STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0411

BUSINESS BROKERS OF LOUISIANA, INC., d/b/a SUNBELT BUSINESS BROKERS OF BATON ROUGE

VERSUS

DAN V. NGUYEN; DAN TRANG, L.L.C.; KYUK KIM; ANTHONY PARK, & JUNG SOOK MOON

Judgment Rendered: DEC 2 1 2011

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On Appeal from
The 19th Judicial District Court for the Parish of East Baton Rouge
State of Louisiana
Docket No. 553,067, Section 25

Honorable Judge Wilson Fields, Judge Presiding

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

HUGHES, J.

This is an appeal from a judgment of the Nineteenth Judicial District Court in favor of the defendants, Dan V. Nguyen, Dan Trang, LLC, Kyuk Kim, Anthony Park, and Jung Sook Moon, and against Business Brokers of Louisiana, d/b/a, Sunbelt Business Brokers of Baton Rouge (Sunbelt). For the reasons that follow, we affirm in part, reverse in part, render, and remand.

FACTS AND PROCEDURAL HISTORY

This is an action for a real estate broker's commission. The relevant facts are as follows:

On April 25, 2006 Bill Oliver, a real estate agent of Sunbelt, was contacted by Dan V. Nguyen. Nguyen advised Oliver that he wanted to sell his business, known as DB Food Mart, a convenience store in Clinton. On May 1, 2006 Oliver drove to Nguyen's store and, based on the information given to him by Nguyen, completed a listing agreement. The agreement stated the firm/company name as DB Food Mart and Nguyen as the seller, individually and on behalf of the company. This information later proved to be inaccurate as the actual owner of DB Food Mart was Dan Trang, LLC. At all relevant times herein, Nguyen was the only member of Dan Trang, LLC.[1]

Under the listing agreement, Sunbelt would market DB Food Mart for the purpose of procuring a buyer and in exchange, Nguyen agreed to pay Sunbelt a commission for its services. On May 26, 2006 Nguyen signed a "re-worked" listing agreement with Sunbelt.[2] According to the "re-worked"

[1] At one time, Nguyen's wife was also a member of Dan Trang, LLC. However, when they divorced, Nguyen's wife transferred her interest to Nguyen and he has since been the only member. There have never been any other members of Dan Trang, LLC.

[2] The first listing agreement, completed on May 1, 2006, was revised on May 26, 2006. It is the May 26, 2006 "re-worked" listing agreement that is the subject of this litigation. The only

listing agreement, the initial term was a five-month period, beginning on May 26, 2006, and ending on October 25, 2006. The agreement further provided that after the expiration of the initial term, it would automatically renew for consecutive one-year periods until Nguyen notified Sunbelt in writing, at any time, that he desired to cancel the listing. Nguyen never gave a written notice of cancellation to Sunbelt.

Meanwhile, Sunbelt was also contacted by Mr. Kyuk Kim regarding Sunbelt's advertisements of businesses for sale. Sunbelt presented information to Kim on several convenience stores, including DB Food Mart. Kim advised his friend, Mr. Anthony Park, of DB Food Mart's availability for purchase, and the two agreed to purchase the store together and run the business as equal partners. Kim testified that he informed Sunbelt that he and Park were interested in purchasing the store together. Mr. Alan Risher, also an agent of Sunbelt, confirmed that Kim told him that he would be purchasing the business with a "partner," although he never told Sunbelt the name of his partner. Mr. Oliver set up a meeting with Nguyen for them to look at the business.

In early September, Kim and Park went to DB Food Mart during its business hours and Nguyen showed them the store. The three men greeted one another and exchanged contact information. Specifically, Park and Nguyen testified that Park gave Nguyen his contact information, including two telephone numbers where he could be reached. Kim testified in his deposition that on that first visit, he informed Nguyen that he and Park had been sent by Sunbelt.[3] Thereafter, Park and Kim returned to DB Food Mart

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differences in the first and "re-worked" agreements are a decrease in the asking price of the store (from 1.66 million to 1.4 million), and the omission in the "re-worked" agreement of the availability of the business for lease as well as purchase.

