

The Commercial Real Estate Broker's Lien Act

A Powerful New Tool for MI Commercial Real Estate Brokers

By Steven D. Sallen

The commercial real estate broker's lien act is finally a reality in Michigan. After years of indifference, the Michigan legislature finally heeded the pleas of trade organizations like the Michigan Association of Realtors and the Commercial Board of Realtors, and various other interested organizations and their broker-members, and passed Senate Bill No. 610. Signed into law by Governor Granholm on Oct. 5, 2010, the Bill took immediate effect, and will apply to written commission agreements signed after that date. But rejoice not, unless you understand how to use this important but narrowly crafted tool.

WHAT YOU NEED TO KNOW

A commercial real estate broker's lien is only available to Michigan licensed real estate brokers, and is not available to their employees, agents or independent contractors. Three critical elements are required for a commercial real estate broker's lien to attach. First, the broker must have a written commission agreement, signed after Oct. 5, 2010, the effective date of the act. Second, the broker must be entitled to a commission under the written commission agreement. Do not underestimate the importance of this requirement; this entitlement requirement could be the undoing of many poorly written commission agreements. A thorough review of your standard commission agreement should be

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undertaken immediately to avoid an unpleasant surprise later. And, third, the broker must record a claim of lien in the county where the real property is located before the actual conveyance occurs.

Where a commission is owed for a lease, the claim of lien may be recorded within 60 days after the lease is signed. The time for filing a notice of claim of lien may be forced earlier, however, if the owner notifies the broker of an intent to enter into a lease, which includes a date on which the lease is intended to be signed (such date must be not less than 10 days later), and serves it on the broker. In that case, the broker must file the claim of lien before the intended date of lease signing. Buyer's brokers (and tenant rep brokers) can similarly claim a lien if the buyer purchases the property and records a claim of lien. There are also provisions designed to protect a broker's right to be paid a commission where the commission is to be paid in installments, and for purchase options, and where a commission is due on modifications or extensions of leases.

A CLAIM OF LIEN

A claim of lien must include several specific elements, and these are readily available in Section 9 of the commercial real estate broker's lien act, including a form of claim of lien. Within 10 days after recording the claim of lien, however, the broker must provide a copy of the claim of lien to the owner of record of the property and to the party who signed the commission agreement, by certified mail, with return receipt requested, or by personal service. Since a commercial real estate broker's lien is "void and unenforceable" if not properly served, a title search should be undertaken to make sure that service is properly effected on the "owner of record." In other words, do not trust that the signer of the commission agreement is, in fact, the owner of the property; doing so could render a commercial real estate broker's lien void.

Commercial real estate broker's liens should not prevent real estate

transactions from closing, however. Section 5 of the Commercial Real Estate Broker's Lien Act provides that the parties to a transaction shall establish an escrow account for depositing a sum of the proceeds of the transaction sufficient to satisfy the lien, and specifically provides that neither a buyer nor seller shall refuse to close a transaction based on the statutory requirement to establish such an escrow account. There are no penalties stated in the act for recalcitrant buyers or sellers who might refuse to close in spite of Section 5. Where the proceeds of sale are sufficient to satisfy a commercial real estate broker's lien, the lien is automatically extinguished and the broker is obliged to provide a release of its lien. If, however, the proceeds of sale are insufficient to satisfy all liens, then no escrow is required and, presumably, the sale may proceed, but subject to the lien. Just like a mortgage lender, brokers are cautioned to make sure that the property has sufficient equity to support payment of all prior debts for which security is granted, and the commercial real estate broker's lien.

ENFORCEMENT

To enforce a commercial real estate broker's lien, the broker may file a complaint to foreclose the lien, and an affidavit that the claim of lien is recorded, in the circuit court for the county where the property is located. The broker must also name as defendants everyone having an interest in the property whose interest would be divested or impaired by foreclosure of the broker's lien. Broker lien foreclosure actions must be brought within one year after the date on which the broker's lien is recorded, or the lien will be null and void, and it cannot be re-filed. In successful foreclosure actions, the court may order sale of any interest in the property, or part thereof, and shall set a period of redemption of not more than four months. Presumably, the court may order a period of redemption shorter than four months. The court can also, in

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Subordination

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a lengthy foreclosure process that may inhibit a mortgagee from effecting certain cures. Foreclosure in some jurisdictions can take two or three years or more.

