

**IN THE SUPERIOR COURT  
OF THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

In the Matter of the Estate of  
FIDELIA RANGAMAR MERUR,  
Deceased.

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**CIVIL ACTION NO. 97-1257**  
**DECISION AND ORDER  
AS TO CLAIMANTS SHAKIR'S  
(CNMI) INC., dba BALI  
FASHIONS AND MUSTAFA  
SHAKIR**

**I. INTRODUCTION**

This matter came before the court for an evidentiary hearing on the claims of Shakir's (CNMI) Inc., dba Bali Fashions ("Bali Fashions") and Mustafa F. Shakir's ("Shakir") in the estate of Fidelia Rangamar Merur ("estate"). Brien Sers Nicholas, Esq., appeared on behalf of Eddimus R. Abon, the administrator for the estate ("administrator"), who was present at the hearing. V.K. Sawhney, Esq., represented claimants Bali Fashions and Shakir (collectively "claimants"). The court, having reviewed the evidence and having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its written decision.

**II. FACTUAL BACKGROUND**

Fidelia Rangamar Merur ("decedent"), a person of Northern Marianas descent, died intestate on October 11, 1997. Her son Eddimus Abon filed a Petition for Letters of Administration on

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[p. 2] February 6, 1998. On March 10, 1998, the court held a hearing and appointed Eddimus Abon as the administrator of the estate.

On March 3, 1998, Bali Fashions filed a notice of claim in the estate for unpaid merchandise and loans in the sum of \$2,321.00. On the same day, Shakir, who owns Bali Fashions, filed a notice of claim for an unpaid commission in the amount of \$8,000, according to two broker agency agreements executed by the decedent and Shakir.

The first agency agreement (“first agreement”) took effect on September 13, 1995, and expired on September 12, 1996. (Claimants Ex. 1.) Shakir was to serve as the decedent’s exclusive agent. Under section two of the first agreement, Shakir was to find a lessee and negotiate the lease of the decedent’s interest in Lot 1835-New-1-R1. Shakir would receive a commission of 10% of the total lease price, if the price was \$100,000 or higher. The decedent and Shakir were to agree at a later date the commission due if the total lease was less than \$100,000. Shakir contends that he and the decedent verbally agreed on a 10% rate, but this agreement was never reduced into writing. Shakir also testified that the decedent told him that if she sold the property for more than \$100,000, she was definitely going to pay him a 10% commission. Section three of the agreement also provides that a 10% commission would be paid on every partial payment made on the lease price.

On November 12, 1996, two months after the expiration of the first agreement, a purported extension (“second agreement”) was executed. (Claimants Ex. 2.) The second agreement incorporated the terms of the original agreement, fixed a new expiration date of June 30, 1997, and specified the subject property.

On April 16, 1997, the decedent and Lee Kwang Suk (“lessee”) entered into a 55-year lease for a total purchase price of \$80,000, to be paid in installments as specified in the lease. (Claimants Ex. 4.) Shakir testified that he had the lease prepared at the request of the lessee who provided him a copy of a handwritten document, entitled “ground lease,” signed by both the lessee and the decedent summarizing the terms including the lease price. (Claimants Ex. 3.) He did not inform nor obtained the permission of the decedent to act on the lessee’s request. The administrator at the hearing noted that the lessee was in default and that he was considering legal action to recover the

amounts due.

The administrator denied Bali Fashions and Shakir's claims in his Petition for a Decree of [p. 3] Partial Distribution filed on January 7, 1999. The administrator contends that the alleged amount due with Bali Fashions was to be offset against the \$500 that Shakir agreed to pay the decedent under the first agency agreement. (Claimants Ex. 1 at 4.) As to the commission, the administrator asserts that Shakir's claim is invalid since he did not pay the \$500 under the terms of the second agency agreement and alleges that Shakir violated his fiduciary to the decedent because he also acted as an agent for the lessee by having the lease prepared at the lessee's request.

### III. ISSUES

1) Is a decedent's estate liable for unpaid merchandise and loans extended to the decedent prior to her death?

2) Is an agent pursuant to an exclusive broker agency agreement entitled to receive an alleged unpaid commission from principal's estate when the agreement fails to provide a definite amount of commission, when the agent introduced the lessee to the principal, and the agent had the lease prepared at the lessee's request without obtaining the principal's consent?

### VI. ANALYSIS

#### A. Unpaid Merchandise and Loans

Bali Fashions asserts that the decedent owed a total of \$2,321.00, of which \$401.00 was for unpaid merchandise and \$1,920.00 for loans extended from the period September 1995 to November 1996. At the hearing, Bali Fashions referred to a ledger showing entries of the decedent's charges and cash advances. (See Claimants Ex. 5) The ledger also showed numerous cash advances purportedly given to the decedent.