[3] Kim did not testify at the trial. However, his deposition was admitted into evidence at the trial without objection.

a second time with their wives one evening at approximately 10:15, after the business had closed for the day. While Nguyen claimed at the trial that only Park and his wife returned for a second visit, both Park and Kim testified that Kim and his wife were present that night and that it was Kim who phoned Nguyen to ask him to return to the store and open it for them. Either Kim, or Park through Kim, (who spoke better English than Park) requested that Nguyen lower the sale price of the store from $800,000. Nguyen responded that he could not reduce the price because he had to pay his broker a commission.

On September 13, 2006 Kim executed an offer to purchase DB Food Mart for $800,000. Kim and Park both testified that it was their intent to purchase the store together and run the business as partners, but that because Kim had more time and spoke better English, only Kim executed the offer to purchase on their behalf. After the offer was signed, Kim took a copy of the offer to Park. Nguyen accepted the offer on that same day, September 13, 2006.

Shortly after the offer was made, Park's brother-in-law in Korea became ill, leading Park's wife to decide to go to Korea. Park testified that he immediately notified Kim of the situation and advised Kim that he did not wish to make the purchase until after his wife returned. Kim testified that he advised Sunbelt of Park's need to delay the purchase. This was confirmed by Sunbelt's representative, Alan Risher. After that time, Kim and Park lost communication. Then, on September 26 and 27, Nguyen phoned Park three separate times at both numbers that were provided to him by Park. While Nguyen first denied ever having phoned Park, after the phone records were introduced into evidence, Nguyen indicated that he could not remember why he called Park, or whether he ever actually spoke to Park, but could provide

no other reason for calling Park other than to discuss the sale of the business. Unlike Nguyen, Park *did* recall speaking to Nguyen on the phone. Park stated that Nguyen phoned him and "urged [him] to hurry up and buy" the store. Park then, through the aid of his brother Howard Park, a realtor in California, retained Ms. Dee Melgar, a local realtor with Paul Gilmore & Associates, Realtors (Gilmore) to assist him in better communicating with Nguyen for the purpose of buying DB Food Store. On October 21, 2006 Ms. Melgar prepared a "Buyer Representation Agreement" that Mr. Park signed on October 28, 2006. Ms. Melgar testified that at the time she was contacted by Park and his brother, Park already specifically knew that he wanted to buy DB Food Mart, and that the price of the store that Nguyen would accept was $800,000. She stated that it was only necessary for her to negotiate *how* Park would pay the money and she testified that some of the money would come from the sale of Park's home. Park and his brother provided her with the information necessary for her to prepare the offer. She and Park drove to DB Food Mart on at least one occasion, and she introduced herself to Nguyen as an agent of Gilmore. Although Nguyen was very busy servicing his customers, he told her that he was not paying her a commission and indicated for them to look around.

Ms. Melgar prepared the offer to purchase the business for $800,000. On October 28, 2006 Park signed the offer. Nguyen accepted the offer on October 30, 2006. On December 1, 2006 Park and Nguyen closed the deal at the office of the closing attorney, Rob Ligon. Park purchased DB Food Mart for $800,000, paying $400,000 cash and financing the balance of $400,000 by executing a promissory note, secured by a mortgage on the store, and payable in monthly installments of $4,761.90. On the date of the closing, Nguyen received a check made payable to Dan Trang, LLC in the

amount of $128,161.20, representing the net proceeds of the sale after payment of a first mortgage on the property to Feliciana Bank. Nguyen deposited the check into his personal checking account at Chase Bank. Sunbelt and Kim did not learn of the sale until sometime in January of 2007. Dan Trang, LLC's bank account was closed by Nguyen in February of 2007, even though payments were still owed to Dan Trang, LLC by Anthony Park pursuant to the sale agreement. Nguyen testified that he continued to collect payments from the credit portion of the sale and deposited those funds into his personal account. Dan Trang, LLC's charter was later revoked. However, Nguyen testified that just before the first trial date in this case, Dan Trang, LLC's charter was reinstated by him on the advice of his attorney.

