

REAL ESTATE

Real Estate Brokers May File a Lien for Commission

BY ALAN NOCHUMSON

Special to the Legal

Whenever a piece of commercial property is leased or sold, a real estate broker is normally involved in the transaction. The broker's compensation for the completed transaction is generally dictated by the terms of the agency agreement executed by the owner and broker.

In *Situs Properties Inc. v. Peter Roberts Enterprises*, a commercial property owner recently found itself obligated to pay its former broker a sales commission even though their relationship had terminated three years before the sales transaction even took place.

In *Situs*, the broker was appointed the sole and exclusive agent to lease or sell the owner's building per the terms of an exclusive agency agreement. Per the terms of the agreement, the broker was also entitled to a commission if a prospective tenant procured by the broker leased the building within six months of the agreement terminating.

The building was leased to a charter school two months after the agreement expired. In the lease, the parties acknowledged the broker as part of the transaction and incorporated the exclusive agency agreement by reference. The owner also paid the broker the leasing commission as set forth in the exclusive agency agreement.

The charter school and the owner extended the lease twice. During the lease term, the owner also continued paying the broker a commission in accordance with the exclusive agency agreement.

After the lease expired, the owner and charter school executed a new lease containing a provision giving the school or its designee the option to purchase the building. Similar to the prior lease agreements, the broker and the exclusive agency agreement were specifically referenced in the lease and the broker was paid a leasing commission in accordance with the exclusive agency agreement.

A nonprofit corporation and parent advocacy group then purchased the building for the charter school. Several days before closing, the broker submitted an invoice for its commission on the sale of the building. After the owner refused to pay the commission, the broker filed a lien on the property in Philadelphia County pursuant to the Commercial Real Estate Broker Lien Act, 68 P.S. Section 1052 et seq., for an amount equaling the unpaid commission. The disputed amount was escrowed at closing.

The broker then filed a complaint against the former building owner alleging breach of contract, among other things. The parties eventually filed motions for summary judgment with respect to the breach of contract claim and the broker's request for attorney fees and costs under the Commercial Real Estate Broker Lien Act.

The court found in favor of the broker with respect to the breach of contract claim. In doing so, the court rejected the owner's contention that the broker was precluded under the Real Estate Licensing

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and Registration Act (RELRA), 63 P.S. Section 455.101 et seq., from collecting the commission under the exclusive agency agreement.

Specifically, the owner argued that the broker violated RELRA "by acting as though no termination date existed in the exclusive agency agreement." The owner believed that the broker should not be entitled to a commission on a sale which occurred three years after the expiration of the agreement and the six-month trial period.

RELRA "protect[s] buyers and sellers of real estate, the most expensive item many persons ever buy or sell, from abuse by persons engaged in the real estate business." "RELRA establishes rules and regulations governing the profession of real estate brokers and provides for fines and penalties for violations" of the statute.

The court concluded that, whether the broker violated RELRA depended upon the interpretation of the exclusive agency agreement, "since a broker's right to a commission is a matter of contract, express or implied."

Interpreting the plain language of the exclusive agency agreement, the court found that the broker was entitled to collect a commission for the sale of the building, disagreeing with the owner's restrictive interpretation of the exclusive agency agreement. The court concluded that, under the exclusive agency agreement, the broker was entitled to a commission if the broker procured a tenant during the term of the agreement or within the six-month period after the expiration of the agreement and if the tenant or its designee purchases the building.

The court believed that the owner's own conduct demonstrated that the owner understood and, in fact, ratified the terms of the exclusive agency agreement. The court pointed out that the owner entered into various lease agreements with the charter school acknowledging the broker as the sole broker in the transaction and its obligation to pay the brokerage commission in accordance with the exclusive agency agreement. Moreover, the court stressed that the owner, in fact, paid the leasing commissions due to the broker.

Since the charter school's designee purchased the building in accordance with the lease agreement, the court held that the owner was contractually obligated to pay the sales commission per the terms of the exclusive agency agreement.

