been issued, it follows that the same behavior is grounds for denial of an application for a license."⁶²

Courts have consistently taken the position that the power to refuse a license is coextensive with the power to revoke.^[63] Where the commission has power to revoke a salesman's license upon specific grounds, it may properly refuse to issue a license initially upon the same grounds. It would be an exercise in pure futility to require the commission to issue a license and then immediately revoke it.⁶⁴

Therefore, in exercising its discretion, the Real Estate Commission may look to 12 AAC 64.130, the regulation setting forth grounds for revocation or suspension of a license, to determine whether an application for a license should be granted or denied.

B. Mr. Downs Obtained his Alaska USA Loan through Fraud, Misrepresentation or Deceit

The Division contends that the Commission should deny Mr. Downs' application for a real estate salesperson license because he committed fraud in order to obtain the Alaska USA

⁵⁹ See AS 08.88.071(a)(3)(C).

⁶⁰ See 12 AAC 64.130, Grounds for revocation or suspension.

⁶¹ See 12 AAC 64.130(5).

⁶² *In re Wilson*, OAH No. 07-0199 (Alaska Board of Dental Examiners, September 14, 2007).

⁶³ *Bartlett v. State Real Estate Commission*, 188 Neb. 828, 199 N.W.2d 709, 712-713 (Nebraska 1972) (internal citations omitted).

⁶⁴ *Id.*

loan and is thus barred from licensure under 12 AAC 64.130(5).⁶⁵

Commission regulation 12 AAC 64.130(5) lists acts which are grounds for suspension or revocation of a license held by a real estate professional:

being found guilty of forgery, embezzlement, obtaining money under false pretenses, larceny, extortion, conspiracy to defraud, or other similar offenses committed while licensed under this chapter^[66]

The regulation provides that for purposes of this chapter, “being found guilty” includes having the Commission make a finding after a hearing that a licensee participated in or committed one of the named offenses “or other similar offenses.”⁶⁷ As discussed above, the Commission in its discretion may also apply the same standards to the conduct of an unlicensed person in order to determine whether to grant or deny the individual’s application for a real estate license.

Embezzlement, obtaining money under false pretenses, larceny and extortion are criminal offenses formerly listed under AS 11.20, Offenses Against Property. In 1978 their specific statutory provisions were repealed and reclassified.⁶⁸ The first three are now considered a form of theft under AS 11.46.⁶⁹ Theft involves the “intent to deprive another of property”⁷⁰ The former crimes organized under the general category of “False Pretenses and Fraud” are now considered “theft by deception” under AS 11.46.180. Deception may involve transferring or encumbering property and failing “to disclose a lien, adverse claim, or other legal impediment to the enjoyment of the property.”⁷¹

The statutes and regulations governing the real estate industry in Alaska utilize the terms “fraud,” “misrepresentation,” and “deceit” when describing improper conduct.⁷² In the context

⁶⁵ The Division initially asserted that Mr. Downs should be collaterally estopped, or barred, from denying he committed fraud in obtaining the loan. The Division’s basis for this argument is that Mr. Downs signed a confession of judgment in the bankruptcy action that acknowledged his home equity loan was not dischargeable because it was obtained through “false pretenses, a false representation, or actual fraud.” Because this appeal is resolved on other grounds, the Division’s collateral estoppel argument is moot.

⁶⁶ 12 AAC 64.130(5).

⁶⁷ *Id.*

⁶⁸ Sec. 21 ch 166 SLA 1978.

⁶⁹ Extortion has been reclassified as an offense against the person under AS 11.41.520.

⁷⁰ AS 11.46.100(1).

⁷¹ AS 11.81.900(18)(D).

⁷² See e.g., AS 08.88.071(a)(3)(B) (the Commission may suspend or revoke the license of a licensee who “procures a license by deceiving the commission”); AS 08.88.460(a)(1) (a person seeking an award from the Real Estate Recovery Fund must show a person “committing fraud, an intentional tort, [or] deceit”); and 12 AAC 64.160(a) (“making any false or fraudulent representation or material misstatement on an application . . . is grounds for revocation, suspension, or denial of a license.”)

of civil law, the misconduct expressed by these terms is very like the description of the crimes listed in 12 AAC 64.130(5) and as a result the terms qualify as “similar offenses” in the regulation. Thus, a licensee or applicant “being found guilty” of “fraud,” “misrepresentation,” or “deceit” would be subject to discipline under the regulation.⁷³