Sunbelt filed a petition for damages seeking to recover the commission it alleged was owed pursuant to the terms of the listing agreement and requesting a writ of sequestration to seize the promissory note and payments being made by Anthony Park to Dan Trang, LLC on the credit portion of the sale. The writ of sequestration was initially issued, but was subsequently dissolved as to the corporation on motion of Dan Trang, LLC. This court denied writs, noting that the trial court acted within its discretion, but clarified that the sequestration remained in effect as to Dan Nguyen, individually. 2007 CW 1588 (La. App. 1 Cir. 10/25/07). After the judgment to dissolve the writ of sequestration was signed, Sunbelt filed a motion for new trial asserting that the testimony by Nguyen at his deposition, not available at the time the motion for dissolution of the writ of sequestration was filed, wherein he acknowledged that he had signed the listing agreement on behalf of Dan Trang, LLC, constituted new evidence. The trial court denied that motion and this court denied review. 2008 CW

0756 (La. App. 1 Cir. 8/4/08). Park, however, filed a motion to deposit funds into the registry of the court. That motion was granted, and pursuant thereto, Park has placed into the registry of the court the payments due to Dan Trang, LLC on the promissory note.

Sunbelt then amended its original petition to add allegations of fraud and alter-ego. At the trial, however, the court would not allow Sunbelt to introduce any evidence in support of those claims.[4] After the trial, the district court rendered an August 6, 2010 judgment in favor of Nguyen, individually, Dan Trang, LLC, Anthony Park, and Jung Sook Moon,[5] releasing them from any liability to Sunbelt. This appeal followed. Sunbelt alleges error by the trial court in the following particulars:

> 1. In its holding that the automatic renewal clause of the listing agreement was invalid and ineffective, and therefore finding that the sale of the store did not occur during the term of the listing agreement;
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> 2. In its finding that DB Food Mart was not sold to a person referred by Sunbelt within two years of the expiration of the agreement;
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> 3. In its finding that DB Food Mart was not sold to a person with whom Nguyen or Dan Trang, LLC had negotiations during the term of the listing agreement;
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> 4. In its finding that Sunbelt was not entitled to a commission under the "procuring clause" doctrine;
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> 5. In failing to find that Dan Trang, LLC was the alter-ego of Nguyen, in failing to allow the introduction of Nguyen's deposition, and in excluding other evidence based on an erroneous interpretation of the "law of the case" doctrine.

[4] The trial court excluded this evidence based on its interpretation of the "law of the case" doctrine, discussed below.

[5] Jung Sook Moon is the wife of Anthony Park.

LAW AND ARGUMENT

I. Evidentiary Errors

In its last assignment of error, Sunbelt challenges the trial court's ruling in excluding certain evidence and testimony. If, upon review, we find that the trial court committed an evidentiary error that interdicts the fact-finding process, we are required to then conduct a *de novo* review. As such, alleged evidentiary errors should be addressed first on appeal, inasmuch as a finding of error may affect the applicable standard of review. **Wright v. Bennett**, 2004-1944 (La. App. 1st Cir. 9/28/05), 924 So.2d 178, 182. This circuit has previously noted that LSA-C.E. art. 103(A) provides, in part, that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." **Wright**, 924 So.2d at 183. "The proper inquiry for determining whether a party was prejudiced by a trial court's alleged erroneous ruling on the admission or denial of evidence is whether the alleged error, when compared to the entire record, had a substantial effect on the outcome of the case. If the effect on the outcome of the case is not substantial, reversal is not warranted." **Wright**, 924 So.2d at 183. Generally, the trial court is granted broad discretion in its evidentiary rulings and its determinations will not be disturbed on appeal absent a clear abuse of that discretion. **Wright**, 924 So. 2d at 183, *citing* **Turner v. Ostrowe**, 2001-1935 (La. App. 1 Cir. 9/27/02), 828 So.2d 1212, 1216, writ denied, 2002-2940 (La. 2/7/03), 836 So.2d 107.

The transcript of the trial evidences that the lower court refused to admit Nguyen's deposition or to allow counsel to question Nguyen regarding Dan Trang, LLC's potential liability to Sunbelt under the listing agreement.

In so deciding, the trial court alluded to the "law of the case"[6] doctrine, apparently interpreting this court's denial to exercise its supervisory review of the dissolution of the sequestration as to Dan Trang, LLC as a final, legal conclusion that Dan Trang, LLC is not liable under the listing agreement.

