

SOMETIMES THERE IS NO JUSTICE

By Jim Hochman

It pains me to make the admission that is the title of this article. Commercial real estate brokerage is a tough enough business, even a hard way to earn a living, and occasionally things don't work out. Let's examine the recent experience of my client "Skip."

He won the exclusive sale listing on an industrial property which was vacant at the time. The owner, actually the sole member of the LLC that held title, had passed away. The owner's son, as successor manager for the LLC, listed the property with Skip, hoping to find a buyer and sell the property before the lender foreclosed, and perhaps salvage the equity in the property. Skip procured a few offers, admittedly on the low end of the property's value, and without some "flexibility" (meaning compromise) on the part of the mortgage lender, no deal could be made. Eventually, with no income from the property, with taxes owed, and with deferred maintenance threatening to further erode the remaining value and equity, the owner did the sensible thing, he gave a deed in lieu of foreclosure to the bank.

No doubt you say "deed," isn't that a commissionable event? Yes, in most well drawn listing agreements, the

conveyance of legal title whether by foreclosure or even threat thereof, is the basis for a commission claim. However, against what, or against whom, and even if Skip sued, and obtained a judgment, then what? The LLC which owned and then conveyed the property had no sale proceeds and no other assets.

Let's say Skip retained me and asked me to pursue his commission claim if I had had time to place a broker lien on the property prior to the deed in lieu, the lender would have commenced a formal mortgage foreclosure, and eventually, the judgment in favor of the bank with its first lien, would extinguish the broker lien. Skip's only hope (if he had retained me in time) might have been the leverage of the lien. It might have been less costly for the lender and owner to pay Skip then to go through the judicial foreclosure to extinguish the broker lien. But we were too late, the bank had title, so that ship had sailed. The sad story continues.

Skip, ever the optimist, brought the property (newly owned by the bank) back to the parties who, at one time, had made offers to buy the property. The eventual buyer checked the public record, made an offer directly to the

bank, and bought the property from the bank. Unfortunately, neither the buyer nor the bank ever agreed to hire Skip or ever agreed to pay his commission. Skip was simply a volunteer.

Yet, you say that Skip created value, procured the sale, either working for the former owner or as a volunteer, working on behalf of either the bank or the buyer. However, neither the bank nor the buyer ever sought Skip's help or agreed to compensate him.

When Skip brought me his claim, I shook my head sadly, but did the legal research, and then brought the following report back to Skip. In Illinois, the case of Owen Wagener v. US Bank is exactly on point, and is still binding precedent. In Wagener, on exactly the same facts, exclusive listing, low offer, bank refusing to accept less than 100 percent of the debt, foreclosure, and direct sale to that same buyer, because neither the lender nor the buyer had sought the broker's help or promised a fee, the broker was deemed a volunteer and its commission claim was denied. In other words, if I had sued on Skip's claim, the complaint would likely fail early or likely fall to a motion to dismiss. To be succinct, Skip's efforts earned him nothing.

Even with an enforceable exclusive listing against the former owner, even having secured the eventual buyer, no commission claim would prevail, against Skip's client which had no assets other than the (previously conveyed) property, and no claim against the bank would succeed either.

Would my 20-20 hindsight offer any advice for avoiding this problem in the future? Here is what I would suggest:

1. Have a solid exclusive listing agreement, making sure that sale by foreclosure or threat thereof is a commissionable sale.
2. If there is a minimal equity (value in excess of secured debt) in the property, you are at a crossroads.
3. Here is where the "tough love" comes in. If you can get a personal guaranty from the property owner or have the commission escrowed in advance, each a big "ask" likely to be rejected, give that a try.

You might be better advised to decline the listing, knowing how the story would end. You could seek to add the lender as guarantor on the listing, but that's another big ask, and I have not had any success with that pursuit in the past.

It hurts to decline business, it's hard to recognize that some business isn't worth your time. It's hard for me to tell a client that his (and my) efforts won't get him his commission. Yet, sometimes you need to ask the hard questions at the onset: who is going to pay the commission and from what funds? Sadly, if those questions can't be answered to your satisfaction, think about taking a pass on the listing. Sometimes your best decisions are the ones where you actually decline the opportunity. ♥



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