

**IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION**

KOKICHI INGAS,
Appellant,
v.
KALEB UDUI, JR.,
Appellee.

Cite as: 2019 Palau 14
Civil Appeal No. 18-033
Appeal from Civil Action No. 16-110

Decided: April 30, 2019

Counsel for Appellant Vameline Singeo
Counsel for Appellee William L. Ridpath

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice
 JOHN K. RECHUCHER, Associate Justice
 ALEXANDRO C. CASTRO, Associate Justice

Appeal from the Trial Division, the Honorable Lourdes Materne, Associate Justice, presiding.

OPINION¹

PER CURIAM:

INTRODUCTION

[¶ 1] This case involves a dispute regarding a contract matter between Appellant Kokichi Ingas, holder of leases to Koror State Public Lands Authority-owned land (“KSPLA” land), and Appellee Kaleb Udui, Jr., a real estate broker tasked with subleasing Ingas’s leasehold interests.

¹ The parties did not request oral argument in this appeal. No party having requested oral argument, the appeal is submitted on the briefs. See ROP R. App. P. 34(a).

[¶ 2] The Trial Division found Ingas liable under the contract, entitling Udui to 6% of the selling price of the subleases issued. For the reasons set forth below, the Court now **AFFIRMS** the Trial Division’s decision and judgment.

FACTS

[¶ 3] Udui owns and operates a real estate brokerage franchise of RE/MAX realty and is a licensed real-estate broker. He employs Risong Tarkong as an agent. Ingas holds a leasehold interest from KSPLA for four commercial properties in Medalaii Hamlet, Koror. In March 2015, Ingas met with Tarkong and discussed listing the properties with RE/MAX to find a prospective sublessee. The parties entered into a Right to Sell Listing Agreement that was fully executed on March 4, 2015.

[¶ 4] The Right to Sell Listing Agreement states, in relevant part, as follows:

The undersigned Owner irrevocably GRANTS the undersigned Broker the EXCLUSIVE AUTHORIZATION and RIGHT, for a period date March 3, 2015, and terminating at midnight (date) March 3, 2016, to transfer, sublease, assign of real property [sic] (or via on *Term of KSPLA Lease* on the same) situated in or near the Village of Medalaii Hamlet, State of Koror, Palau commonly known as (“Property”) Commercial Lot No. 41501 (434 sq. meters) and Lot No. 41502 (124 sq. meters) and Lot No. 41503 (260 sq. meters) and Lot No. 41504 (2,106 sq. meters).

TERMS OF SALE: The lease price will be \$2,000,000.[00] (two million dollars only)

NOTICE: The amount or rate of real estate commissions is not fixed by law. They are set by each Broker individually and may be negotiable between the Seller and Broker.

1. COMPENSATION TO BROKER. Owner agrees to pay Broker as compensation for services rendered a fee of 6% percent of the selling price . . . provided that:

- a. Broker procures a buyer who offers to purchase the Property during the above time period, or any written extension, on the terms specified or on any other terms acceptable to Owner.
- b. The property is sold, exchanged, or otherwise transferred during the above listing period, or any written extension, by Owner, or through any other source.
- c. The property is withdrawn from sale, or transferred, conveyed, or leased without the consent of Broker, or made unmarketable by Owner's voluntary act during the above listing period.

...

4. OWNER'S INSTRUCTIONS AND AUTHORIZATIONS.

- a. Owner instructs Broker to list the property with the local MULTIPLE LISTING[]SERVICE and comply with all the rules of that service, including reporting the[]terms of the sale to MLS if the rules so provide.
- b. Internet Advertising. The Owner authorizes the MLS to disseminate the listing information, which may include the physical address of the property, to those MLS member brokers and their agents (and/or their web vendors) that operate internet sites, as well as online providers such as realtor.com and guamrealtors.com, and that such sites are generally available to the public.
- c. Owner authorizes Broker to place a "FOR SALE" sign on the property [Yes is checked]

...

5. BROKER'S OBLIGATIONS. Broker agrees to use due diligence in effecting a sale of the property in accordance with the custom[]and practice in the community regarding similarly situated properties.

6. ATTORNEY FEES. In any action, arbitration or proceeding[] to recover compensation as provided in this Agreement, the

prevailing[]party will be entitled to recover reasonable attorney fees, expert witness fees, and costs to be determined by the court.

Compl. Ex. (emphasis in original).

[¶ 5] Two months after the execution of the agreement, Ingas sublet the properties himself. He did not inform anyone at RE/MAX of the sublease. Ingas then entered into a second sublease for the properties in July, purportedly superseding the earlier sublease. Ingas again did not inform RE/MAX of the sublease.

[¶ 6] In the meantime, Tarkong worked to find a sublessor. She posted pictures and information about the properties on the RE/MAX website and showed the property to prospective sublessors.

[¶ 7] At some point, RE/MAX learned of the subleases and Udui sent several letters to Ingas demanding payment of the commission due under the agreement. Ingas refused to pay the commission, so Udui brought suit.

STANDARD OF REVIEW

[¶ 8] This Court has previously and succinctly explained the appellate review standards as follows:

A trial judge decides issues that come in three forms, and a decision on each type of issue requires a separate standard of review on appeal: there are conclusions of law, findings of fact, and matters of discretion. Matters of law we decide *de novo*. We review findings of fact for clear error. Exercises of discretion are reviewed for abuse of that discretion.

Kiuluul v. Elilai Clan, 2017 Palau 14 ¶ 4 (internal citations omitted).

