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## Broker's Commission Lien

Stephen Lasser · Tuesday, July 25th, 2017

In New York a real estate broker or salesperson can use a mechanics' lien to collect an unpaid commission after procuring a tenant for a commercial landlord pursuant to New York Lien Law § 10. This statutory right to file a mechanics' lien against a landlord's property was enacted in 1982 in order to address the growing problem of landlords refusing to pay commissions to brokers after a tenant was procured. As a result of New York Lien Law § 10, instead of proceeding straight to potentially costly litigation, a broker has the ability to file a mechanics' lien against the property (similar to a contractor or laborer), which makes it difficult for a landlord to sell or refinance the property without first paying the broker his or her hard earned commission. In addition, after the lien is filed the broker can commence a lawsuit to foreclose on the mechanics' lien and sell the property at auction to recoup the commission if the landlord remains uncooperative.

In order for a broker to file a mechanics' lien for an unpaid commission, the broker must have (i) procured a commercial tenant for the landlord, (ii) for a lease term of more than three years, and (iii) pursuant to a written brokerage agreement. The mechanics' lien must be filed with the County Clerk where the property is located within eight months *after* the brokerage services have been completed (i.e., a written lease has been executed), and then served upon the landlord within thirty days after its filing.

Because the purpose of a mechanics' lien is to impair title to another person's property, and it is filed by the broker without first obtaining a court order or permission, the filing of a mechanics' lien is a powerful remedy with potentially severe adverse consequences for the broker if not done correctly. As a result, a broker must be sure to follow the strict filing and service procedures set forth in the statute, must ensure that the contents of the lien are correct, and file the lien against the correct property. An incorrect filing will be defective, and the broker could be liable for damages if the filing clouds title to the wrong property and adversely affects an unrelated transaction. Thus, it is best practice for a broker seeking to file a mechanics' lien to consult with an attorney to ensure the lien is prepared, filed, and served properly.

Once a mechanics' lien has been filed against a landlord's property, the broker can use it as leverage to demand payment of the commission from the landlord. This can be done by sending the landlord a letter demanding payment of the commission and threatening to foreclose on the property if it is not received by a certain date. In addition, the recording of a mechanics' lien against the property will protect the broker's interest by making it difficult for the landlord to sell or refinance the property without satisfying the lien as part of the closing process.

In the event the landlord is uncooperative or refuses to pay the commission, the broker must foreclose on the lien within one year of its filing or renew it by filing a one year extension with the County Clerk pursuant to New York Lien Law § 19, otherwise the lien will lapse. By foreclosing on the property, the broker will eventually be able to sell the property at auction and recoup the commission if the property has sufficient equity. However, determining whether such equity exists can be a complex process dependent upon the number and order of creditors which must be paid first from the foreclosure proceeds before the broker gets paid his or her commission.

In order to determine the order in which creditors will be paid from the foreclosure proceeds, New York follows the “first in time, first in right” priority scheme, which means that in general any recorded judgments, liens and mortgages are fully paid at foreclosure in the order in which they are recorded against the property with the County Clerk. However, the mechanics’ lien is an exception to this rule since its priority is determined either by the date the lien is recorded against the property, or it “relates back” to the date of completion of the brokerage services or the commencement of construction to improve the property. In other words, a mechanics’ lien for an unpaid brokerage commission filed with the County Clerk within eight months after the date the brokerage services have been completed will take priority over and get paid ahead of other creditors and mortgages[i] that recorded their interests between the date of completion of the brokerage services and the recording of the mechanics’ lien.

In sum, a mechanics’ lien can be a cost-effective way for a commercial broker or salesperson to aggressively pursue a commission owed by a landlord via a lien foreclosure or by compelling payment as part of the closing process if the landlord tries to sell or refinance the property without paying the commission.

In New York, a mortgage containing specific “trust fund” language may maintain its priority over a subsequently recorded mechanics’ lien provided certain statutory requirements are strictly complied with by the mortgagee.

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