



DATED this 18th day of September, 2008.

By: Kim DeMoss  
Linda Schwass/Kim DeMoss  
Office of Administrative Hearings

**Certificate of Service:** The Undersigned hereby certifies that on the 18<sup>th</sup> day of September 2008, a true and correct copy of this document was sent by certified mailed to the following: David and Mary Duncan; Jim Garrison; Shane Osowski, counsel for Linda Garrison; with a copy hand delivered to Sharon Walsh, Real Estate Commission. Courtesy copies sent to R. Younkens, DCED and Lt. Governor.

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claim might be best addressed by way of dispositive motions, the ALJ issued on May 30, 2008 a scheduling order for filing dispositive motions.

Ms. Garrison filed her motion for summary judgment<sup>3</sup> on June 10, 2008. Mr. Crawford filed a motion for summary judgment on June 11, 2008. The Duncans filed their opposition to the motions on July 1, 2008. Ms. Garrison and Mr. Crawford argue that the Duncans' surety fund claim is barred because it was filed too late, and secondly because the surety fund claim is barred by *res judicata*, i.e. the Duncans' claims were fully litigated in the district court and cannot be revived or retried in the surety claim venue. The Duncans oppose the motions, arguing that until Judge Motyka issued his decision, the alleged fraud was not evident to them, and therefore any period of limitation on their surety fund claim does not commence to run until the date of the court decision, i.e., December 20, 2007.

Alaska Statute 08.88.460 requires that a surety fund claim be filed "within two years after the *occurrence*" of the fraud, misrepresentation or deceit claimed as the basis for reimbursement from the fund.<sup>4</sup> It is undisputed that the real estate transaction closed March 25, 2005,<sup>5</sup> and recorded shortly thereafter. The surety fund claim was filed by the Duncans on April 17, 2008, more than three years after the real estate transaction closed. *If* fraud, intentional misrepresentation or deceit occurred, the fraud, intentional misrepresentation or deceit necessarily occurred at or prior to closing on March 25, 2005.

AS 08.88.460 does not use the phrase "within two years after the accrual of the cause of action"<sup>6</sup>; the statute also does not use words like "upon discovery of the facts giving rise to a cause of action"; the statute at issue uses the word "occurrence", which means "a thing that occurs; an incident or event".<sup>7</sup> The Real Estate Commission has adopted the foregoing definition of "occurrence" when denying prior surety claims.<sup>8</sup> The plain language of AS 08.88.460 applied to the instant facts justifies deciding in favor of respondents and against claimants because the

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<sup>3</sup> Motions for summary judgment occur in civil actions pursuant to Civil Rule 56. The functional equivalent in administrative proceedings is a motion for summary adjudication filed pursuant to 2 AAC 64.250.

<sup>4</sup> Emphasis added within the quoted phrase.

<sup>5</sup> HUD-1 Settlement Statement, dated March 29, 2005, prepared by First American Title Insurance Company.

<sup>6</sup> See AS 9.10.070 which uses the limiting language "unless the action is commenced within two years of the accrual of the cause of action".

<sup>7</sup> *The Concise Oxford Dictionary* (10<sup>th</sup> Ed. 1999)

<sup>8</sup> *Roe v. Leisek*, Commission Case No. S-25-009, adopted December 14, 2006; and, *Dyer v. Gartin and Harvey*, Commission Case No. S-21-004, adopted September 14, 2007.

limiting language contained in AS 08.88.460 bars filing a surety fund claim more than three years after the occurrence of events which might otherwise justify a surety fund award.

Real estate surety fund claims heard by an ALJ are administrative proceedings. 2 AAC 64.250(a) provides that summary adjudication may be granted on one or more issues in an administrative hearing if a genuine dispute does not exist between the parties on an issue of material fact. To defeat a motion for summary adjudication, the opposing party must show by affidavit or other evidence that a genuine dispute exists on an issue of material fact for which an evidentiary hearing is required.<sup>9</sup>

The Duncans have not met their burden of showing that a genuine issue of material fact exists with respect to the timing of critical events. An evidentiary hearing is not required to determine when the transaction in question closed, or when the Duncans filed their surety fund claim. It is clear that more than two years elapsed after the occurrence of the alleged intentional misrepresentation, fraudulent conduct, or deceitful conduct.

The issue of whether *res judicata* bars the surety fund claim of the Duncans need not be addressed because the Duncans' claims can be dismissed by applying the surety fund claim statute of limitation. However, it is noted that the decision issued by Judge Motyka does not discuss intentional misrepresentation, fraud, or deceit. The record reveals that the four small claims actions against the Duncans were contract actions by Mr. Crawford and Ms. Garrison designed to collect the commissions owed to plaintiffs as a result of the licensee's participation in the sale of the Duncans' real property located at 4121 Patterson, Anchorage. The record (established to date) in this case does not reveal whether the Duncans asserted fraud as a defense to the contract claims.<sup>10</sup>

Mr. Crawford and Ms. Garrison were not paid their full commissions at the time the transaction closed. Rather, the Duncans' agreed that a portion of the commissions would be deferred and secured by a second deed of trust recorded against the property. When the buyers (from Duncans) defaulted on their obligations under the first and second deeds of trust, security for the obligation to pay Mr. Crawford and Ms. Garrison was eliminated, but the contractual obligation to pay the remaining commissions was not eliminated by the foreclosure of the first

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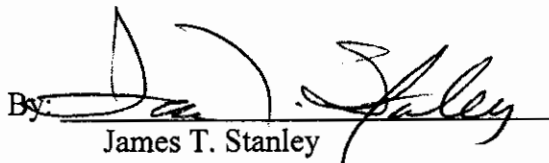
<sup>9</sup> 2 AAC 64.250(b).

<sup>10</sup> Pursuant to Civil Rule 8(c), fraud may be asserted as an affirmative defense to a plaintiff's contract claims.

deed of trust. In other words, the security “went away”, but the debt to Ms. Garrison and Mr. Crawford did not. Based upon the Duncans’ arguments raised in their surety fund claim, it may well be that the Duncans did not fully understand the contractual aspects of agreeing to the deferred commission arrangement, but their lack of understanding was not an obstacle to the district court entering money judgments against the Duncans and in favor of Mr. Crawford and Ms. Garrison.<sup>11</sup>

For the reasons set forth above, IT IS ORDERED that the respondents’ motions for summary adjudication are GRANTED and the surety fund claim filed by the Mary and David Duncan is DISMISSED.

DATED this 22<sup>nd</sup> day of July, 2008.

By:   
James T. Stanley  
Administrative Law Judge


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<sup>11</sup> One of the money judgments against the Duncans is part of the record in this case. It appears that the total of the two judgments was approximately \$25,000. It further appears that the money judgments may have stimulated the Duncans to file the surety fund claim in an effort to recoup losses suffered at trial.

**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 15 day of Sept, 2008.

By:   
Signature  
V. Gene DUVAL  
Name  
CHAIR  
Title