[¶ 9] Ingas's question on appeal is whether the Trial Division erred in determining that Ingas breached the agreement. This question involves a conclusion of law, which is reviewed *de novo*.

DISCUSSION

[¶ 10] Ingas contends that the Trial Division erred in determining that he breached his contract either because the contract was a unilateral offer lacking consideration, Opening Br. 4, or because Udui failed to perform under the contract and, thus, is not entitled to a commission or other damages, *id.* at 13–14.

[¶ 11] Ingas claims that *Kruger v. Soreide*, 246 N.W.2d 764 (N.D. 1976) presents facts analogous to the facts in this case and that this Court should find as the court in *Kruger* did. Opening Br. 13. In that case, the brokers were not entitled to commissions because the agreement had characteristics of a unilateral contract; the evidence presented did not show substantial performance on the part of the brokers and the brokers did not establish that the sale resulted from their efforts; and “strict interpretation of the contract” in favor of either party would have been inequitable. *Kruger*, 246 N.W.2d at 773–74.

[¶ 12] *Kruger* is not binding law, and the facts on which its decision relies are nonetheless otherwise distinguishable from the facts in this case. In reaching its decision, the court in *Kruger* relied on the fact that the agreement, “[w]hile . . . replete with promises and obligations of the owner and [] specifics on matters relating to price, terms of payment and related matters, it [was] sketchy and wanting with reference to the promises and obligations of the broker.” *Id.* at 769. The agreement itself was “barren” in that respect “except for the promise of the broker that ‘in consideration of the foregoing listing and authorization the undersigned broker agrees to use diligence in procuring a purchaser.’” *Id.*

[¶ 13] Here, as Ingas points out, the agreement contains similar language, “stat[ing] that [Udui] will use due diligence in effecting a sale of the property in accordance with the custom and practice in the community regarding similarly situated properties.” Opening Br. 9 (citing Compl. Ex.). What Ingas fails to note is that the agreement here, unlike the agreement in *Kruger*, contains the additional “instructions and authorizations” that specify precise actions required of the broker:

- a. Owner instructs Broker to list the property with the local MULTIPLE LISTING SERVICE and comply with all the rules of that service, including reporting the terms of the sale to MLS if the rules so provide.
- b. Internet Advertising. The Owner authorizes the MLS to disseminate the listing information, which may include the physical address of the property, to those MLS member brokers and their agents (and/or their web vendors) that operate internet sites, as well as online providers such as realtor.com and guamrealtors.com, and that such sites are generally available to the public.

Compl. Ex.

[¶ 14] In the agreement, Ingas also expressly authorized Udui to place a “FOR SALE” sign on the property. *See id.*

[¶ 15] Ingas argues that Udui failed to perform under the agreement or did not diligently perform the duties required under the contract. The Trial Division determined that Udui’s agent, Tarkong, performed some, if not all, of the actions required under the agreement. By the agreement’s terms, complete performance in the first two months of the agreement’s year-long term was not required. Nonetheless, in the first two months of the agreement, Tarkong showed the properties to interested parties, took photos of the properties, and advertised the properties on the RE/MAX website. The agreement provided RE/MAX, Udui, and Tarkong with ten more months to perform. The Trial Division’s factual finding is based on the evidence and is not clearly erroneous. Thus, arguments regarding Udui’s failure to perform are unavailing. Moreover, by entering into a sublease independent of RE/MAX, Ingas rendered further performance by RE/MAX impossible—it could not effect a sublease of the properties because Ingas already sublet them.

[¶ 16] The agreement by its terms is an exclusive listing agreement, providing RE/MAX with the exclusive right to lease the property. *See* 12 Am. Jur. 2d Brokers § 303 (“An exclusive listing agreement . . . is an agreement that provides that the sale or lease of the property during the contract period, no matter by whom negotiated, obligates the property owner

to pay a commission to the listing broker.”); 88 A.L.R.2d 936 (distinguishing exclusive agency agreements from exclusive listing and exclusive right to sell agreements); *see also Dawson v. Hadden*, 743 So. 2d 1230, 1231–32 (Fla. Dist. Ct. App. 1999) (“Under an agreement for an exclusive right to sell, an agent is due a commission even if a buyer is found solely through the efforts of the seller. Where the agreement is for an exclusive right to sell, the owner is obliged to pay a commission if the property is sold during the life of the agreement.”) (internal citation omitted).

[¶ 17] The agreement here explicitly stated that:

Owner agrees to pay Broker as compensation for services rendered a fee of 6% percent of the selling price . . . provided that . . . [t]he property is sold, exchanged, or otherwise transferred during the above listing period, or any written extension, by Owner, or through any other source.

Compl. Ex. (emphasis omitted). This explicit language in the agreement very clearly obligates Ingas to pay 6% of the sublease price to Udui. The Trial Division, thus, correctly found that Ingas “is obligated to pay [Udui] 6% of the selling price of his property.” Order 4. *See, e.g., Joel T. Cheatham, Inc. v. Hall*, 308 S.E.2d 457, 459 (N.C. Ct. App. 1983) (holding summary judgment properly granted in favor of broker where owner sold property to a third party in breach of exclusive right to sell agreement). At trial, it was established that the sublease was valued at \$3,290,606.05. Order 4. As a result, the Trial Division determined that Ingas was liable to Udui for 6% of \$3,290,606.05, or \$197,436.36. *Id.*

CONCLUSION

[¶ 18] The Court **AFFIRMS** the Trial Division’s decision and judgment for the reasons stated herein.