BETWEEN A ROCK & A HARD PLACE

BY JIM HOCHMAN

Perhaps you have found yourself in this particular situation.

You have listed a commercial property for sale, and the owner had confided that he is behind on mortgage payments, but he thinks the lender is willing to "work with him." To you, this signals a flexible and motivated seller, so you continue your marketing efforts and locate a user for the property who offers to buy it. Only then do you learn that the property may be "under water," in that the mortgage balance could exceed any sale price you could reasonably expect. You have choices, but they aren't all that attractive. The first option is to forge on to get a contract and hope the lender's position will soften and a short sale will eventually close. The second option would be to determine that the situation is impossible, and spend your time and efforts on other opportunities, and let this "impossible listing" lapse.

In Owen Wagener & Co., v. U.S. Bank, 287 Ill.App.3d 1045, 697 N.E.2d 902 (1st Dist., 1998), a reported Illinois case, the broker took a listing, brought in a buyer, and managed to broker a contract between the seller and a buyer that had been procured, but the contract was subject to the seller's lender's approval. Although this occurred in 1994 (more than two years after Illinois broker and lien rights), no broker lien was recorded based on the fully executed contract.

The bank refused to consent to a short sale, the seller refused to add funds at closing to pay off the mortgage in full, and the deal died. Foreclosure was commenced, and apparently eight months after the seller defaulted, a judgment was entered and a foreclosure sale was completed. The bank then received the title. What happened next is obvious to the seasoned broker: the bank, after taking title through a foreclosure sale, sold the property to the very prospect procured by the broker.

Owen Wagener & Company filed suit, claiming a fee in several different counts: pursuant to its listing; claiming a contract implied in fact; and claiming to be procuring cause (quantum meruit, Latin for as much as he deserves). The trial court dismissed the complaint and the appellate court affirmed, finding that the broker had no listing agreement with the bank, the bank never promised to pay a commission, the bank never accepted the broker's services, and the broker had no expectation of receiving its fee from the bank.

It is often said that "Hindsight is 20/20." Could the broker have done anything differently to save his commission? After all, the broker did market the property, he did find the buyer, and he did procure a signed contract – but the eventual seller was the bank, it wasn't the broker's client.

I have counseled my clients listing property with a pending foreclosure or the potential for foreclosure, to obtain the lender's assurance that if a commission is earned but sales proceeds are insufficient to pay the full fee, the lender will pay or supplement the commission. Some lenders (with owner consent) will agree to this. Others refuse. But from the facts set forth in the reported opinion, Owen Wagener & Company may have missed or overlooked a remedy, depending on the terms and conditions of his listing with his client, the owner/borrower. A question that should have been asked is, "Why didn't the broker record a notice of commercial broker lien upon execution of the initial contract between the owner and the buyer that had been procured?"

I recently handled a matter with very similar facts, and I represented both the seller's/listing broker and the buyer's broker. The property was "under water" although foreclosure had not yet commenced. Seller and buyer signed a sale contract, and I urged the brokers to immediately record a lien to secure the commission. In fact, if the seller gave a deed to the lender then under the terms of the listing agreement, a commission would be owed. They accepted my advice. As you might have

guessed, the seller then gave the property back to its lender in a deed in lieu of foreclosure, and the contract buyer quickly came to terms with the lender. Meanwhile, my client's lien, based on the exclusive sale listing and the Owner/Buyer contract, remained of record. We claimed the fee was earned when that contract was procured and signed by both parties.

Instead of a battle where the lender would have had to actually foreclose to clear title and erase the lien (which could have taken several months), I received a call from the bank's attorney, as preparer of the Notice of Lien. The bank's attorney recognized me as attorney for the listing broker. The bank's lawyer advised that the contract price had been slightly reduced, but the bank agreed to pay the broker's commission at the same rate, on the new price, so long as we provided a recordable release of lien at closing. We happily complied with a letter to the closing agent:

"When you are prepared to pay the sum of $[commission] to [lien claimant] in accordance with the attached invoice, you may deposit the enclosed Release of Lien into escrow and record same after payment of the commission. Wiring instructions are enclosed."

We lawyers learn from reported case law, brokers learn from their peers' experiences. Teamwork often leads to better results. It bears mention that one of my clients on the deal described above is an SIOR.

Is there a lesson to be learned? Of course: know your rights, and if you have broker lien rights, understand what that means and how to use this powerful remedy to protect the fee that you have earned, before a deed in lieu of foreclosure or a foreclosure could eliminate your right to a fee.

ABOUT THE AUTHOR

As Coman & Anderson's Real Estate Partner, Jim Hochman represents many commercial real estate brokerage firms, receivers, landlords, tenants, and real estate investors by assisting in commercial and residential real estate transactions. Prior to joining Coman & Anderson, Jim was Senior VP & Senior Counsel for CBRE for 22 years, representing CBRE in all aspects of real estate services. Jim can be reached at jahochman@arnstein.com.