

# Real Property

The newsletter of the Illinois State Bar Association's Section on Real Estate Law

## Understanding the Illinois Commercial Real Estate Broker Lien Act

BY JULIA JENSEN SMOLKA

**As the economy continues to improve, and the real estate market picks up,** there will be more and more real estate transactions. With more transactions, there will be more instances where sellers and brokers argue whether a commission was earned by a broker. With larger commercial price tags, a broker could be out tens of thousands of dollars—or significantly more if there is a dispute. Broker's listing agreements are typically well written form contracts which address when a commission is earned by a broker. But there is even a more powerful tool in Illinois which allows brokers to attach a lien to a commercial property for earned, but unpaid commissions.

Illinois allows real estate brokers to place liens for earned commissions on commercial real estate as a way to force payment when a seller or buyer attempts to circumvent payment to the broker. The act is known as the Commercial Real Estate Broker Lien Act, 770 ILCS 15 *et seq.* This article addresses the basics on how the act works.

### Step 1: Does the Broker Have A Lien?

To know whether the act applies to your client, first you have to determine if the property at issue is covered under this act. There are many instances where a property is being used for commercial purposes;

however, the act specifically defines what properties are covered.

Under Section 5 of the Act, "Commercial Real Estate" is defined as

any real estate located in Illinois 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 Property Tax Code. 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.

Next, whether the broker has a lien depends on whether the broker has earned his or her commission under a written instrument signed by either the owner, buyer or tenant. That written instrument is typically a listing agreement, lease or sales contract. For the broker to have earned his or her commission, he or she has to produce a ready, willing and able buyer or

lessor.

Illinois has extensive caselaw on when a broker earns his or her commissions. The general rule regarding brokers' commissions was stated by the Illinois Supreme Court in *Fox v. Ryan* (1909),<sup>1</sup> as follows:

Where a broker is employed to sell property by the owner, if he produces a purchaser who is ready, willing and able to purchase the property upon the terms proposed by the seller he is entitled to his commissions, even though the seller refuses to perform the contract on his part.

A prospective purchaser of realty will be considered ready, willing and able to buy if he has agreed to purchase the property and has sufficient funds on hand or if he is able to command the necessary funds with which to complete the purchase within the time allowed by the offer. A broker who shows he produced a prospective purchaser who agreed to the sellers' terms, who was continuously willing to purchase during the time of the relevant negotiations and became able to execute a contract upon the agreed terms at a reasonable time subsequent to the initial negotiations, has made a prima facie case for recovery of his commission.

The commission is earned upon the simultaneous concurrence of the buyer's readiness, willingness and ability.<sup>2</sup>

## Step 2: Perfecting the Broker's Lien

If your client has a right to record a lien, he or she has to take steps to perfect the lien. The statute describes what needs to be in the lien notice—names of the owner, description of the property, amount of lien and real estate broker's license number. It has to be signed and verified.<sup>3</sup> There is no statutory form.<sup>4</sup> To perfect the lien, the client has to record a lien in the Recorder's office of the county where the property is located. Additionally, in the event the lien relates to a lease transaction within 90 days from when the tenant takes possession. If it's a sale, within 90 days from when the purchase or conveyance happens, or when the seller refuses to consummate a valid sale.<sup>5</sup> Thereafter, the broker shall send notice, within 10 days of recording the lien, to the owner of the property by registered or certified mail, return receipt requested or personally. Strict compliance is required or the broker lien is not enforceable. The lien relates back only to the date its recorded, not the date of the earned commission.<sup>6</sup> So, ideally, if the broker sees the writing

on the wall that the parties are trying to avoid paying the commission, he or she can record their lien prior to the closing. It forces the title company to holdback funds, as it would for any other lien.

## Step 3: Foreclosing the Broker's Lien

This statute operates similar to the Illinois Mechanics Lien Act. Like the Mechanics Lien Act, the broker has to stickily comply with the statute, and has to file a foreclosure complaint within two years after recording the lien. If the claim for lien is based on an option to purchase, the time to file a complaint is reduced to six months. Similarly, like with a mechanics lien, an owner can make a 30 day demand to file suit. In the event the suit is not instituted within the 30 days of demand, then the lien will be extinguished as matter of law.<sup>7</sup> The statute describes what needs to be plead in the complaint, including a description of the property and the services performed.<sup>8</sup> The broker's complaint would also likely have breach of contract or *quantum meruit* counts against the defendant as well. Also, the broker has to join all parties with an interest in the property, serving each with summons. If the broker is successful, the statue allows

for his or her recovery of attorneys fees and costs. If he is unsuccessful, the judge can award attorneys fees and costs against the broker.<sup>9</sup>

## Summary

Having filed both broker lien actions and mechanics lien actions in my career, the procedural steps are very similar. So are the pitfalls if you fail to follow the statute precisely. Defending these actions are very similar. Strict compliance to the dates, notices and forms of the documents in this statute is necessary, or the foreclosure complaint will be dismissed. For both actions, once the plaintiff complies with the statute the underlying question, whether the plaintiff is entitled to the funds, is the issue. ■

1. 240 Ill.391, 396, 88 N.E. 974, 976

2. See *Garrett*, 24 Ill.App.3d at 945-946, 322 N.E.2d at 220. See also *Kenilworth Realty Company v. Sanquist* 56 Ill.App.3d 78, 371 N.E.2d 936 (1st Dist 1977).

3. 770 ILCS 15/10 (h-i)

4. When I recorded a Broker's Lien in the past, I used a Mechanics Lien claim form as a guide.

5. 770 ILCS 15/10 (d-e)

6. 770 ILCS 15/10 (c)

7. 770 ILCS 15/10(j)

8. 770 ILCS 15/10(h)

9. 770 ILCS 15/10(l)

**THIS ARTICLE ORIGINALLY APPEARED IN  
THE ILLINOIS STATE BAR ASSOCIATION'S  
REAL PROPERTY NEWSLETTER, VOL. 61 #3, SEPTEMBER 2015.  
IT IS REPRINTED HERE BY, AND UNDER THE AUTHORITY OF, THE ISBA.  
UNAUTHORIZED USE OR REPRODUCTION OF THIS REPRINT OR  
THE ISBA TRADEMARK IS PROHIBITED.**