

COMMISSIONS ON LANDLORD OR SELLER DEFAULT

By Jim Hochman

There is no doubt that the past six months have raised issues in our society, in housing, in your way of life, and yes, in your real estate transactions as well. Much has been said—and written, and published—about the application of force majeure clauses, whether business interruption insurance applies to protect tenants, and whether the pandemic is a basis to allow landlords and tenants to terminate leases without liability. To be sure, this is all relatively new ground for the legal profession, and sadly, we can expect troublesome litigation to ensue in the coming months, perhaps even the coming years. This raises the question for brokers, among so many other worrisome issues, “Am I covered and still due a commission if my Owner client fails to perform and deliver leased space? Am I due a commission if the tenant I procured has a change of heart and rescinds its lease before occupying the leased space?” In short, are brokers innocent victims of these troubled times, and is there recourse? Regular readers of my columns know my usual answer to those questions: “It depends... on your listing agreement, on the terms of the subject lease, on the nature of your relationship with that landlord client, one whom you have represented through thick and thin.”

You also know that my guidance to my brokerage firm clients is always to protect yourselves by taking time to craft a sensible and acceptable listing agreement, but make sure that you give some thought to all the potential “what if” questions. Let me raise a few of those

questions and offer a few thoughts for your consideration.

1. When the Landlord Can't Deliver the Space Timely or When the Lease is Terminated Before the Tenant Occupies

You have listed a property for lease, marketed it energetically, and by some accounts, successfully, in that you have procured a tenant, negotiated a signed lease, and await “only” the landlord’s completion of its buildout requirements, as well as the tenant’s completion of its buildout thereafter. COVID-19 strikes, your landlord is delayed, but he soldiers on and completes his responsibilities, albeit a bit behind schedule. The tenant, though, looks at its obligations, considers a bleak outlook for its business in the coming years, and decides not to proceed, and negotiates a termination of the lease. On these facts, have you performed and earned a commission? Many would quickly answer in the affirmative, the signed lease is evidence that you have procured a ready, willing, and able tenant (or at least the landlord has deemed that tenant ready, willing, and able), the matter is no longer up for debate. However, be sure to check your listing agreement. Broker drafted agreements usually indicate a lease commission is deemed earned upon lease execution; but sometimes that commission is only payable when and if the tenant takes possession of or occupies the space. Moreover, on these facts, it appears that when the landlord and tenant negotiated to terminate the lease, the landlord made it impossible for you to earn the fee (if it

was not already earned). There MAY be case law in your state that supports a broker’s commission claim when the owner made it impossible for the fee to be earned.

2. When the Owner Decides to Sell the Building You Were Hired to Lease

It is not unusual to take a lease listing, one that clearly indicates no compensation is due the broker if the property is sold. Fair enough, you were not hired to sell the property, and if a sale occurred through the efforts of others, no sale commission may be due. However, when an owner sells a property and terminates your listing before you were able to earn a lease commission, are you due some compensation? Might your listing provide for a termination fee on sale of the property? I can assure you that an owner won’t offer such a term, but a broker might want to consider asking for some form of compensation for premature termination of the listing. Thoughts which come to mind include recovery of all marketing expenses incurred by the broker, in addition to a negotiated amount, perhaps a portion of the fee that would have been earned, had the property actually been leased.

3. When the Owner Loses the Property

It is not unheard-of that an owner owning a vacant building would be behind on debt service, and lose the property to its lender in a foreclosure. You may have been working hard to find a tenant or a buyer, but you were not successful. The foreclosure decree occurred and your

client lost possession of the property before you could find any sort of relief. This one doesn't seem fair, but what are a broker's chances of recovery here? Yes, there is likely a claim against an owner for, again, making it impossible for you to have the full term of your listing to perform and find a buyer or a tenant—if the listing so provides. However, your claim here is against the business entity which owns the property. Without a personal guaranty, you may end up with a judgment against an entity with no assets other than the property lost in foreclosure. I do recall asking an owner for a personal guaranty, and even asking the lender to guaranty the commission while my broker client tried to save the property from foreclosure. Those requests were, predictably, declined. By the way, I have warned in other articles that a broker is wise to require commission protection in a variety of circumstances—foreclosure is one, eminent domain is another; and

without language in the listing for these specific circumstances, your chances of recovery are slim.

4. Relationships Matter

I want to add a thought in this somewhat somber article. Brokers need owners as much as owners need brokers, and it may be that in these troubled times, a broker needs to pause and consider the existing and potential future relationship with that owner client. I firmly believe that the present economy, the present market, yes the present pandemic, will all eventually pass and evolve; and that we will be doing business again in a more robust economy eventually. How you bear these troubled times, whether you choose to assert legal claims that you have against clients you may want to keep, well, these are the business questions that you as senior brokers or managers need to consider before taking action. To quote my late father, a man wise beyond his years,

“You don't put your knee in a man's chest just because you can.” There may be clients you want to keep, and forebear on claims now for business later. There may be clients you have who have hurt you and claims should be brought against them, all of these questions become very personal and fact specific.

I close with the reminder that you should always do your best to take care of yourselves, but at the same time, it is so true that we are all in this together. ♥

MEET THE AUTHOR

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