Sequestration is a provisional remedy available for the seizure of property as to which the seizing party claims a property, possessory, or security interest, to prevent the disposal or concealment of the property by another party. LSA-C.C.P. arts. 3571, *et seq.* An order or writ of sequestration (or denial thereof) is an interlocutory judgment, that is, it does not determine the merits but only a preliminary matter in the course of the action. LSA-C.C.P. art. 1841. It is therefore not appealable unless specifically provided for by law. LSA-C.C.P. art. 2083. However, in the interests of judicial efficiency and fairness to the parties, an appellate court, in its discretion, *may* review an interlocutory judgment pursuant to its supervisory jurisdiction. Uniform Rules of the Courts of Appeal, Rule 4-3, Revision Comment. If the court of appeal grants such an application for writs and renders judgment, either peremptorily or after briefing and argument, the decision of the court of appeal may be the "law of the case" in subsequent proceedings in that matter; but a denial by the court of appeal of an application for supervisory writs does not prevent the appellate court from reconsidering the matter on appeal after trial on the merits. **Day v. Campbell-Grosjean Roofing & Sheet Metal Corp.**, 260 La. 325, 330, 256 So.2d 105, 107 (1971).

Sunbelt challenges the exclusion of the deposition testimony of Nguyen as well as the trial court's refusal to allow Sunbelt to elicit any testimony from Nguyen at the trial regarding his relationship with Dan

[6] While the trial court's language was "law of the land," it is clear that the doctrine referred to

Trang, LLC in furtherance of its claim that Nguyen was acting on behalf of the corporation. Alternatively, Sunbelt alleged that Nguyen is the alter-ego of Dan Trang, LLC, and therefore liable to Sunbelt for the unpaid commission. Because the ruling on the writ of sequestration was an interlocutory judgment that was not ruled upon on its merits by this court under our supervisory review, the trial court erred in its application of the "law of the case" doctrine and its consequential exclusion of that evidence. Review of the proffered deposition reveals numerous inconsistencies in Nguyen's testimony, weighing on his credibility, as well as his explicit acknowledgment that: he furnished Mr. Oliver with the information contained in the listing agreement; he knew that Dan Trang, LLC was the legal owner of the business; Dan Trang, LLC was doing business as DB Food Mart; and he signed the listing agreement with Sunbelt on behalf of Dan Trang, LLC. We find that the erroneous exclusion of this evidence, when compared to the record as a whole, had a substantial effect on the outcome of the case. Consequently, we will allow the deposition testimony and conduct a *de novo* review.

II. Liability of Dan Trang, LLC

Nguyen argues that he is not liable to Sunbelt for the payment of the commission because he was not the owner of the property; the owner of the property was Dan Trang, LLC. Nguyen argues further that Dan Trang, LLC is not liable to Sunbelt since it is the owner of the property and did not sign the listing agreement, contending that it is the broker's responsibility to ascertain the proper legal name of a seller at the time a listing agreement is confected. We find no merit in those arguments, which were previously

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was "law of the case."

addressed in **Barnett v. Saizon**, 2008-0336 (La. App. 1 Cir. 9/23/08), 994 So.2d 668.

In **Barnett**, an agent brought an action for a commission against a limited liability company. The corporation, J. Hunter Development, Inc., asserted various affirmative defenses, including that mistakenly designating the corporation's name in the listing agreement as "J. Hunter Development, LLC" provided a basis for releasing the corporation from liability under the agreement. **Barnett**, 994 So.2d at 672. This court, noting that "the parties clearly had no misunderstanding as to the identity of the entity on whose behalf Mr. Saizon signed," held that the corporation was bound to the terms of the listing agreement by the signature of Mr. Saizon and was thus liable to the broker for the commission agreed upon therein. **Barnett**, 994 So.2d at 672. Mr. Saizon, much like Mr. Nguyen, was the president and sole stockholder of the corporation, and acknowledged that he signed *for* the owner of the property.