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its discretion, award costs to the broker, including reasonable attorneys' fees and prejudgment interest. But brokers beware; one of the main differences between the act and prior bills, was the addition of a provision

Co-Tenancy

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the amount of time depending on the types of remedy that the tenant may elect.

8. REMEDIES

A tenant's remedies for a co-tenancy violation fall into three categories. The first such remedy is rent abatement, where if a co-tenancy violation is not cured within the stated time period, the tenant has the right to pay a lesser rent for so long as the co-tenancy violation exists. The lesser rent is typically based on either a percentage of the fixed annual rent (usually 50%) or percentage rent only during the violation period. The second remedy for a co-tenancy violation is termination of the lease, but as this is an extreme remedy, landlords are loathe to grant it unless the co-tenancy violation continues for an extended period of time — at least six months, often a year, and even longer if the space is particularly large (such as a space occupied by Target, Home Depot or Wal-Mart). An operating co-tenancy provision will usually allow for rent abatement and termination (because rent abatement is not as drastic, a landlord will often permit a tenant to invoke that remedy

CONCLUSION

A mortgagee wants the right, after foreclosure, to maintain forever the marriage created between its defaulted borrower and its defaulted borrower's tenant. Moreover, mortgagees want the marriage continued on their own terms and are generally not willing to make a reciprocal vow. How-

that allows the court to order litigation costs and attorneys' fees against the broker, if a court determines a foreclosure action to be frivolous.

CONCLUSION

The Commercial Real Estate Broker's Lien Act is a powerful tool that commercial real estate brokers in Michigan have long sought to pro-

sooner than the termination remedy, often as soon as the violation occurs) The third remedy for a co-tenancy violation only arises if there is an opening co-tenancy violation, and allows the tenant to delay the opening and/or rent commencement date (although most tenants will also want to have the right to open, but with rent abatement as set forth above).

9. RETURN TO FULL RENT;

RECAPTURE

If a tenant elects rent abatement, the landlord will not want the tenant to be able to take advantage of the substitute rent provision for the remainder of the lease term. In such an instance, a landlord will typically require that if the co-tenancy violation is not cured within a certain period of time (typically one year) and the tenant has not terminated the lease within that time, then the tenant will have to return to paying full rent. The obligation to return to paying full rent is based on the theory that if the tenant is remaining in the shopping center despite the co-tenancy violation, it must believe that its store is doing well enough to warrant continuing at full rent. If the tenant does not want to return to full rent, then the landlord will usually insist on the right to recapture the premises.

ever, most tenants are entitled at least to some loving, honoring, and cherishing. Once the parties agree conceptually on the need for reciprocity in the relationship, tenants must read the marriage contract carefully, because some rain falls on every parade.



tect their right to be paid a commission. As noted above, the act will apply to written commission agreements signed after Oct. 5, 2010. And like any useful tool, it will only work well if used properly, and can, if misused, backfire against the broker.



10. REIMBURSEMENT

If either party terminates the lease due to a co-tenancy violation, the tenant will want to be reimbursed for its unamortized leasehold improvements (typically amortized on a straight-line basis over the initial term), since the termination was not due to an event within the tenant's control. However, reimbursement should only apply during the initial term of the lease, as that is the length of time on which the tenant based its original decision to enter into the lease. A landlord will want to avoid making any payment to the tenant, as the landlord will already have lost the rental income stream from the applicable lease.

CONCLUSION

In summary, while landlords may use whatever bargaining power they possess to avoid granting a co-tenancy provision in a retail lease, the circumstances may dictate that a deal will not get done without one, especially in the current economy. In such a case, the negotiation of the co-tenancy provision will raise several issues that both the landlord and tenant will need to address to arrive at a compromise that will satisfy both parties.



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