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Post-Term Protection for Expired Listing Agreements

Welcome to my new quarterly column for the *SIOR Professional Report*. I hope to address legal issues which commercial real estate professionals encounter, and to offer my observations. Call these columns “Do’s and Don’ts,” or “Legal Lessons I Have Learned,” or “Topics of Current Interest.” The scope of this forum is broad, but its primary goal is to provide useful information to all of our readers.

The issue of post-term protection for expired listing agreements is surely one which fills the annals of case law. Commercial real estate brokers are well advised to spend time and effort on crafting (or negotiating) a provision in their listing agreements which will protect the broker’s right to a commission under the following circumstances: The listing term is ending, but a deal could still be completed somehow which started during the listing term, but will likely conclude after the listing term has expired.

First, define your “Protected Prospects” carefully – and broadly – so that you are permitted to register with the Seller or Landlord “all of those parties to whom the Property was submitted during the term.” Don’t limit this group by requiring that the prospects be procured by you, or that you showed the Property to the prospect.

Second, expand the protected list with the characterization “or an affiliate, subsidiary, or other entity formed by or related to the Prospect.” Most buyers of commercial properties these days are counseled to hold title to the property in a single asset entity, one which may be named and formed just days before closing.


Next, if your listing agreement is for sale and lease, make sure your post term protection covers both. Some deals start as a lease but become a sale. Others start as a sale but become a lease.

Allow a reasonable post term protection period in which negotiations may resume, continue, or commence and thereafter continue leading to consummation of the sale or lease of the property. Note that you will choose a finite period for negotiations to start or resume, but take special care to word your provision so that your right to the fee continues “so long as negotiations continue leading to sale or lease.” Experience shows that if you negotiate a flat period of 90 days, the lease might not be signed until day 91 or later. Closings can be delayed for reasons beyond your control (e.g. financing issues, environmental due diligence), so don’t accept an outside or “Drop Dead” date.

Take care to register your prospects timely (usually within a short period after expiration of the term), and don’t snooze through that period, or fall for the old line “the listing extension is in the mail,” and fail to register prospects, and thus allow your registration period and post term protection rights to lapse.

You must send your registration letter by a medium where you can prove both sending and receipt, such as: (i) certified mail, return receipt requested; (ii) overnight mail with a reputable service; or (iii) fax or e-mail with confirmation of transmission and receipt. I litigated two cases recently. In one, the registration letter was sent by regular mail, leading to the usual swearing contest of “I sent it,” vs. “I never received it.” In the other case, the broker sent the registration letter by certified mail and fax – and the issue was not disputed.

I do not recommend that your registration letter have an acceptance line for the owner. You should have the right to register certain defined prospects (and their related entities). Don’t tempt fate with an owner acceptance line. The owner may refuse to sign or dispute whether all registered parties are qualified prospects. Remember that if your listing is ending, and you will be replaced by a new listing broker, there could be resistance to excluded parties in the new listing. You and the owner may end your term cordially (“we can still be friends”), but the owner’s head has been turned by his new listing broker. You need to protect your rights to harvest the fruit from the seeds you have sown.

Every broker’s listing should reflect his own business and legal terms, and different listing assignments may merit more or less post term protection. However, the side bar to this column offers specimen post term protection language for your consideration. 

EXPIRATION/ TERMINATION PROVISION

Owner agrees to pay Broker a commission computed in accordance with the terms of Exhibit A if within ___ days of the expiration or termination of the Term, either Owner sells or leases the Property to, or Owner executes a contract for the sale or lease of the Property with, or negotiations for such a transaction either continue, resume, or commence and thereafter continue leading to a sale or lease of the Property to a Registered Prospect as defined below. A Registered Prospect is any party or entity formed by such a party, or employer or subsidiary or affiliate of such party whose name appears on a list of Registered Prospects provided by Broker to Owner within ___ days of expiration of the Term of or termination of this Agreement. If Broker fails to provide Owner a list of registered Prospects within ___ days of the expiration of or termination of the Term, Broker shall have no further right to commission under the terms of this Section.