It is also settled in our jurisprudence that a broker is entitled to assume that the person representing himself to be the owner either is the owner, or is authorized to represent the owner. **Strahan v. Weiland**, 216 So.2d 169 (La. App. 1 Cir. 1968). The broker is under no obligation to examine the title to determine the true owner and in the absence of actual knowledge to the contrary may presume his client to be the owner. **Strahan**, 216 So.2d at 172, **Doll v. Russo**, 7 So.2d 406 (La. App. 1 Cir. 1941), **Leaman v. Rauschkolb**, 1 So.2d 338 (La. App. 1 Cir.).

We also note that the listing agreement itself provides further protection for Sunbelt. The applicable terms of the agreement are unambiguous and state, in pertinent part, as follows:

> 6. The Seller acknowledges that he/she has supplied the listing information above and Seller warrants such information to be true and correct.
>
> * * * *
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> 10. Seller hereby acknowledges that he/she has read this agreement and has received a copy of it.
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> 11. If Seller is a partnership, corporation or other entity, the person(s) signing on behalf of such entity hereby represent(s) and warrant(s) that he/she is, or they have the authority to enter into this contract on behalf of said entity. The signing individual below guarantees payment of commissions earned by Sunbelt Business Brokers individually in the event that the partnership, corporation, LLC or other entity does not pay earned commission.

Finally, we find that Nguyen's attempts to dodge liability in any capacity based on his claim that he barely understands the English language and thus, he did not understand the listing agreement that he signed with Sunbelt, is, in the least, disingenuous. During Nguyen's thirty years in America, he has bought, run, and sold at least two successful businesses. There is evidence in the record that he, in fact, listed his first convenience store business, Quick Track in Prairieville, Louisiana, for sale with Sunbelt and that he also sold that business without notifying Sunbelt or paying Sunbelt its commission. He testified at his deposition in English, answering the questions himself, and he also testified at the trial of this matter without needing the assistance of a translator. In fact, he testified that in all of his years in America he has never required the assistance of a translator. While he claims to not remember most of the relevant facts in this case, it is difficult not to notice that his failed recollection consistently occurs when it suits his best interests. Nevertheless, a person who signs a written document is presumed to have knowledge and understanding of that which he signs, and Nguyen's claim that he did not is no defense. See **Smith v. Terrebonne**

Parish Consol. Gov, 2002-1423 (La. App. 1 Cir. 2003), 858 So.2d 671; **Aetna Casualty and Surety Co.,** 417 So.2d 471 (La. App. 1 Cir. 1982).

Based on the evidence, Nguyen clearly was acting for and on behalf of Dan Trang, LLC and bound Dan Trang, LLC under the listing agreement.

III. The Listing Agreement

The remaining assignments of error address whether various clauses of the listing agreement provide a basis for Sunbelt to recover the agreed-upon $100,000 commission. We will first address the automatic renewal clause, which states:

> This Agreement shall commence on the day and year set forth below and continues until 10-25, 2006. After this date, this listing agreement will renew automatically for consecutive one year periods and remain in effect until Sunbelt Business Brokers of Baton Rouge is notified in writing to the address below from the seller of their intent to terminate (cancel) this listing.

In its oral reasons for judgment, the trial court seemingly found that the consecutive one-year extension periods invalidate the agreement insofar as it does not meet the requirement of LSA-R.S. 37:1431(30)[7] to state a "defined period of time." We disagree. Agreements legally entered into have the effect of law upon the parties thereto, and courts are bound to give legal effect to these agreements according to the true intent of the parties, as determined by the words of the contract when clear and specific. LSA-C.C. arts. 1901, 1945. Under that principle, the jurisprudence has overwhelmingly upheld such extension periods in other contracts.

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[7] LSA-R.S. 37:1413(30) defines a listing agreement as follows:

> (30) "Listing agreement" means a written document signed by all owners of real estate or their attorney in fact authorizing a broker to offer or advertise real estate described in such document for sale or lease on specified terms for a defined period of time. A listing agreement shall only be valid if signed by all owners or their authorized attorney in fact.

In **Hood v. Ashby Partnership**, 446 So.2d 1347 (La. App. 1 Cir. 1984), this court upheld an extension clause in a lease agreement that provided for an initial three-month term and an "automatic renewal" if written notice was not given at least thirty days prior to the expiration date. The provision was continuing, as is the provision in the instant case, in that the automatic renewal would occur at the end of the initial term and each subsequent term. However, the ability of the agreement to continue perpetually did not cause the agreement, or the provision, to be unenforceable. Therefore, this court held that the lower court erred in ignoring the extension clause.

