

HOW IS YOUR FEE CALCULATED?

By Jim Hochman

Most commercial property owners can understand and do the math necessary to calculate and understand what a sale commission will be. It could be as simple as X percent of the gross sale price, it could be Y percent of the gross sale price up to ___ MM, and Z percent of the portion of the sale price in excess of -MM. It might even be a flat or fixed amount. All are easily calculated, and if necessary, easily explained, and easily written clearly in your commission agreement or schedule of commissions.

Lease commissions, on the other hand, can be a bit more complex, and may vary from market to market, or even vary from one type of property to another. This variance, and the differences from market to market, even from one firm to another, all highlight the need for a clear, well written, and perhaps patiently explained schedule of commissions. Consider the following scenario, which recently found its way to my desk.

A restaurant owner was struggling, maybe it was the menu, maybe the concept, even the location of the restaurant itself, but it was apparent that it was time to get out. My client listed the property for sale or lease – and found a restaurant operator looking for a new

location in that area. The prospect was represented by his own broker, and the prospect wanted a long term lease – keeping his cash to open and operate the restaurant, protecting the location with a 10-year lease, even negotiating an option to purchase the building and property during the lease term.

The owner/operator of the “tired” restaurant was happy to oblige, and this led to execution of a 10-year lease which included an option to purchase. The lease was executed, and my client, the listing broker, invoiced for the fee, a surprisingly high fee to the owner.. The owner professed shock, offered some cash with a payment plan for the balance, but no agreement was reached. The parties hired counsel, and a broker lien was recorded. You know how this story develops, you might have a sense for how it might end.

Counsel for our landlord also professed shock at the size of the fee. I struggled with calculus twice, first in high school and again in college, same text book, nearly flunked both times. Sometimes, self-deprecating humor helps in a negotiation. As counsel and I finally reached agreement on the calculation of the fee, he told me that he never took calculus, but he had studied vegetables in

college, adding “I am not sure how you got to that number, but I do know one thing: you can’t get blood from a turnip.”

Commission was earned, the lien was recorded, but how do we get to my computation of the fee, X percent of the average annual rent plus Y percent of the remainder of the rent in the term of the lease? The landlord claims he didn’t see the override clause for an outside broker, which in this case, increased the fee substantially. We labored through the calculation of the fee, interpreting the (enforceable) listing agreement with the (not so clearly written) computation of the lease commission. We worked through the math together over the phone, with an error or two along the way. I apologized, explaining the difference between what his client would be required to pay, as opposed to what his client claimed he could pay.

Here are a few ideas to resolve the problem:

1. Partial payment with a promissory note and a personal guaranty for the balance;
2. Assignment of Rents as security if the landlord misses a payment; or



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3. Lien foreclosure if the landlord fails to pay, even if the tenant defaults, or vacates the space.

At this point, wouldn't it have been helpful if our landlord had understood his commission obligations at the outset of the transaction? I know that my client might have done a better job in explaining commission liability and calculation. For what matter the tenant's broker might have suggested a different location with a more solvent landlord. The landlord's broker, happy enough with the lease, is gnashing his teeth at the thought of deferred commission payments, and additional legal fees to document the arrangement.

Check back in the Winter issue of the *SIOR Report* to find out whether the landlord found blood in the turnip, or whether my client's large fee morphed into a small annuity, or whether we will find ourselves in court, whether for the lien foreclosure or bankruptcy court. ▽



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