The administrator does not dispute that the merchandise items were charged to the decedent's account nor that the loans were extended. He, however, contests the total amount due. The administrator testified that the charge account was established to off-set the \$500 fee that Shakir owed the decedent under the agency agreement. (See Claimants Ex. 1 at 4.) The administrator points to the first entry date in Bali Fashions' ledger which corresponds with the

agency agreement's effective date of September 13, 1999. This permits the inference that the charge account was set up to offset [p. 4] the fee Shakir owed the decedent according to the agency agreement. Shakir offers no proof that he paid the \$500, not even a receipt from the decedent. The absence of this ordinary business document seems unusual given Shakir's business experience and that his business Bali Fashions keeps a record of receivables. Without such evidence, the court, therefore, concludes Bali Fashions is entitled to be paid \$2,321.00 less \$500, or \$1,821.00, from the estate.

## **B. Exclusive Agency Commission**

### **1. Contract precept of mutual Assent**

A contract to give a broker an exclusive agency to deal with a specified property is ordinarily interpreted as precluding the principal from appointing another agent to deal with the property. RESTATEMENT (SECOND) OF AGENCY § 449 cmt. c (1957). The right of a broker to recover a commission depends on the specific terms of the broker's contract. *Ham v. Morris*, 711 S.W.2d 187, 189 (Mo. 1986). In the absence of an enforceable contract, courts generally allow recovery in quasi-contract or quantum meruit when one party has conferred a benefit on the other and that, under the circumstances, to deny such recovery would be unjust. *Weichert Co. Realtors v. Ryan*, 608 A.2d 280, 285 (N.J. 1992).

In the instant case, the parties signed the first agency agreement on September 13, 1995, which expired on September 12, 1996.<sup>1</sup> The first agreement terminated without any lease transacted within its effective date. On November 12, 1996, the parties executed an amended agency agreement which extended the effective period to June 30, 1997, and specified the subject property. The sale of property was executed on April 16, 1997.

The record clearly shows that the purported amendment is not an extension of the initial agreement because it was executed well after the initial agreement had expired.<sup>2</sup> *See Property Sales, Inc. v. Irvington Ice Cream & Frozen Arts, Inc.*, 165 N.W.2d 78, 81 (Neb. 1969) (a contract which by its terms has expired is legally defunct). In order to bring the terms of an extinguished

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<sup>1</sup> The written agreement comports with the Statute of Frauds requirement in 2 CMC § 4914(d).

<sup>2</sup> The issue of whether the second agreement was a valid extension was not specifically raised during the hearing. The administrator alluded to the effect of incorporation by reference of the first agreement by asking Shakir if he had paid an additional \$500 when the second agreement was signed. Shakir replied that he did not pay the additional \$500.

contract into [p. 5] renewed existence, a new contract is required embodying such terms. *Id.* In the second agreement, Shakir and the decedent specifically incorporated the original terms of the initial agreement except for the following modifications: (1) a more specific property description was inserted, and (2) the expiration date was changed to June 30, 1997. Thus the second agreement is not an extension but an entirely new contract.

The court now examines whether the second agreement meets the basic elements of contract formation, specifically mutual assent. To create an enforceable contract, the parties must agree on the essential terms and manifest an intent to be bound by those terms. *Weichert Co. Realtors v. Ryan*, 608 A.2d at 284. An agent's compensation is considered an essential term in a broker agency contract. *Id.* If the parties do not agree on agent's compensation, courts generally hold that the agreement is unenforceable. *Id.* See also *Cooper Square Realty, Inc. v. A.R.S. Management, Ltd.*, 181 A.D.2d 550, 551 (N.Y. App. Div. 1992), *Parkway Group, Ltd. v. Modell's Sporting Goods*, 678 N.Y.S.2d 656, 657 (N.Y. App. Div. 1998), and *Paladino v. Brovitz*, 170 A.D.2d 958 (N.Y. App. Div. 1991). In *Paladino*, the court found that there was no mutual assent in light of the fact that the parties agreed that the agent would be paid a commission of \$12,500, or 6% of base rents for a 10 year period. *Paladino*, 170 A.D.2d at 958.

The decedent and lessee executed a 55-year lease for a total price of \$80,000, to be paid according to a timetable in the lease. Two sections in the second agreement address broker compensation. The applicable provision in section two provides that if the lease consideration was less than \$100,000, the commission due would be determined upon mutual agreement of the parties at a later time. Section three states that if the lease allows partial payment, then the decedent would pay Shakir a commission of 10% on every payment as received by the decedent. As to which section governs, Shakir's testimony during the hearing is helpful. Shakir alluded to a verbal agreement with the decedent but he did not indicate what amount they had agreed to. The alleged verbal agreement was not reduced into writing. Shakir's assertion, however, is disputed by the decedent's refusals to pay him any commission and his own recollection of the decedent's statement assuring him that if she signs a lease for \$100,000, she would definitely pay him a 10% commission. The decedent's statement only indicates her understanding that Shakir would get a 10% commission if the lease was [p. 6] for \$100,000 or more. The agency agreement specifically provides for such

a commission. There is nothing in the decedent's statement which indicates she had agreed to pay him a 10% commission if the lease was less than \$100,000.