Additionally, in the case of **Emergency Physicians Assc. v. Leventhal**, 2005-1063 (La. App. 1 Cir. 3/24/06), 934 So.2d 80, this court affirmed the district court's ruling that upheld an automatic renewal clause in an employment contract. In that case, the contract automatically renewed each year for an additional one-year term unless either party terminated the contract by providing written notice at least sixty days prior to the expiration of the current term.

And finally, in **Prevost v. Eye Care and Surgery Center**, 635 So.2d 765, 766 (La. App. 1 Cir. 04/08/94), this court affirmed the district court's determination that the employment at issue was for a specific duration even though the contract term was for "one year beginning June 1, 1989. This contract will automatically renew for another twelve-month period unless either party gives notice in writing no later than March of each year."

Likewise, in this case the initial term expired on October 25, 2006 and thereafter the agreement renewed for consecutive one-year periods, terminable at any time by Nguyen with the submission of a written notice of cancellation to Sunbelt. It is undisputed that Nguyen never gave such

notice. The listing agreement was therefore still in effect at the time of the sale of the business to Park on December 1, 2006 and Dan Trang, LLC is thus liable for the commission.

However, assuming that the listing agreement expired after the initial term, on October 25, 2006, as Nguyen urges, the record supports the finding that Nguyen and Park had negotiations *prior* to the expiration of the initial term of the agreement. This results in Dan Trang, LLC's liability under Paragraph 7 of the listing agreement, which states that:

> 7. Seller agrees to pay Broker's full commission, if not paid prior to, then at closing; and Seller grants to the Broker a security interest in said proceeds of the closing. Seller agrees to pay the full commission set forth in this Agreement to the Broker in the event the property described herein is, within two years after the termination of this Agreement, sold, traded or otherwise conveyed to anyone referred to Seller by Broker **or with whom Seller had negotiations during the term of this Agreement.** (Emphasis added.)

Park visited DB Food Mart at least three times before executing the final offer to purchase on October 28, 2006. The testimony of Kim and Park, combined with the September 13, 2006 offer to purchase signed by Kim, evidences that two of those occasions occurred prior to September 13, 2006, well within the expiration of the initial term. Further, the testimony of both Kim and Park, combined with the September 13, 2006 offer and the October 28, 2006 offer, establish that the price term was negotiated and agreed upon by September 13, 2006, the date that Nguyen signed to accept the offer to purchase by Kim. Moreover, the testimony of Park, corroborated by the telephone records of Nguyen that were introduced without objection at the trial of this case, evidence that Nguyen phoned Park three times on September 26 and 27, 2006 to "urge [Park] to hurry up and buy the store." Ms. Melgar confirms that by the time she was contacted on

or before October 21, 2006, to help Park with the formal requirements of the purchase, Park and Nguyen had already negotiated the price and it was only necessary for her to complete the paperwork and work out the details of *how* Park was to obtain the funds for payment. Clearly, Nguyen had negotiations with Park during the initial term of the listing agreement. Dan Trang, LLC, through its only member, Nguyen, sold the property to Park on December 1, 2006, within two years of the initial term of the re-worked listing agreement, again triggering Dan Trang, LLC's liability to Sunbelt for the commission.

CONCLUSION

For the reasons assigned herein, the portion of the judgment of the district court rendered in favor of Dan Trang, LLC is reversed and judgment is rendered against Dan Trang, LLC and in favor of Business Brokers of Louisiana, Inc., d/b/a Sunbelt Business Brokers of Baton Rouge, for the full amount of the commission, $100,000, plus attorney's fees and interest at the rate of 25% per annum. This case is remanded to the trial court for the determination of attorney's fees consistent with this opinion. The portion of the judgment in favor of Anthony Park and Jung Sook Moon is affirmed. All costs of this appeal are to be assessed against appellee, Dan Trang, LLC.

AFFIRMED IN PART, REVERSED IN PART, RENDERED, AND REMANDED.