

TITLE ISSUES

The Brokers' Lien – A New Illinois Hurdle

by **MATTHEW J. KELLER JR.**

Over the Governor's veto, the Illinois Legislature in late 1991 passed a bill creating lien rights for commercial real estate brokers. (See Public Act 87-0779.) This law became effective on January 1, 1992, and is known as the Commercial Real Estate Broker Lien Act (hereinafter referred to as the Act).

GENERAL TERMS

The Act defines "commercial real estate" to mean

- ...any real estate other than
 - (i) real estate containing one to 6 residential units,
 - (ii) real estate on which no buildings or structures are located, or
 - (iii) real estate classified as farmland for assessment purposes under the Revenue Act of 1939.

Commercial real estate shall not include single family residential units such as condominiums, townhouses, or homes in a subdivision when sold, leased, or otherwise conveyed on a unit by unit basis even though these units may be part of a larger building or parcel of real estate containing more than 6 residential units.

The Act adopts the definition of "real estate", "broker", and "employee" from the Real Estate License Act of 1983 (Ill. Rev. Stat. 1989, ch. 111, par. 5801 et. seq.). Real estate includes leaseholds and other interests in land. Broker includes an individual, partnership, or corporation which for compensation agrees to assist in the sale, purchase, exchange, or lease of real estate. An employee is a real estate salesperson working for a broker.

The Commercial Real Estate Broker Lien Act establishes a right to a lien in the real estate for which the broker has arranged sale, purchase, lease or exchange in favor of a broker who has, pursuant to written agreement, arranged sale, lease, exchange, or purchase of commercial real estate. The lien is perfected by recording a notice of lien in the Office of the Recorder of Deeds or the Registrar of Titles in the county where the land is located.

The notice of lien in most cases must be placed of record before the closing of the commercial real estate transaction to have priority over subsequent purchasers or lenders. There

are, however, at least three instances in which it appears a secret lien may be established under this Act. These are:

- (1) where the real estate commission is payable in installments;
- (2) where the real estate commission is payable for the leasing of the real estate; and
- (3) where the commission being claimed is under a written agreement with the buyer.

Mainly because of these exceptions title insurers and others dealing with real estate are requiring affidavits and lien waivers at closing to protect themselves and their insured against the possibility of any secret lien.

AFFIDAVITS and WAIVERS

Since the Act appears to establish the possibility of secret liens, those dealing in commercial real estate must at closing collect sufficient information to protect themselves against this possibility. Title insurers have chosen to raise an exception to title on their commitments of title to the following effect:

Information should be furnished establishing whether any written agreement has been entered into by and between any party and a broker for the purposes of buying, selling, leasing, or otherwise conveying any interest in the land described herein; and, if such agreement has been entered into, satisfactory evidence should be furnished establishing that the compensation agreed upon in such agreement has been paid and the broker's lien, or right to a lien, for such amount has been extinguished. In the event said evidence is not furnished, our policy(ies), when issued, will be subject to the following exception:

"Any lien, or right to a lien, imposed by law under the provisions of the Commercial Real Estate Broker Lien Act and not shown in the public records for compensation agreed upon by a broker and the broker's client or customer under the terms of a written agreement entered into for the purposes of buying, selling, leasing, or otherwise conveying any interest in the land described in Schedule A."

To clear this title exception and obtain a policy free of any exception relating to a broker's lien, it is essential that both

the seller and buyer (and if a lease is being insured, the lessee and the lessor) furnish the title insurer with affidavits that either no broker has been utilized, or the name of the broker(s). If a broker is disclosed, as will usually be the case, then a waiver of the right to the lien must be furnished by the broker together with a further affidavit from the broker establishing that no other brokers were involved. Title insurers are providing affidavit and lien waiver forms for these purposes. The affidavit should establish the relationship of the affiant to the land (owner, lessee, buyer), whether a written agreement has been entered into for the transfer of the land (or for the leasing of the land) and with whom and for what compensation (expressed in a dollar amount), and that the affiant is unaware of any other agreements to use broker services.

The lien waiver form is combined with an affidavit for the involved broker to sign. The waiver must establish who the broker is, what land is involved, and that a waiver is given for a named compensation (which must coincide with that disclosed by his client's affidavit). The waiver must be for the full amount of the commission, not a nominal amount. In addition, the waiver must include an affidavit wherein the broker states that no other broker is involved, or discloses the name of any other broker involved. If other brokers are involved, similar waiver/affidavits must be obtained from them. If a lien was in fact recorded, a release in recordable form must be provided to clear the record. Like the waiver, the release must not be for a nominal amount, but express the full consideration for which it was obtained. Also, it must release the full amount of the compensation agreed upon in any written agreement.

WHO IS ENTITLED TO A LIEN?

