

LOOK BEFORE YOU LIEN

By Jim Hochman

Most of you know me to be a real estate broker's advocate, a spokesperson for the profession on enacting legislation for broker lien rights, and in the trenches, a bit of a pit bull in collecting unpaid commissions. All of that is true. However, a recent matter which came to my attention sparks me to warn that brokers should—indeed they must—look before they lien a property: things may not be as they appear.

Recently a regular client called me, explaining that he had procured a tenant, received a commission, and noted that after expiration of the initial lease term, the tenant remained in possession of the leased space. Looking further at the original lease, my client was reminded that the lease contained multiple options to renew for successive terms. Looking at his listing agreement, he noted that if the tenant remained in the leased space after expiration of the initial lease term, whether pursuant to exercise of an option to renew or otherwise, additional commission was due. He also noted that a broker lien for a lease commission must be recorded in Illinois within 90 days of commencement of the renewal term, hence his call to me; and hence my immediate preparation of a notice of broker lien. Failure to record a timely notice of broker lien could result in loss of the lien right, and with that, loss of leverage in collecting that lease renewal commission.

However, things are not always as they seem, and as it turned out, the tenant was merely holding over. He had contracted to purchase a building and relocate

his business to the newly purchased property after closing. So a lease renewal commission, if any was due, was a far cry from what the notice of lien claimed. Brokers should always act responsibly in business, including in prosecution of commission claims; and especially when wielding the weapon of lien rights. Wrongly asserted lien claims can have severe negative consequences, including counterclaims for slander of title, breach of fiduciary duty, liability for an owner's attorney fees, loss of good will, even damage to the broker's general business reputation.

Along those lines, a careful broker should examine the lien act in the state where the property is located. When drafting and negotiating the passage of lien acts, opponents to broker lien rights asked how an innocent property owner would be protected from overzealous prosecution of lien rights. We were quick to point out that the right for the prevailing party to collect its attorney fees cut both ways, and a victorious owner in defending an improper lien claim could really make that overzealous broker pay, including reimbursement of the owner's attorney fees. Some of the broker lien acts go a bit further and expressly make a broker lien claimant liable for a victimized property owner's damages if a recorded lien is not timely released. Truthfully, I didn't envision this to be a risk for brokers.

The case of *Anton, Sowerby & Associates Inc. v. Mr. C's Lake Orion LLC*, 309 Mich. App. 535 (Ct. of App., Mich., 2015) is instructive and highlights my points. I worked long and hard on the negotiation

and eventual passage of the Commercial Real Estate Broker's Lien Act in Michigan, a struggle that ended happily after many years of negotiation and legislative wrangling. Accordingly, when I read this case, I was disappointed to see that a court ruled that a broker had actually incurred liability in asserting lien rights. The facts were somewhat complicated. When a broker—armed with an exclusive listing—sensed that the foreclosing lender's receiver and a buyer procured by the broker were negotiating a sale of the property, he recorded a lien, and sought to foreclose. However, the broker failed to sue the owner/seller, later a fatal flaw. The receiver and prospective buyer found the lien, escrowed a sum of money in excess of the lien claim, and closed the sale. The broker refused to release his lien—even though the Act required that when an escrow was created, the lien must be released. In fact, the lien was released as a matter of law based on the Act, so why the broker refused to record a specific release of lien remains a mystery. It was ruled that the lien was proper and the broker was entitled to record its lien; but when the escrow was formed and the broker refused to release the lien, in the court's judgment, the broker committed slander of title. The court ordered the broker to pay the buyer's damages, including legal fees, in the amount of \$20,000. This was carefully reviewed and affirmed on appeal. This broker, who may have had a valid lien claim for a fee, should have released the lien when it learned of the escrow, surely when the court specifically ordered release of the

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lien. This case remains a mystery to me, and is surely a black eye for broker lien right advocates.

Ohio was one of the earlier states to enact broker lien rights, and I was somewhat disappointed to read a case which came down in Ohio against an Ohio broker lien claimant, in *Union Square Realty Inc. v. Golfers & Hackers, Inc.* 2011-Ohio-1882 (App. 5th Dist. 2011). In this case, a broker prosecuted a claim for procuring a buyer (after the listing had expired) based on procuring cause, and not based on the exclusive listing. Then, the broker recorded a broker lien to exert leverage on its separate procuring cause claim, despite the fact that the claim was not supported by a written commission agreement. We all know that there must be a written contractual basis for a lien claim. The results in this case were interesting. The broker received a judgment for \$17,000 for its commission as procuring cause—not under the expired listing—and the Seller and Buyer, who had suffered damages from the wrongly recorded lien, recovered

a judgment for breach of fiduciary duty and tortious interference in the amount of \$12,000. The wrongful lien delayed the closing and caused the parties to suffer damages including extra mortgage interest. Again, perhaps there was a valid commission claim, but misuse of the lien rights afforded by statute resulted in an adverse result for the broker.

Back to my recent Illinois lien claim. Fortunately, rather than recording the lien and asking questions later, I drafted the lien, had it executed by my client—but did not record it—and mailed a copy to the owner with a demand letter in support of the commission claim. The owner explained the holdover, the lack of exercise of the renewal option, and the tenant closed on his purchase elsewhere and vacated the leased space. My clients were justified in thinking they had a claim, reasonable in seeking counsel and requesting a demand letter; but in the end, the claim was not justified. Fortunately, they looked before they liened; fortunate for all parties concerned, I would say. ♥

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