Protect Your Right to an **Equitable Lien**

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A dispute has arisen about the seller paying your commission for securing the buyer. Have you taken the steps necessary to ensure that your right to an equitable lien will be fully enforceable?

Cases Interpreting A Broker's Right to an Equitable Lien

Equitable liens for brokers were created by the court in 1987 because the transaction never would have closed but for the efforts of the broker. An equitable lien, which does not get recorded, attaches to the property from the date the sales contract is signed and then, at closing, to the closing funds. In deciding whether or not to create an equitable lien, courts look at such factors as if there is any contractual provision in the listing agreement, sales contract or lease providing for such a lien, the custom and practice of the industry, and the conduct of the parties.

Courts have refined the parameters of an equitable lien over the years. For example, the New Jersey Supreme Court held that a broker was not entitled to an equitable lien on rents received by the buyer of property that had tenants procured by the broker where the commission agreement did not provide for a lien and the buyer did not assume responsibility to pay the commissions in the sales contract. In addition, the broker did not provide any evidence that it was the custom and practice regarding commercial leases for a broker to have any right to encumber rent payments after the closing.

Another court held that an equitable lien is valid against judgment creditors who record a lien after the equitable lien becomes effective. However, a broker's equitable lien is not superior to liens that were recorded before the date the equitable lien became effective. Another decision provided that a bona fide buyer takes title free of any equitable lien. A federal court also noted that a broker's equitable lien does not attach to the funds that the buyer will use to purchase the property.

Finally, a court recently held that a broker was not entitled to an equitable lien on funds at the closing where the funds had been released to a lender pursuant to a recorded mortgage. The court indicated that there was nothing in the listing agreement that the proceeds at the closing would be security for payment of the commission and that the lender was not unjustly enriched by having been paid at the closing.

Conclusion

As a result, in order to protect the right to an equitable lien, a broker should include in the listing agreement that the broker has a right to an equitable lien for the commission. Wording along the following lines is suggested:

> Owner agrees that Broker will have an equitable lien for Broker's commission on the property beginning when a sales contract is signed and then on the proceeds at the closing. If the property is leased, then Broker will have an equitable lien on rental payments for any commissions due to Broker and, if the property is then sold, on the proceeds at the closing for any commissions then due. If Owner sells the property, Owner will include in the sales contract that buyer will assume all obligations under this Agreement, it being agreed that this Agreement will be binding on Owner's successors and assigns.

Finally, where there is a possible dispute about the broker being paid its commission at the closing, it is recommended that the broker confirm in writing to the parties and whoever is closing title that the broker has an equitable lien on the proceeds and expects to be paid at the closing or, at the very least, that the commission will be held in escrow. If the commission is released to another party, whoever released the funds may be liable to pay the commission. ■

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