The Act gives only a broker who has entered into a written agreement a right to a lien. Merely an oral contract, or the fact that a broker brought a seller and buyer together, but without benefit of a written agreement, will not entitle the broker to the right to file a lien under this Act. An employee of a broker is not entitled to a lien, only the broker has rights under this Act.

To be entitled to a lien, the broker must have completed his duties, that is he must have provided licensed services resulting in the procuring of a person or entity ready, willing, and able to purchase, lease, or otherwise accept a conveyance of the commercial real estate or any interest therein upon terms provided for in the written agreement with the owner or owner's agent (or in the case of a buyer, with the buyer).

HOW DOES THE BROKER PERFECT HIS LIEN?

As alluded to above, a broker must place a notice of lien (a document stating the name of the broker, the name of the

owner, a description of the land in question, the amount of the lien claimed, and the real estate license number of the broker, signed by the broker or a person authorized to sign in his behalf, and verified) of record in the county where the land is located with either the Recorder of Deeds or the Registrar of Titles, whichever is appropriate. In addition the broker must, by certified mail, send a copy of the notice of lien to the owner. Generally, except for the three cases previously noted and for liens relating to options to purchase, this notice of claim for a lien must be recorded prior to the closing of the real estate transaction to be valid against subsequent purchasers and/or lenders. If the lien is not recorded as provided by the Act, it is void and unenforceable. The usual contract remedies, however, of course remain unaffected.

The lien is enforced by bringing suit in the Circuit Court in the county where the property is situated. Such suit must be commenced within two years after the recording of the lien. Failure to bring suit within two years extinguishes the lien. Such a lien shall have priority over subsequently filed deeds and mortgages.

Under the provisions of the Act, an owner may demand the recording of a written release of any lien filed whenever a condition occurs (such as payment) which would preclude the broker from receiving compensation under the terms of the written agreement between the broker and the owner. The Act also provides that the owner may serve notice on the broker demanding that suit be filed within thirty days, and if no such suit is filed, the lien shall be extinguished. Unfortunately, the Act, does not, like the Mechanics' Lien Act, provide any method for an owner to obtain court approval of the notice such as obtaining a judgment for a nominal amount against the broker. Such a judgment would provide a court finding that such notice by the owner to the broker was done properly. Since no such court order will be obtainable, title insurers, to insure over the problem, will require certified mail return receipts, copies of the notice and probably indemnification. Each situation will certainly be met on a case by case basis.

To attempt to assure that frivolous liens and suits will not be filed, the Act includes provisions that the attorneys' fees of the non-prevailing party may be included in the judgment awarded to the prevailing party.

The Act also provides a method to escrow the funds in question if a dispute arises between the owner and the broker. In fact, however, it is more likely funds will be placed in escrow with a title insurer in a title indemnity account, to be released only upon mutual settlement of the dispute or upon a court order holding to whom and in what amount funds are due.

SECRET LIENS

The Act provides a few areas that may result in the possibility of secret liens as mentioned above. The first of these is when the commission is payable in installments. As one would expect, the lien can only be in that amount and to the extent monies are still due the broker. The lien is limited at recording to those amounts due at the time of recording, It cannot

include amounts due after the date of recording.

In the case of a claim for a lien for leasing premises, the notice must be filed within 90 days after the tenant takes possession of the leased premises unless written notice of the intended signing of the lease was personally served on the broker at least 10 days prior to the date of the intended signing.

In the case of a lien due a broker by reason of a written agreement with a buyer, the broker has a period of 90 days after the purchase or other conveyance or transfer to the buyer to record his notice of lien.

In the case of a broker claiming a lien based upon an option to purchase, the broker has 6 months after the transfer or conveyance of the commercial real estate, under the exercise of the option, in which to file a suit for enforcement of the claim for lien. The Act makes no provision for the broker to record any notice of lien to assert this type of claim.

CONCLUSION

The Commercial Real Estate Broker Lien Act creates a new hurdle and additional paperwork for every closing of a commercial real estate transaction involving Illinois real estate. It unfortunately adds to the already too large and numerous paper storm that must be produced and processed at every commercial real estate closing. It is hoped that the legislature does not see fit to add more liens for other closing participants, and it might be hoped, (though realistically only faintly) that an amendment to the Act will make the brokers' lien effective against subsequent bona fide purchasers and mortgagees only if of record. Until such action, however, we must all jump this additional hurdle.

We are soliciting ideas for possible subjects for future *TITLE ISSUES*. If you are interested in submitting ideas for subjects, complete the form below and submit to:

Chicago Title Insurance Company

171 NORTH CLARK STREET
CHICAGO, ILLINOIS 60601-3294

Attn: Sharon Marszalek
Chicago Metro Marketing

SOLICITATION FOR IDEAS: Subjects for future *TITLE ISSUES*

NAME: _____

DATE _____

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SUBJECT: _____