Fraud entails: (1) a false representation of fact, (2) knowledge that the representation was false (or lack of confidence in the representation, or knowledge that the basis for the representation was not as stated or implied), (3) an intention that the other person rely on the representation; (4) justifiable reliance on the representation; and (5) damage as a result of the reliance.⁷⁴ The knowledge element, formerly known as “scienter,” is an essential component that must be proven.⁷⁵ Intent is a question of fact that may be proven by inference through circumstantial evidence.⁷⁶

Mr. Downs insists there was no fraud. His explanation for the series of events that occurred regarding his Alaska USA loan is that in his attempt to obtain conventional financing to pay off his construction loan, he made applications for financing to his employer, Homestate Mortgage, and three applications to Alaska USA, beginning with the first one for \$490,000. Mr. Downs claims in order to get a loan from either Homestate or Alaska USA, that Mr. Carlson’s deed of trust would have to be subordinated, which Mr. Carlson agreed to do. However, the actual method of subordinating the loan was left with the title company, who handled the closing. Mr. Downs claims that the title company decided the method of subordination and made the arrangements for the Carlsons to sign the reconveyance without Mr. Downs’ knowledge.

Mr. Downs further claims that Alaska USA was aware of the debt he owed to Mr. Carlson by virtue of the deed of trust being listed on the preliminary commitment for title insurance and also because Alaska USA wrote out a cashier’s check to Mr. Carlson for \$50,000. According to Mr. Downs, the new deed of trust to the Carlsons was subordinated by virtue of being recorded after his deed of trust to Alaska USA for the loan was recorded.

⁷³ In this context, “misrepresentation” includes conduct that has been described as either “knowing,” “intentional” or “fraudulent.” *Pape v. Miller*, OAH No. 06-0023-RES (Alaska Real Estate Commission, March 22, 2007). It does not include the tort of “negligent misrepresentation,” which arises from “a duty to provide accurate information” once one undertakes to speak. *See Barber v. National Bank of Alaska*, 815 P.2d 857, 862 (Alaska 1991).

⁷⁴ *City of Fairbanks v. Amoco Chemical Co.*, 952 P.2d. 1173, 1176 & n.4 (Alaska 1998); *Bubbel v. Wien Air Alaska, Inc.*, 682 P.2d 374, 381 (Alaska 1984).

⁷⁵ *In re Moser*, OAH No. 04-0294-REC (Alaska Real Estate Commission, June 14, 2005).

⁷⁶ *Id.*

In applying the elements of fraud, misrepresentation and deceit to this appeal:

(1) Mr. Downs made a false representation of fact to Alaska USA in two ways. The first was by sending a message by facsimile to Valerie LeDay on December 2, 2004, that represents his deed of trust to the Carlsons had been paid in full. The text portion of the message indicates “misc reconveyance information” was attached.⁷⁷ The document Mr. Downs referred to could only have been the reconveyance signed by the Carlsons on November 16, 2004. It is the only reconveyance document contained in the record or discussed throughout the course of this appeal.

The second way in which Mr. Downs made a false representation of fact to Alaska USA was by signing a Mortgagor’s Affidavit of Ownership and Good Title that recited there was no lien or encumbrance on his property, nor had any lien been given or executed.⁷⁸ Mr. Downs signed the affidavit on December 3, 2004, approximately two weeks after he and his wife executed a new deed of trust to the Carlsons.⁷⁹

(2) Mr. Downs had knowledge that the representation that his deed of trust to the Carlsons had been paid in full was false because he knew that he had not paid the Carlsons all of the funds due and owing on the deed of trust.

(3) Mr. Downs intended that Alaska USA rely on his representation. He was seeking a loan in the amount of \$135,000 from the credit union. It was more likely than not that had Alaska USA known his debt to the Carlsons was not paid in full, he would not have obtained the loan.

(4) Alaska USA relied on the false representation that the Carlson deed of trust had been paid in full because that was part of the information the credit union considered in making its decision to extend the loan to Mr. Downs.

(5) Alaska USA was damaged in the amount of \$135,000, the principal of the loan extended to Mr. Downs.

To the extent that Mr. Downs testified he did not hide his debt to the Carlsons from Alaska USA, that testimony is supported by only one piece of evidence – Mr. Downs sent the credit union the title report that listed the Carlson Deed of Trust. What Mr. Downs fails to acknowledge is that he also faxed Alaska USA the Carlsons’ reconveyance, which represented – *falsely* – that the \$185,000 debt had been paid in full. Mr. Downs testified he doesn’t remember

⁷⁷ R. 28.

⁷⁸ R. 55.

⁷⁹ R. 46.

sending the fax to Ms. LeDay because his assistant might have sent it. The facsimile tells a different story. It is titled at the top, “A Fax from John Downs;” it is signed, “Cordially, John Downs;” and it includes a sentence that reads, “Please call me with any questions you may have.”⁸⁰ Clearly, it was Mr. Downs who sent this document to Alaska USA, not his assistant.

