

STEP BY STEP GUIDELINES UNDER THE NEW COMMERCIAL BROKER'S LIEN ACT

After years of relentless effort and overcoming numerous obstacles, commercial REALTORS® in Michigan have a commercial broker's lien law. Now we all have to learn how to take full advantage of its benefits.

The new commercial broker's lien law applies to "commercial real estate" which is defined in the statute to include all property EXCEPT: (1) vacant land zoned residential; (2) land with four or fewer residences; or (3) single family subdivisions/condominium projects.

Under Michigan license law, it is the licensed broker who enters into a commission agreement and, likewise, under the commercial broker's lien law, it is the licensed broker who is entitled to a lien. Associate brokers and salespersons do not have lien rights in their own name. Moreover, a broker is not entitled to a lien in the absence of a written commission agreement with the seller/landlord or the buyer/tenant. A cooperating broker working through a listing broker's offer of cooperation does not have lien rights.

The new commercial broker's lien law has a number of time deadlines that must be remembered. For example, as a general rule, a claim of lien must be recorded prior to closing on a sale and a lawsuit must be filed to enforce that lien within one (1) year after recording. Within ten (10) days after recording a lien, a broker must provide a copy of the lien to the owner via registered or certified mail, return receipt requested. The time deadlines will be strictly enforced – there will be no do-overs.

All of the forms necessary to comply with the commercial broker's lien law are provided by statute. REALTORS® should not customize the statutory forms or try to improve them. The steps outlined for claiming and enforcing a lien in this article are based

upon the strict use of the statutory forms. While the commercial broker's lien law only requires that the forms used by REALTORS® be "substantially" in the form set forth in the statute, the statutory forms should not be modified in any form without guidance from someone who thoroughly understands all of the working parts of the commercial broker's lien law.

The lien process varies slightly depending on the nature of the transaction at hand. In this article, we will walk through the process for a number of different types of real estate transactions.

Traditional Sale Transactions – Listing Broker

Where a listing broker has earned a commission on the sale of commercial property, the listing broker must record a claim of lien AFTER the purchase agreement is signed, but BEFORE the actual closing. The claim of lien should be recorded as soon as the ink dries on the purchase agreement. The listing broker should record a lien for the full amount of the commission earned under the listing agreement, even if the listing broker, in turn, owes a part of that commission to a cooperating broker.

Prior to recording a claim of lien, the broker must complete the claim of lien form (Exhibit 1) and attach to that form the legal description of the property and a copy of the executed written listing agreement. Again, there must be a written commission agreement in order to be able to claim a lien.

The claim of lien should then be recorded with the register of deeds of the county in which the commercial property is located. Again, the claim of lien must be recorded prior to the closing on the sale of the property. Once the purchaser takes title to the property, the listing broker no longer has the right to file a claim of lien.

After the lien is recorded, the listing broker should provide a copy of the lien to the seller and to the person who signed the commission agreement (usually the same party). Copies must be provided within ten (10) days of the recording of the lien and must be sent via registered or certified mail, return receipt requested. The broker may also want to provide a copy to the buyer so that the buyer is aware of the lien.

After the lien is recorded, the listing broker has one (1) year to file a lawsuit to enforce the lien. Once the one-year period has run, if no lawsuit has been filed, then the lien is no longer valid.

Traditional Sale Transaction – Buyer’s Brokers

A buyer’s broker has lien rights only if the buyer’s agency agreement obligates the buyer to pay a commission. If a buyer’s broker’s right to a commission is through the listing broker’s offer of cooperation and compensation, then the buyer’s broker’s right to recover is through the enforcement of its contractual agreement with the listing broker. In this situation, the buyer’s broker has no contractual right to a commission from the seller (or the buyer) and, therefore, has no lien rights.

Where the buyer IS obligated to pay its buyer’s broker a commission, then the buyer’s broker must file a lien after the purchase agreement is signed, but before the actual closing. The buyer’s broker must complete the lien form and attach the legal description of the property and a copy of the buyer’s agency agreement to the claim of lien form before it is recorded. The buyer’s broker must provide a copy of the lien to the owner and to the person who signed the commission agreement via registered or certified mail, return receipt requested, within ten (10) days of the recording of the lien.

A buyer's broker must file a lawsuit to enforce its lien within one (1) year after the lien is recorded or after the buyer has taken title, whichever occurred later.

Leases

Assume that a broker enters into a written commission agreement with a landlord obligating the landlord to pay a commission if a tenant is found for the landlord's commercial building. The broker may record a claim of lien once a tenant is located and a lease is signed. Similarly, if a broker has a written commission agreement with a tenant obligating the tenant to pay a commission if space is found, the broker may record a claim of lien once space is located and a lease is signed. In either event, the broker must complete and record the claim of lien form within sixty (60) days after the lease is signed. Both the legal description of the property and a copy of the written commission agreement must be attached to the claim of lien before it is recorded with the appropriate register of deeds.

When filling out the claim of lien form, if the entire leasing commission is owed immediately, the broker should check box 5(a). If the written commission agreement entitles the broker to an additional commission if the lease is extended or the leased space is expanded, the broker should check box 5(b). If the written commission agreement provides that the broker is entitled to additional commission if the tenant exercises an option to purchase the property, then the broker should check box 5(c). Note that more than one of the subparagraphs in paragraph 5 of the claim of lien form may be applicable. A copy of the claim of lien should be mailed to both the owner of the property and the party who signed the commission agreement within ten (10) days of its recording. The copy must be sent via registered or certified mail, return receipt requested.

