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**NO. 68066-8-1
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

KIDDER MATHEWS & SEGNER, INC., a Washington corporation,

Respondent,

v.

HARBOR MARINE MAINTENANCE & SUPPLY, INC., a
Washington corporation,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY
THE HONORABLE RICHARD T. OKRENT

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS DIV I
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INTRODUCTION

The essence of Kidder's argument is that under the terms of the CRA, it is entitled to receive a commission even if it had no part of the lease entered into by Harbor.¹ Although Kidder argues at length that it provided "brokerage services", its interpretation of the CRA would not require proof of this. The mere fact that Harbor was successful in obtaining a lease during the term of the CRA was enough. This argument not only is contrary to the terms of the CRA, but ignores the reality that the CRA contemplates some type of quid pro quo, that it would provide some value to Harbor in exchange for the six figure commission it claims.

ARGUMENT

Instead of including language in a brokerage agreement that required the "Client" to pay the "Agent" a commission, Kidder chose to use language that created an ambiguity. If Kidder had intended Harbor to be obligated to pay it a commission, it could have easily and succinctly so provided by using language like "in the event of the consummation of a lease, Client agrees to pay Agent a commission".

However, Kidder, the drafter of the Agreement chose to use language that was much less clear, and as is seen from the questions raised by Harbor prior to execution of the Agreement, was confusing

¹ Brief of Respondent at 27.

to Harbor. Instead, Kidder chose to use the following language, which is confusing at best, and deceptive at worst:

“It is hereby confirmed that in the event of the consummation of a lease renewal, new lease, or purchase of a facility, Client hereby requires that a brokerage commission in consideration of brokerage services rendered shall be paid by Owner to Agent as follows.”²

1. ***The CRA Uses Ambiguous Language to Define the Obligation to Pay a Commission.***

Conspicuously absent from Kidder’s responsive brief is any counter to the undisputed evidence presented to the trial court that Kidder believed that it was the owner’s obligation to pay a commission. As stated in Harbor’s opening brief this express representation was made before the CRA was signed; is seen in the lease proposals made by Kidder; was again reaffirmed when the POE responded to Harbor’s lease proposals; and finally after Kidder became aware that Harbor had entered into a lease with Norton.

Instead, Kidder argues that these representations should be disregarded as irrelevant as the CRA unambiguously obligates Harbor to pay a commission. In support of this argument Kidder cites *Go2Net, Inc. v. C I Host, Inc.*, 115 Wash.App. 73, 60 P.3d 1245 (2003) for the proposition that Kidder’s admission that it did not believe that Harbor was obligated to pay a commission was relevant.

² CP 94 (*emphasis added*)

However, *Go2Net, Inc.* is factually distinguishable from the case at bar.

In *Go2Net, Inc.* the dispute centered around the interpretation of the word “impressions” contained in the contract. Go2Net argued that “impressions” meant all impressions, both human and artificial, whereas the advertiser argued that the word “impressions” meant only human impressions. However, the court rejected the advertiser’s contention based upon other language in the contract, which provided “that “[a]ll impressions billed are based on Go2Net’s ad engine count of impressions,” and that “[i]n the event of a conflict between the numbers of impressions reported by Go2Net, Inc. and any remote server, the Go2Net, Inc. count stands.” As observed by the trial court this language preempted any dispute about the definition of the word “impressions”.

In the instant case Kidder could have, but did not, include contract language like that present in *Go2Net* that would have clearly and unambiguously obligated Harbor in the event Harbor was unable to “require” the Owner to pay a commission. For example, the CRA could have easily provided additional language that states that if the Client was unable to require the Owner to pay Kidder a commission, that the Client would be obligated to pay the commission. But instead of using language that anyone could understand, Kidder chose to be cute, and to hide from the Client its true intentions. To add insult to

injury, when Harbor questioned Kidder as to the meaning of the language, Kidder made an express representation that it was the Owner, not Harbor, who would be obligated to pay the commission.

