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Glenn D. Baker

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PROPERTY

Commercial Real Estate Broker Lien Act: Provide for Civil Actions to Enforce Liens of Commercial Real Estate Brokers

CODE SECTIONS: O.C.G.A. §§ 44-14-600 to -605 (new)
BILL NUMBER: HB 523
ACT NUMBER: 553
SUMMARY: The Act authorizes commercial real estate brokers to execute liens on commercial real estate arising out of a listing or any other agreement for the management, sale, or lease of commercial real estate. The Act permits real estate brokers to commence civil actions to enforce such liens and provides for the attachment of the liens, the recording of claims for the liens, and the method for providing notice of the liens. The Act provides for escrow accounts in connection with claims for liens, for pleadings relating to these matters, and for release or extinguishment of such liens.

EFFECTIVE DATE: July 1, 1993

History

A primary function of a commercial real estate broker is to locate potential tenants or buyers for commercial real estate leasing or purchasing agreements. In the case of a lease, the broker usually receives a monthly commission payment from the lessor as soon as the lessor receives the monthly rent from the tenant.¹ Previously, when the leased commercial real estate was sold and the property changed owners, if the owner refused to pay, the broker had no means of collecting his or her commission other than to sue. Often, the new owner would have to buy out the tenant's lease and pay off the lease. Because the new owner would feel that he had already paid a premium to the tenant, he would not consider providing the broker with any compensation.² The Act is the first legislation in Georgia to provide commercial real estate brokers with a lien to enforce their

1. Telephone Interview with Keith Hatcher, Lobbyist, Georgia Association of Realtors (May 7, 1993) [hereinafter Hatcher Interview].

2. *Id.*

commissions.³ At least four other states have enacted a similar law, but none is as strongly worded as the Georgia Act.⁴

HB 523

The Act amends Code section 44-14-8 by adding sections 44-15-600 to -605.⁵ This part contains provisions which create liens for commercial real estate brokers.⁶ Such liens will not have priority over prior recorded liens or liens for ad valorem taxes.⁷

The primary purpose for adopting the Act was “[t]o provide a way for . . . commercial real estate brokers to protect their commissions when they had brought leases to an owner [which] improved the value of the commercial building.”⁸

For purposes of the Act, commercial real estate is defined as:

any real estate other than real estate containing one to four residential units; real estate on which no buildings or structures are located and which is not zoned for nor available for commercial, multifamily, or retail use; or real estate classified as agricultural for tax assessment purposes. Commercial real estate shall not include single-family residential units such as condominiums, townhomes, mobile homes, or homes in a subdivision when sold, leased, or otherwise conveyed on a unit by unit basis even though these units may be a part of a larger building or parcel of real estate containing more than four residential units.⁹

To obtain a lien under the Act, the broker must not be an employee or “an independent contractor of another real estate broker.”¹⁰ In either case, there must be a listing agreement or “other agreement for the management, sale, or lease of” commercial real estate which is in writing, signed by the owner, “with written notice to the party whose property may be liened, if different from the parties to the agreement.”¹¹ If such an agreement exists with a seller, a broker may place a lien on the property if the broker or his or her employees provided licensed services which resulted in a buyer or tenant ready,

3. *Id.*

4. *Id.* The four other states to enact legislation which provides a lien for commercial real estate brokers are Illinois, Florida, Virginia, and New York. *Id.*

5. See O.C.G.A. §§ 44-14-600 to -605 (Supp. 1993).

6. *Id.*

7. *Id.* § 44-14-603 (Supp. 1993).

8. Letter from Rep. Roy E. Barnes, House District No. 33 (Apr. 28, 1993) [hereinafter Barnes Letter].

9. O.C.G.A. § 44-14-601(3) (Supp. 1993).

10. *Id.* § 44-14-602(a) (Supp. 1993).

