



Caveat Emptor: Why a buyer should beware of the seller's listing agreement

JOHN METZGER | REAL ESTATE TRENDS | SEP 16, 2014

Normally, in a commercial real estate sale, the Buyer does not pay too much attention to the commission arrangement between the Seller and its broker. Although the purchase contract typically contains representations identifying the brokers, and cross indemnities against brokerage claims, the Buyer does not usually obtain a copy of the Seller's listing agreement because the Seller is the party responsible for paying the commissions at the closing. However, a recent Florida case illustrates that, in a "short sale" scenario, a Buyer should always obtain and review a copy of the Seller's listing agreement as part of its due diligence.

In *J. Milton Dadeland, LLC v. Abala, Inc.* (39 Fla. L. Weekly D1602) (Fla.App. 3 Dist. 2014), the Appellate Court held that a commercial real estate broker may file a lien for its commission against the subject property **prior to** the closing of the sale, if the Seller's listing agreement contractually grants that right to the broker. The Appellate Court was faced with a situation where the broker was due a \$1.5 Million commission pursuant to its listing agreement. However, because a "short sale" was being orchestrated, there were no net proceeds payable to the Seller, and, thus, no funds available to pay the broker's commission. To protect its interests in advance of the closing, the broker filed a lien against the property.

From the reported facts of the case, it appears that the Buyer ultimately agreed to accept a \$500,000.00 reduction in the purchase price and took title subject to the broker's lien, thereby accepting the risk of whether or not the broker's lien was valid. After the closing, the Buyer then sued to extinguish the broker's lien, arguing that the Florida Commercial Real Estate Sales Commission Lien Act (the "Act") was the broker's exclusive remedy for recovery of any commission owing, and that the Act limited the broker's lien to any proceeds of the sale. Although the Court agreed that the Act did not create any lien rights against the subject real property itself, the Court nevertheless ruled that nothing prohibited the Seller from contractually agreeing to grant the broker lien rights in the property. In this case, the listing agreement did, in fact, contain such a provision.

AS PART OF ITS DUE DILIGENCE INVESTIGATIONS, THE BUYER SHOULD DEMAND A COPY OF THE SELLER'S LISTING AGREEMENT IN ORDER TO DETERMINE IF ANY CONTRACTUAL LIEN RIGHTS EXIST

In most commercial real estate closings, it is common practice to obtain a release at closing from the brokers, thereby confirming that all commissions due and owing are paid from the closing proceeds. However, when there are inadequate proceeds to pay the commissions owing, the closing can be stymied if the broker has contractual lien rights in its listing agreement and elects to exercise those rights in advance of the closing.

The lesson to be learned is that, as part of its due diligence investigations, the Buyer should demand a copy of the Seller's listing agreement in order to determine if any contractual lien rights exist, and should confirm that there are sufficient proceeds to satisfy any potential lien of the broker at the closing. If not, the Buyer may end up in the same unenviable position as *J. Milton Dadeland LLC* and not discover the problem until shortly before the closing, after substantial time and expense have already been invested in the transaction. This is an especially risky position when the Seller is in financial distress and a suit to recover damages would likely be a futile remedy.

IT IS LIKELY THE J. MILTON DADELAND LLC RULING WILL ENCOURAGE MORE COMMERCIAL BROKERS TO INCLUDE CONTRACTUAL LIEN RIGHTS AS PART OF THE "BOILERPLATE" IN THEIR LISTING AGREEMENTS

Moreover, the *J. Milton Dadeland* case demonstrates the potential risk for title agents when a broker's inchoate lien can unexpectedly appear in the "gap" prior to closing. While title agents are typically very careful about requiring releases of inchoate construction lien rights, broker's liens for unpaid commissions are relatively rare. Nonetheless, the *J. Milton Dadeland LLC* case will certainly give title agents pause for concern over inchoate broker lien rights, resulting in a more universal requirement that broker releases of lien be obtained in advance of the closing and held in escrow in exchange for payment from the closing proceeds.

It is likely the *J. Milton Dadeland LLC* ruling will encourage more commercial brokers to include contractual lien rights as part of the "boilerplate" in their listing agreements. As a result, Owners must be diligent to review the listing agreements to discover any such lien rights and to eliminate or limit the scope of those lien rights. Otherwise, the owner may find a broker's lien thwarting the closing if a dispute arises over the brokerage commission.

Likewise, commercial real estate brokers will need to decide which transactions (such as "short sale" transactions) contain the most risk of non-payment and insist that contractual lien rights be granted before accepting the listing. Otherwise, the broker, even though due a commission, may have no viable remedy in the event that there are insufficient closing proceeds to pay the commission.



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