

IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

FILED *JK*

2022 DEC 29 A 10:36

BESURE KANAI and VICTORIA N. KANAI,
Appellants,
v.
JACKSON M. HENRY,
Appellee.

SUPREME COURT
OF THE
REPUBLIC OF PALAU

Cite as: 2022 Palau 28
Civil Appeal No. 21-027
Appeal from Civil Action No. 09-072

Decided: December 29, 2022

Counsel for Appellant Siegfried B. Nakamura
Counsel for Appellee Allison Nixon

BEFORE: ALEXANDRO C. CASTRO, Associate Justice
DANIEL R. FOLEY, Associate Justice
KEVIN BENNARDO, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salli, Presiding Justice, presiding.

Amended Opinion*

BENNARDO, Associate Justice:

[¶ 1] In its Judgment, the Trial Division found Third-Party Defendants Besure Kanai and Victoria N. Kanai liable to Plaintiff Mutou Shizushi for \$1,000,000 plus interest, costs, and fees previously awarded under a Judgment

* Pursuant to this Court's Order on Appellants' Petition for Rehearing, this Amended Opinion replaces the original opinion in this matter issued on October 28, 2022.

from October 21, 2013. This liability stemmed from a promissory note given to Shizushi and signed by Jackson M. Henry. The focus of the dispute was whether Henry had executed the promissory note as an agent of Kanai.

[¶ 2] The Trial Division also found Kanai liable for breach of contract to Henry for \$50,643 (plus pre-judgment interest) for unpaid commissions owed under a Land Brokerage & Commission Agreement. The Trial Division further ordered Kanai to pay \$10,000 in punitive damages to Henry plus attorney fees and expenses.

[¶ 3] On appeal, Appellants raise eight separate grounds for appeal from that judgment. Most claim defects in the Trial Division's judgment regarding the \$1 million promissory note. We have carefully considered each in turn, reviewing legal determinations *de novo* and factual determinations for clear error. *E.g., Koror State Pub. Lands Auth. v. Rengill*, 2022 Palau 11 ¶ 8. We **AFFIRM** the Trial Division's Judgment and Decision with regard to seven of the eight appealed questions, and we **REVERSE** the Trial Division's Judgment and Decision with regard to the appealed question relating to the Land Brokerage & Commission Agreement.

[¶ 4] In rendering its judgment, the Trial Division found Besure Kanai's testimony lacking in credibility. Trial Division's Decision and Orders, Civ. Act. No. 09-072, at 29 (Oct. 26, 2021). Thus, where conflicts arose, the Trial Division credited Henry's testimony rather than Kanai's testimony. Due to the many points of conflict, the Trial Division observed that "[t]his case turns in large part on the Court's determination of which witness is credible in order to determine what was agreed to by the parties, what was said, what agreements were made orally and what was memorialized in writing." *Id.* at 28.

[¶ 5] On appeal, we agree in large part with Henry's observation that much of the Appellants' arguments are grounded in challenges to the Trial Division's credibility determinations. Appellee's Response Brief at 10 (May 4, 2022). As we've stated before, we are not well positioned to test the credibility of witnesses and will not set aside a trial court's credibility determination absent an extraordinary circumstance. *See, e.g., Telungalk ra Ksaw/Klai Clan v. Rengulbai*, 2022 Palau 16 ¶¶ 4-5. With that in mind, from our appellate perch we find nothing in the record that would support us overturning the Trial Division's credibility determinations.

[¶ 6] We do not mean to suggest that the entirety of the appeal is resolved on credibility determinations. It is not. But once the Trial Division's credibility determinations are upheld, little room remains for the Appellants to demonstrate reversible error. As to its other legal and factual determinations regarding the promissory note, we are persuaded by the Trial Division's reasoning. With the one exception explained below, we see little need to rehash the Trial Division's reasoning.

[¶ 7] The issue that deserves further consideration is the appeal of the Trial Division's judgment in favor of Henry for breach of contract of the Land Brokerage & Commission Agreement. This Agreement was executed by Kanai as the landowner and by Henry, George Kebekol Alfonso, and Masaichi Eiterngel. The Agreement specified that Kanai would pay a commission of 10% of the lease purchase price to Summit Realty upon the successful brokerage of a 99-year lease of the property to a qualified lessee. Later, when the funds were being disbursed, Kanai and Henry signed an "Instruction to Escrow" to the escrow agent to distribute 6.5% of the purchase price as commission to "Jackson M. Henry of Summit Realty." Henry received \$97,500 pursuant to the instruction to escrow. Upon receiving this money, Henry paid a portion to Alfonso and to Eiterngel.