11. *Id.* § 44-14-602(a)(1) (Supp. 1993).

willing, and able to enter, “and who actually enters into a purchase or lease” of such property, “upon terms acceptable to the owner.”¹² Alternatively, if the broker has a listing agreement with a prospective buyer or tenant in which the broker *represents* the buyer or tenant in a transaction as to the “purchase, lease, or other conveyance of real estate,” and if the broker becomes entitled to compensation, the broker may place a lien on the property according to the terms of the Act, upon written notice to the party whose property is to be liened.¹³

Under the Act, the lien will be effective and actually attach to the property as soon as the broker records a notice of lien in the county superior court in which the property is located.¹⁴ The notice should contain the name and license number of the broker, the name of the owner, a description of the property being liened on, and the amount of the lien.¹⁵ A copy of the notice must be forwarded to the owner of the commercial real estate via certified mail.¹⁶ Furthermore, the notice must state that “the broker has disclosed to all parties that a lien might be claimed under this part.”¹⁷

Generally, the broker will have ninety days from the time of the written agreement to record the lien.¹⁸ However, when the ninety day period begins depends on the type of transaction involved. If a lump sum payment is due the broker and he or she is not paid, the lien must be recorded “within 90 days after the tenant takes possession of the leased premises or the transaction procured by the broker is closed.”¹⁹ If the broker is to receive payments in installments, all or a portion of which are due after the conveyance of the property, the lien must be recorded “at any time subsequent to the conveyance,” but within ninety days of the date payment was due the broker and he or she was not paid.²⁰ If there is a written agreement in which a broker represents a prospective buyer or tenant in a purchase or lease of property, the lien will attach to the client’s interest in the purchase, lease, or conveyance, upon the recording of notice of a lien “within 90 days after the later of purchase, lease, or other conveyance or transfer to the buyer or tenant or the failure of the buyer or tenant to compensate the broker or to cause the broker to be compensated pursuant to its agreement.”²¹ If there is a written management agreement for an improved property,

12. *Id.* § 44-14-602(a)(2) (Supp. 1993).

13. *Id.* § 44-14-602(a)(3) (Supp. 1993) (emphasis added).

14. *Id.* § 44-14-602(b) (Supp. 1993).

15. *Id.* § 44-14-602(h) (Supp. 1993).

16. *Id.* § 44-14-602(i) (Supp. 1993).

17. *Id.* § 44-14-602(h) (Supp. 1993).

18. *Id.* § 44-14-602(c)-(g) (Supp. 1993).

19. *Id.* § 44-14-602(c) (Supp. 1993).

20. *Id.* § 44-14-602(d) (Supp. 1993).

21. *Id.* § 44-14-602(e) (Supp. 1993).

the lien must be recorded "within 90 days of the termination of the agreement."²² Finally, if the lien arises as a result of "an option to purchase or lease, the lien must be filed within 90 days of the date the transaction for which a commission or other fee is due or within 90 days of the date the transaction for sale, lease, or other conveyance is closed, whichever is later."²³

The Act provides that a broker may bring suit to enforce the recorded lien by filing a complaint in the superior court in the county where the property is located, along with a sworn affidavit which avers that the lien has been recorded.²⁴ If the broker is asserting a lien based upon an option to purchase or lease, the broker must file the complaint within six months of the recording, or the lien will extinguish.²⁵ Otherwise, the complaint must be filed within one year of the recording of the lien, or the lien will extinguish.²⁶

The complaint should include:

[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, a description of the property that is subject to the lien, and other facts necessary to state a claim for the payment of a commission, fee, or other compensation due the broker.²⁷

The prevailing party in any action commenced under the Act will be entitled to "costs and expenses of all proceedings . . . including reasonable attorney's fees actually incurred, costs, and prejudgment interest."²⁸ If there is more than one losing party, costs will be apportioned by the court.²⁹

The Act also provides for escrow accounts in connection with a broker's lien.³⁰ An escrow account will be established from the proceeds of a transaction or conveyance whenever a claim for a lien has been filed which otherwise would prevent the closing of the transaction or conveyance.³¹ When the broker releases the commercial real estate lien, the broker will have an "equitable lien" on the escrow funds, and

22. *Id.* § 44-14-602(f) (Supp. 1993).

23. *Id.* § 44-14-602(g) (Supp. 1993).

24. *Id.* § 44-14-602(j)(1) (Supp. 1993).

25. *Id.*

26. *Id.*

27. *Id.* § 44-14-602(j)(3) (Supp. 1993).

28. *Id.* § 44-14-602(k) (Supp. 1993).