One might ask why Kidder would use the language it chose instead of more straightforward language anyone could understand. The answer to that is simple: if Kidder had explained to any client that they would be responsible to pay a commission if the property owner declined, no client would ever sign such an agreement.

2. *The CRA Incorporates the Procuring Cause Rule.*

Kidder argues that the procuring cause rule does not apply because the CRA entitles it to a commission even if it had nothing to do with the eventual lease. But this contention ignores the plain language of the CRA. Although Kidder goes to great length in its brief to explain why it was the procuring cause of the lease, the essence of its argument is that it doesn't matter. Taking Kidder's argument to its logical conclusion it argues that under the terms of the CRA it would be entitled to a commission if it played no part whatsoever in the lease.

However, this argument is directly contrary to the language of the CRA. The CRA provides that the commission is "in consideration of brokerage service rendered". This language can be read in no manner other than requiring the agent to do something, and is entirely consistent with the procuring cause rule.

Kidder concedes the contention made in Harbor's opening brief that where the procuring cause rule is consistent with the parties agreement, the procuring cause rule applies.³ This concession is consistent with the holding in *Professionals 100 v. Prestige Realty, Inc.*, 80 Wash.App. 833, 911 P.2d 1358 (1996). In that case the brokerage agreement required the agent to "provide a buyer". There is no significant difference between "provide a buyer" and the requirement to provide "brokerage services". In fact, to argue that Kidder could have done absolutely nothing, and yet be entitled to claim a commission would make the language "in consideration of brokerage services rendered" superfluous.

3. The Obligation to Pay a Commission Arises Only If Kidder Performs Services.

Kidder argues that the plain language of the CRA citing *Geoghegan v. Dever*, 30 Wash.2d 877, 194 P.2d 397 (1948)⁴ entitles it to a commission simply because of the exclusive agency relationship. However, the decision in *Geoghegan* is factually and legally distinguishable from the case at bar. *Geoghegan* involved an agreement to list a particular parcel of property, not an agreement to find a suitable property for a lessee. Furthermore, even without this distinguishing factor, the court observed that the agent was entitled

³ Brief of Respondent at 26.

⁴ Brief of Respondent at 27.

to a commission because it “performed the services required of him under the contract”.⁵ The court found that the agent had found a ready, willing and able purchaser of the property, and who did buy the property. Based upon this finding, the agent performed his obligations and therefore was entitled to his commission.

Under Kidder’s reasoning it would be entitled to a commission if it did nothing after the CRA was executed so long as Harbor eventually found suitable property to lease. Not only is this interpretation contrary to the language of the CRA, it ignores common sense. No person would agree to pay a six figure commission if the agent did nothing other than obtain a signature on an agency agreement.

4. Whether Kidder Was the Procuring Cause Is an Issue of Fact.

Kidder goes to great length to justify its claim for a commission based upon all of the efforts it made to find Harbor suitable lease space. However, the attention it devotes to this argument demonstrates that its claim is founded upon the services it claims to have performed. Unfortunately, it cannot be disputed that the Norton property was investigated by Harbor long before Kidder was ever engaged. The determination of whether the activity of a broker was

⁵ *Geoghegan* at 899-900.

the procuring cause of a sale is generally a question of fact. *Zelensky v. Viking Equip. Co.*, 70 Wash.2d 78, 91, 422 P.2d 293 (1966).

CONCLUSION

Kidder's obligations under the CRA did not end when Harbor signed the CRA. In order to warrant the payment of a six figure commission, Kidder was then required to procure leasehold space suitable to Harbor. If Kidder did nothing more after Harbor signed the CRA, then it should be paid an amount commensurate with its efforts - nothing.

However, what Kidder did and whether or not it performed its obligations clearly present issues of fact to be resolved by the trial court. The decision of the trial court should be reversed, and the case remanded for trial.

Respectfully submitted,

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