The court then reviewed the broker's

AREA MORTGAGE RATES

| Lender | Fixed Rates | | Adjustable Rates | Jumbo Rates* | Commercial |
|--|-------------|---------|------------------|--------------|------------|
| | 30 yr. | 15 yr. | 1 yr. | 30 yr. fixed | Yes/No** |
| Price Financial Services 800-401-9091 | 5.38/0 | 4.88/0 | N/A | 5.75/0 | No |
| Absolute Mortgage Co. 888-904-6617 | 5.38/0 | 4.88/25 | 3.75/0 | 5.75/0 | No |
| AA E Mortgage 877-793-1900 | 5.38/0 | 5.00/0 | N/A | 5.75/0 | No |
| Lighthouse Mortgage 800-784-1331 | 5.38/0 | 5.00/0 | N/A | 5.88/0 | No |
| Home Finance of America 800-558-5626 | 5.38/0 | 5.13/0 | 5.25/0 | 5.88/0 | No |
| Stepping Stone Lending 800-638-2659 | 5.38/0 | 5.25/0 | N/A | 5.88/0 | No |
| Turquoise Mortgage 800-752-7514 | 5.50/0 | 5.13/0 | N/A | 5.75/0 | No |
| Washington Mortgage 610-518-3099 | 5.50/0 | 5.23/0 | 3.25/0 | 5.88/0 | No |
| AmTrust Funding 800-774-0779 | 5.10/1 | 4.88/1 | 4.25/1 | 5.50/1 | No |
| Indiana Home Loan 877-839-9829 | 5.38/1 | 5.23/0 | N/A | N/A | No |
| East Coast Financial 800-333-9440 | 4.75/2 | 4.50/2 | 3.75/1.5 | 5.25/3 | No |
| American Family Mfg. 630-338-5324 | | | | | |

* A "Jumbo" or non-conforming mortgage is a loan amount in excess of \$360,000.

** Indicates if a lender offers mortgage loans for commercial properties. Call to discuss rates and terms.

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request for attorney fees and costs under the Commercial Real Estate Broker Lien Act.

In Pennsylvania, a broker may attach a lien by filing a notice of lien in the county where the commercial property is located. The notice of lien must state the name of the broker, the name of the owner, the description of the property, the amount of the claim and the real estate license number of the broker. The notice of lien must be verified either by the broker or by a person who is authorized to sign on behalf of the broker. The broker must mail a copy of the notice to the owner by certified mail.

The notice may only be recorded if the broker gives prior written notice of the claim for lien to the owner and the prospective buyer that he is entitled to compensation and intends to claim a lien on the commercial property. The notice must be served upon the owner and prospective buyer by registered or certified mail. The notice must also include a statement of the buyer's right to deposit funds in escrow.

Afterward, a broker may bring suit to enforce the lien in the court of common pleas in the county where the lien was recorded by filing a complaint. The complaint must be filed within two years after recording the lien or the lien is automatically extinguished. The complaint must "contain a brief statement of the contract or agreement on which the lien is founded, the date when the contract or agreement was made, a description of the services performed, the amount due and unpaid and a description of the property that is subject to the lien." The broker must "make all inter-

ested parties, of whose interest he is notified or has knowledge, defendants to the action."

Under the statute, "[t]he cost of proceedings, including reasonable attorney fees and prejudgment interest due to the prevailing party, shall be borne by the nonprevailing party or parties."

In *Situs*, the court denied the broker's motion for attorney fees and costs under the statute without prejudice because there was no evidence supporting the amount claimed. "Based on the absence of said evidence the court [was] unable to determine if the amount requested by" the broker was reasonable. The court did allow the broker to file an appropriate motion and supporting evidence at a later date.

LESSON LEARNED

Situs illustrates why a commercial property owner must pay particularly close attention to the terms contained in an agency agreement. In *Situs*, the agency agreement required the owner, in no uncertain terms, to pay a broker's commission even after the agreement terminated.

When the owner in *Situs* refused to pay the brokerage commission, the owner soon encountered the wrath of the Commercial Real Estate Broker Lien Act. The amount in dispute was placed into escrow at closing and the owner became embroiled in a lawsuit where the broker was not only seeking the commission allegedly owed under the exclusive agency agreement but also attorney fees and costs that incurred as part of its collection efforts.