29. *Id.*

30. *Id.* § 44-14-604 (Supp. 1993).

31. *Id.*

the escrow will "not be released until a resolution is reached and agreed to by all necessary parties or ordered by a court."³²

The Act also sets forth methods by which a lien may be extinguished.³³ If a condition occurs whereby the broker is precluded from receiving compensation under the terms of the written agreement, the lien will be extinguished.³⁴ In addition, if the owner of the property claims the lien and serves written demand on the broker, requiring either commencement of a suit to enforce the lien or the filing of an answer in a pending suit, the lien will be extinguished unless the broker commences the suit or files the answer within ninety days.³⁵ If the lien is paid or the broker fails to institute a suit within the time limits allowed, "the broker shall acknowledge satisfaction or release of the lien, in writing, on written demand of the owner within 30 days."³⁶

The broker may lose the right to file a lien if any of the parties who have an interest in the property³⁷ subject to lien can demonstrate one of two conditions: the lien was waived in writing by the broker or the owner gave a sworn written statement at a time when "the lien of record had not been previously canceled, dissolved, or expired" and that any compensation due or to become due was paid or waived in writing.³⁸

As introduced, HB 523 defined a "prospect" as someone who is a "prospective buyer or tenant."³⁹ This definition was modified by the House Committee on Judiciary in its substitute to HB 523. Rather than using the term "prospect" to identify a person who might be affected by the new Act, the House substituted the word "client," and utilized a much more specific definition for such a person.⁴⁰ "Client" is defined as "a person or entity having an interest in real property that has entered into a written brokerage agreement with a real estate broker relative to such property."⁴¹ Otherwise, the House Committee on Judiciary offered no other changes to the Act as originally introduced.

Also, the original version of HB 523 did not require that any notice of a broker's lien rights be provided to a prospective buyer or tenant until the time the lien was recorded.⁴² Several real estate closing lawyers

32. *Id.*

33. *Id.* § 44-14-605 (Supp. 1993).

34. *Id.* § 44-14-605(a) (Supp. 1993).

35. *Id.* § 44-14-605(b) (Supp. 1993).

36. *Id.* § 44-14-605(c) (Supp. 1993).

37. Such parties would include: the owner, the purchaser from owner, and the lender providing a loan secured by commercial real estate. *Id.* § 44-14-605(d) (Supp. 1993).

38. *Id.* § 44-14-605(d)(1)-(3) (Supp. 1993).

39. HB 523, as introduced, 1993 Ga. Gen. Assem.

40. HB 523 (HCS), 1993 Ga. Gen. Assem.

41. *Id.*

42. HB 523, as introduced, 1993 Ga. Gen. Assem.

and members of the Real Estate section of the Georgia Bar believed the lien right should be mentioned in the actual contract in order to provide notice.⁴³ The sponsors of the bill, however, believed that this would make the lien a part of the negotiation.⁴⁴ The Senate substitute to the bill did include a requirement that the broker provide notice of his or her lien right to a prospective buyer or tenant.⁴⁵ As enacted, the Act included this condition, but it does not require that such notice be included in the contract.⁴⁶

The Act does not state exactly when or how the broker is to provide the required notice.⁴⁷ That decision is apparently left to the broker's discretion.⁴⁸ The Georgia Association of Realtors believes it would be prudent of the broker to give notice as early as possible—either prior to, or at the time of, the contract.⁴⁹ The earlier the broker provides notice of his or her right of lien, the more likely the courts will be to enforce the lien.⁵⁰

Glenn D. Baker

43. Barnes Letter, *supra* note 8; Hatcher Interview, *supra* note 1.

44. Hatcher Interview, *supra* note 1. Mr. Hatcher and the Georgia Association of Realtors believe it would be unfair for a broker to be strong-armed into waiving his or her lien right as a part of a contract negotiation, when that right is the law of the state. *Id.*

45. HB 523 (SCSFA), 1993 Ga. Gen. Assem.

46. O.C.G.A. § 44-14-602(a) (Supp. 1993).

47. *See id.*; Hatcher Interview, *supra* note 1.

48. Hatcher Interview, *supra* note 1.

49. *Id.*

50. *Id.*