The court finds, based on the second agreement and Shakir's testimony at the hearing, that there was no mutual assent on the commission to be paid if the lease was less than \$100,000. As in *Paladino*, the facts establish nothing more than an agreement to agree on the commission amount at some time in the future. Because the parties failed to agree on Shakir's compensation if the lease was less than \$100,000, an essential term of a broker agency agreement, the court concludes that the agency agreement is unenforceable.

## 2. Breach of Fiduciary Duty

The court now addresses the question of whether, in the absence of an enforceable contract, Shakir would be entitled to quasi-contract recovery. Courts have allowed quasi-contract recovery for services rendered when a party confers a benefit with a reasonable expectation of payment. *Weichert Co. Realtors*, 608 A.2d at 285. That type of quasi-contract recovery, known as *quantum meruit* which means literally "as much as he deserves," entitles the performing party to recoup the reasonable value of services rendered when the circumstances are such that to deny recovery would be unjust. *Id.*

Assuming the agency agreement was enforceable, Shakir still would not have been entitled to a commission because he breached a fiduciary duty to the decedent. Courts have generally held that a broker owes "the highest fidelity" to the principal. *See Urban Investments, Inc. v. Branham*, 464 A.2d 93, 96 (D.C. Ct. App. 1983). The fiduciary duty owed by the broker to the seller under an exclusive listing agreement includes the duty to act with utmost good faith and loyalty in all dealings with the seller, to use reasonable care in carrying out the agency agreement, and to account to the seller for all money and property received by the broker. *Moore and Co. v. T-A-L-L, Inc.*, 792 P.2d 794, 799 (Colo. 1990); *see also* RESTATEMENT (SECOND) OF AGENCY §§ 13 cmt. a, 387-398 (1957). "Part and parcel of this duty is the requirement that the broker make a full and complete disclosure of all facts relative to the subject of his agency which. . . may be material to the principal to know." *Id.* An agent's breach of fiduciary duty may not be exonerated even if the principal suffered no actual [p. 7] monetary damages, the agent did not harm the principal, or the agent believed he was acting for the benefit of the principal. *Id.* at 799-800.

The administrator asserts that Shakir acted as the lessee's agent in the subject transaction thereby breaching the fiduciary duty owed to the decedent. The court reviews the witnesses' testimony to determine if that assertion is supported by the facts. Shakir testified that he had the lease agreement prepared "on behalf of Mr. Lee," the lessee. The lessee had given him the handwritten document signed by both parties setting out terms including the lease price. (*See* Claimants Ex. 4.) The handwritten document also indicated that the lessee would be responsible for preparing the lease agreement by March 25, 1997. Shakir also testified that he did not inform the decedent that the lessee asked him to prepare the lease and, in fact, he stated that he believed he had no obligation to do so since the lease preparation was part of his agency duties.

Shakir is mistaken about his agency obligations under the agreement. First, the agreement restricts his duties to finding a lessee and negotiating the lease. There is no provision conferring on him the authority to prepare a lease. Second, the decedent and the lessee had agreed, according to the handwritten document, that the lessee was to prepare the lease agreement. Furthermore, as an exclusive agent for the decedent with the sole right to find a lessee for her and to negotiate on her behalf, Shakir owes the decedent fiduciary duties with respect to matters within the scope of his agency. RESTATEMENT (SECOND) OF AGENCY § 13 (1957). As a fiduciary, an agent may not act on account of an adverse party without the principal's consent. *Id.* § 13 cmt. a (1957). The lessee was an adverse party to the decedent in the lease transaction. Shakir not only neglected to obtain the decedent's consent but failed to inform her that he had the lease prepared according to the lessee's request. Shakir's conduct constitutes a breach of fiduciary duty and his duties of loyalty to the decedent and he is not entitled to a commission even though the decedent may not have sustained money damages or Shakir believed he was acting for the benefit of the decedent. *Id.* §§ 399(k) & 469. *See Moore and Co. v. T-A-L-L, Inc.*, 792 P.2d at 799-800.

\_\_\_\_\_ Because the court finds that Shakir has breached a fiduciary duty owed to the decedent, he is not entitled to recover under the theory of quantum meruit. *See Lauriedale Associates, Ltd. v. Wilson*, 9 Cal. Rptr. 774 (Cal. Ct. App. 1992)(a party which has breached its fiduciary duties may not [p. 8] bring an action for restitution against the persons harmed by that breach).

## V. CONCLUSION

Based on the reasons stated above, the court hereby orders that the estate pay Shakir's (CNMI) Inc. (dba Bali Fashions) the amount of \$2,321.00 less \$500, or \$1,821, for loans extended to and merchandise charged by the decedent. The court, however, denies Mustafa Shakir's commission claim because the agency agreement is unenforceable and Shakir breached a fiduciary duty to the decedent.

SO ORDERED this February 2, 2000.

/s/ John A. Manglona  
JOHN A. MANGLONA, Associate Judge