Mr. Downs’ claim that the credit union knew about his debt to the Carlsons because Alaska USA wrote out a cashier’s check to Mr. Carlson for \$50,000 is disingenuous. The check was written to Mr. Carlson *after* the loan closed and Mr. Downs received his money.

By his actions, Mr. Downs misrepresented his financial condition to Alaska USA for the purpose of being approved for a \$135,000 loan from the credit union. Had Mr. Downs informed Alaska USA that the Carlson Deed of Trust was not, in fact, paid in full, it is more likely than not that the credit union would not have given him the \$135,000 home equity loan.⁸¹ Given this misrepresentation, the Commission correctly denied Mr. Downs’ license application.

C. Mr. Downs’ Application for a Salesperson’s License Contained False Information

Commission regulation, 12 AAC 64.160, provides that “[m]aking any false . . . representation or material misstatement on an application for a license . . . is grounds for revocation, suspension, or denial of a license.” In a published decision, the Commission has stated that “even an innocent ‘false representation’ or ‘material misstatement’ meets the regulation’s standard.”⁸²

An incorrect answer to one of the questions on the application does not automatically lead to denial of the application.⁸³ The regulation gives the Commission discretion to deny a license based on a false answer, but the Commission also has discretion to grant the license.⁸⁴ The Commission may weigh the degree of innocence, negligence, or outright deception behind the untrue answer in making this determination.

Mr. Downs’ application indicates that he had never held a real estate license.⁸⁵ Yet at the hearing, Mr. Downs revealed for the first time that he was issued an Alaska real estate salesperson’s license in 1988 but let it expire two years later. Mr. Downs’ explanation for the

⁸⁰ R. 28.

⁸¹ *See* R. 25.

⁸² *In re Moser*, OAH No. 04-0294-REC (Alaska Real Estate Commission, June 14, 2005), at 11.

⁸³ Testimony of Michele Wall-Rood.

⁸⁴ Although not directly at issue in this appeal, it may also be within the Commission’s authority to grant a license conditionally, requiring an applicant to agree to discipline of some kind in order to receive a license. *See In re Scott*, OAH No. 10-0496-REC (Alaska Real Estate Commission, December 1, 2010), at n.24.

⁸⁵ R. 10.

incorrect information is that he forgot he had previously held a real estate salesperson's license and that it did not even come to mind when he was filling out his 2010 application.

All of the information elicited by the application for a real estate salesperson's license is designed to give the Commission the information it needs to protect the public. Whether the applicant has ever been licensed in the real estate industry and, if so, where, provides an important starting point for learning about his or her professional history. Inaccurate or incomplete answers on the application form interfere with the Division's ability to obtain the information necessary for the Commission to perform its statutory function.

Mr. Downs' failure to list his previous real estate license on the application form does not suggest that he was deliberately attempting to deceive the Commission, but rather that he was careless about being completely accurate. If he had intentionally answered this question incorrectly, it is unlikely that he would have volunteered the information during this hearing. But even this careless inaccuracy should not occur in a sworn license application, especially one in which he had an ample amount of time to contemplate his answers while filling it out. It raises concerns about his ability to be careful and accurate in real estate documents.

D. Remedy

The Commission has discretion to grant a license, or to grant a license with conditions, to an applicant who has engaged in conduct that could support revocation. Mr. Downs has done so, and indeed his fraud involved a real estate matter. It is too risky to the public to license an individual with such a history. Real estate licensing laws emphasize that licensees must be trustworthy.⁸⁶ The special duties owed by all real estate licensees reflect the pervasive potential for public harm from licensee self-dealing and other dishonest acts in real estate transactions. Real estate licensees operate in an environment where conflicts of interest commonly can arise. They must exhibit undivided loyalty, encompassing the utmost good faith and fair dealing.

Mr. Downs' inaccurate application provides additional cause to decline licensure.

IV. Conclusion

Because John M. Downs obtained a home equity loan through fraud, misrepresentation or deceit, and because his application for a real estate salesperson's license contained false information, the Real Estate Commission has discretion to deny him a salesperson license. Mr.

⁸⁶ See AS 08.88.071(a)(3)(A); AS 08.88.171; AS 08.88.401.

Downs did not prove by a preponderance of the evidence that he is entitled to a real estate salesperson's license, so the Commission should exercise its discretion to withhold the license.

Dated this 23rd day of August, 2011.

By: Signed
Kay L. Howard
Administrative Law Judge

Adoption

The 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 distribution of this decision.

DATED this 7th day of September, 2011.

By: Signed
Signature
Bradford Cole
Name
Chairman AREC
Title

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