

REAL ESTATE BROKER LIEN RIGHTS: A RETROSPECTIVE ON THE OLD STYLE LIEN RIGHTS WHICH MAY STILL APPLY

By Jim Hochman

The “recent history” of commercial real estate broker lien rights was based on statutes—i.e. new legislation—and covers the period from the initial Illinois broker lien right bill in 1990 through 2013, when Delaware—the 34th statutory broker lien right state—enacted its law. However, additional research (along with time and opportunity provided by the 2019 Polar Vortex) has led to my review of previous materials on a concept called an “equitable lien.” Before statutory lien rights, brokers occasionally succeeded in seeking and enforcing equitable lien rights to collect fees that had been denied, refused, or withheld. Perhaps a look back at how lien rights were established and prosecuted “the hard way” would be of interest, and of application where statutory lien rights may not apply.

What are Equitable Lien Rights?

Courts of equity—called chancery in many states—have jurisdiction to sequester, seize, enjoin transfer of, or otherwise provisionally secure assets for application on money. This occurs before the demand has been reduced to judgment, but only under certain very specific circumstances. An equitable lien—also called a “vendor’s lien”—can be and has been enforced on some occasions where a broker’s right to compensation is fixed on funds in his possession or proceeds of the transaction—i.e. sale proceeds or

even rents. A promise merely to pay the broker was one thing—and then usually gave rise to a contract claim—where a promise to pay the broker from the proceeds of the transaction is quite another—and here is where equitable liens have been successfully claimed. To be sure, the statutory lien right is clearer, more easily and more economically asserted, and usually meets with greater success, which is why brokers in 34 states have sought and obtained this right (see sidebar).

Historical Review

Here is a look at some of the ancestral bases of these statutes which we now take for granted. Note that in several states when equitable liens were enforced, these facts might just serve as a viable cause of action today—where no statutory lien right exists— or the facts of the matter preclude the broker from asserting statutory lien rights.

In cases reported as early as 1871 and 1919, an Arkansas-based broker holding the property of his principal—the deed—could enforce an equitable lien for his unpaid fee¹. In 1919—also in Arkansas²—a broker successfully asserted an equitable lien on earnest money held by a third party for his fee due when the buyer exercised an option to buy property. In 1939³, a Florida broker’s equitable lien on earnest money was enforced. The

broker’s commission agreement provided for a commission of 10 percent of the sales price out of the first money paid by the purchaser on the sale price.

An early Illinois case⁴ found an Illinois broker—cooperating with an out-of-state licensee—successful in impressing a lien on sales proceeds, as much due to the seller’s fraudulent efforts to conceal the transaction as anything else. Again, the broker was promised commission out of the sale proceeds. In Alabama, the Court applied a vendor lien in favor of a broker who was entitled to his commissions—specifically, from sales proceeds⁵. New York (whose skeletal statutory lien right on lease commissions preceded the Illinois Commercial Real Estate Broker Lien Act effective January 1, 1992), where the broker’s agent was promised a one half share of the net proceeds of sale, a lien on the proceeds was enforced⁶. In this case, the broker was promised one half of the net proceeds of sale for his efforts in managing the property, collecting the rents, and advancing his own funds to carry the property. This cause of action is worth remembering, since there are no statutory lien rights (yet) in New York for sale commissions.

Recent History

More recently in Tennessee⁷, a broker holding seller’s proceeds to collect his commission was not liable for breach of

“The key is good counsel, and language in commission agreements relating the commission to sales proceeds or rent. ”

trust and was entitled to his commission. The broker was to receive—as his compensation—all of the proceeds above a set price, the so-called net listing which today is frowned upon and deemed unenforceable in some states. Not much later, a Florida court granted the broker a vendor’s lien on the seller’s real estate sale proceeds⁸, not unlike the current Florida Commercial Broker Lien Act⁹ where the broker’s lien is on sale proceeds but not on the property itself.

In New Jersey, where brokers still have no statutory lien rights, a plucky broker sought—and enforced—a writ of attachment on the out-of-state landlord’s bond which the landlord had posted over his claim for a lease renewal commission¹⁰. Likewise in Utah—another state without statutory broker lien rights then or now—a broker claimed and enforced its lien on proceeds of a foreclosure sale, based on language in the commission agreement relegating the broker’s claim to proceeds, as opposed personal liability of the seller¹¹.

Why it Matters

It is possible that there are other cases where brokers have asserted either equitable or some other non-statutory lien rights with success. This success could have been based on language in listing or commission agreements that allow courts to focus on seller’s or

landlord’s proceeds. Where your state has no statutory broker lien rights yet, it is good to know that there have been—and may still be—alternatives, albeit no real substitute for the statutory lien right itself.

A brief note of caution is in order. When a broker’s claim is against sale proceeds, there is an implication that the commission is due only if there is a closing and proceeds. In other words, it becomes a condition precedent to the broker’s right to the fee.

The key is good counsel, and language in commission agreements relating the commission to sales proceeds or rent. It may be time to give your agreements a fresh look. ▼

1. *Byers v. Danley*, 27 Ark. 77 (1871).
2. *Sanders v. Berry*, 139 Ark. 447, 214 S.W. 58 (1919).
3. *Moss v. Sperry*, 140 Fla. 301 (1939).
4. *Tinsley v. Durfey et al.*, 99 Ill App. 239 (3rd Dist. 1900).
5. *Moss v. Thomas*, 218 Ala. 141 (1928).
6. *Baker v. Cooper et al.*, 201 A.D. 639 (2d. Dept. 1922)
7. *Duncan v. State of Tennessee*, 6 McCanless 431 (1957).
8. *Winston v. Ahlman*, 131 So. 2d 487 (Dist. Ct. of App, 2d Dist. 1961).
9. Florida Statute 475.703 et seq.
10. *Louis Schlesinger Co. v. Kresge Foundation*, 236 F. Supp. 373 (D.N.J. 1964).
11. *Sprouse v. Jager*, 806 P. 2d 219 (Ct. of App. 1991).

STATES WHERE BROKERS HAVE STATUTORY LIEN RIGHTS

1. Alabama
2. Arizona
3. Arkansas
4. Colorado
5. Connecticut
6. Delaware
7. Florida
8. Georgia
9. Illinois
10. Indiana
11. Kansas
12. Kentucky
13. Louisiana
14. Maine
15. Maryland
16. Michigan
17. Mississippi
18. Missouri
19. Nevada
20. Nebraska
21. New Hampshire
22. New Mexico
23. New York
24. North Carolina
25. Ohio
26. Oklahoma
27. Pennsylvania
28. Rhode Island
29. South Carolina
30. Tennessee
31. Texas
32. Virginia
33. Washington
34. Wisconsin