[¶ 8] Along with Henry, Alfonso and Eiterngel participated for a time in the litigation below as third-party plaintiffs. The breach of contract claim was premised on an argument that Kanai underpaid his commission to Henry, Alfonso, and Eiterngel by paying only 6.5% of the purchase price rather than the 10% in the Land Brokerage & Commission Agreement. According to the Trial Division, at some point Alfonso and Eiterngel ceased to appear or participate in the litigation. Henry continued to press the under-payment of commission claim after Alfonso and Eiterngel dropped out of the litigation. Kanai argued that the Instructions to Escrow amended the amount of commission due under the Brokerage & Commission Agreement. In the alternative, Kanai argued that Henry had been fully compensated and had no standing to press Alfonso and Eiterngel's claims for them.

[¶ 9] The Trial Division found that Henry had no authority to amend the commission rate on behalf of Alfonso and Eiterngel; thus, the 10% rate remained payable because Alfonso and Eiterngel did not sign the instructions

to escrow. Trial Division's Decision and Orders, at 21. Moreover, approaching the issue as one of foreseeability, the Trial Division found that Henry's payments to Alfonso and Etiterngel were a foreseeable consequence of Kanai not paying them any commission. *Id.* at 22. Thus, Kanai was liable to Henry for the balance of the unpaid commission. *Id.*

[¶ 10] The record does not clearly disclose the relationship of Henry, Alfonso, and Etiterngel. The Land Brokerage & Commission agreement did not specify a separate commission percentage for Henry, Alfonso, and Etiterngel. Rather, it simply stated a total commission amount of 10%. Moreover, the ultimate commission payment was made to one of the three, presumably with the expectation that it would be divided appropriately among the three. This has all the looks of a partnership. If it was a partnership, then Henry could press the legal claim on behalf of the partnership even if Alfonso and Etiterngel ceased participating in the litigation. However, if it was a partnership, Henry's acquiescence to a 6.5% commission in the instructions to escrow would also bind the partnership. Approaching the trio as a partnership leads to the conclusion that the commission, as amended to 6.5%, was fully discharged by the payment of \$97,500 to Henry.

[¶ 11] If the trio was not a partnership and each signed the Land Brokerage & Commission agreement as separate individuals, then Kanai should have paid each separately. That is how the Trial Division interpreted the situation. If that was the case, then the Trial Division was correct that Henry's signature on the instructions to escrow would not bind Alfonso and Etiterngel to a lower commission amount. However, if the trio really were operating as separate individuals, we do not find it foreseeable that a payment to one of the three would be shared with the other two. Foreseeability that the \$97,500 payment to Henry would be shared with Alfonso and Etiterngel only makes sense if the three were partners. Under a non-partnership theory, Kanai overpaid Henry and underpaid Alfonso and Etiterngel. If that is the case, Kanai should have foreseen Alfonso and Etiterngel to come to collect their share. In actuality, Henry—the one who was overcompensated under this theory of analysis—came to collect for the other two. If the three were not partners, we do not agree that it was foreseeable that Henry would pass along a portion of his payment to Alfonso and Etiterngel.

[¶ 12] As stated earlier, the more likely scenario is that Henry, Alfonso, and Etiterngel were operating as partners. We need not determine this, however, because either way it was error for the Trial Division to award Henry damages for any unpaid commission. Either Henry agreed to amend the commission rate to 6.5% on behalf of the partnership or the three are not partners and Henry lacks the ability to press Alfonso and Etiterngel's claims for them. We therefore **REVERSE** the Trial Division's Decision and Judgment with regard to Appellants' liability for \$50,643 of unpaid commissions, which totals \$110,705.47 after the calculation of pre-judgment interest. In all other respects, the Trial Division's Judgment is **AFFIRMED**.¹

SO ORDERED, this 29th day of December, 2022.



DANIEL R. FOLEY
Associate Justice



ALEXANDRO C. CASTRO
Associate Justice



KEVIN BENNARDO
Associate Justice

¹ We see no need to disturb the Trial Division's award of punitive damages, which was based on a cumulation of what the Trial Division found to be "outrageous behavior" by the Appellants. See Trial Division's Decision and Orders, at 22-24.