If the commission is immediately due and owing (and is not contingent upon the happening of some future event), then the broker must file a lawsuit within one (1) year of the later of the following to occur: (a) the claim of lien is recorded; and (b) the tenant takes possession. If the broker is entitled to a commission if the lease is extended or leased space is expanded, then the broker must file a lawsuit to enforce its lien within one (1) year after “the extension or modification of the existing lease is confirmed in writing.” If the commission obligation occurs at the time an option to purchase is exercised, then the lawsuit must be filed within one (1) year after the property is transferred.

Options

If a broker has a written agreement that entitles it to a commission in the event that an option to purchase is exercised, the broker must record a claim of lien AFTER the option to purchase is signed, but BEFORE the option is exercised. If the option to purchase is contained in a lease, the claim of lien would be recorded after the signing of the lease. The broker should check box 5(c) on the claim of lien form and attach the legal description and a copy of the commission agreement to the form before it is recorded. A copy of the claim of lien must be sent via registered or certified mail (return receipt requested) to the owner of the property and to the person who signed the commission agreement within ten (10) days after the lien is recorded. If the option is exercised, the broker has one (1) year from the date the property is transferred to file a lawsuit to enforce its lien.

Installment Payments

In the case of seller-financed transactions, the parties may agree that the broker’s commission will be paid in installments – *i.e.*, the broker will be paid over time as the seller gets paid. In this situation, the broker must record a lien within sixty (60) days after

closing and the lien is only effective to the extent the buyer still owes the seller money. The broker must provide a copy of the claim of lien to both the owner of the property and the person who signed the commission agreement within ten (10) days after the lien is recorded via registered or certified mail, return receipt requested. In this instance, the assumption is that the buyer will take steps to make certain the broker is paid so that the lien on the buyer's property is satisfied.

Don't Ignore Notices

Over the years, one of the primary objections to the commercial broker's lien law was a concern that REALTORS® would record liens with registers of deeds and then would forget about them, whether they were paid or not. This would result in the clouding of titles when a property was to be later sold or financed. In order to overcome this objection, provisions were placed in the commercial broker's lien law to make certain that claims of lien did not unnecessarily cloud titles to property. These provisions are designed to permit a property owner to cause a broker to either enforce its lien or release it. There are also provisions which require a broker to release its lien after its purpose has been served.

There are a number of ways that a property owner can force a broker to take affirmative action or lose its lien rights forever. Accordingly, brokers who receive demand notices from property owners should contact their attorney immediately.

For example, if a broker has recorded a lien, an owner may serve notice on the broker, demanding that the broker file a lawsuit to enforce its lien. If the broker does not file such a lawsuit within thirty (30) days after receiving such a demand, the broker's lien rights are lost.

A broker who receives a notice of intent to lease has ten (10) days to record a claim of lien or lose its lien rights.

If a lien is no longer valid or has been paid, the broker must file a release of lien within ten (10) days after receiving a written demand to do so (Exhibit 2). If a claim of lien has been partially paid, the broker must file a partial satisfaction and release of lien form within five (5) days after receiving a written demand to do so (Exhibit 3).

Litigation to Enforce Liens

If a lawsuit is filed to enforce a lien, the court may order a foreclosure sale of the property to satisfy the lien. In its foreclosure order, the court will set the redemption period, which cannot exceed four (4) months. The court may, in its discretion, award costs and reasonable attorneys' fees to a prevailing broker or, if it determines that the lien was invalid and the case was frivolous, to the property owner.

Conclusion

While this article is intended to summarize the steps that commercial brokers should take in order to protect their lien rights, it is of course not intended as a substitute for legal representation. The commercial broker's lien statute was modeled in part after the construction lien statute. Both statutes are intended as efficient means of protecting and pursuing well-earned compensation. On the other hand, both statutes were drafted with input from people who were very concerned about keeping the real estate records from getting muddled. The trade-off was to put in place specific steps and procedures that must be followed and time deadlines that must be met in order for a lien to be valid. Brokers are strongly urged to seek the assistance of counsel to make sure that all of the steps are correctly followed so that they don't lose their lien rights.

EXHIBIT 1

CLAIM OF LIEN

_____))
[Name of Broker],) Claim of Commercial Real Estate
) Broker's Lien
Broker-Claimant)
) In the Office of the Register
) of Deeds of _____
) County, Michigan

The broker-claimant named above, whose real estate license number is _____, and whose business address is _____, Michigan, claims a commercial real estate broker's lien under section 4 of the commercial real estate broker's lien act and states:

1. The real property ("property") against which the lien is claimed is located at _____, _____ County, Michigan, **and is legally described on Exhibit A** attached to this claim. The record owner ("owner") of the property is _____ .

2. On _____, 20____, the broker-claimant entered into a written agreement with the (choose one) _____ owner _____ buyer obligating the (choose one) _____ owner _____ buyer to pay a commission to the broker-claimant. **A legible copy of the agreement is attached as Exhibit B.**

3. The broker-claimant, by its agents, provided services for the (choose one) _____ owner _____ buyer and is in compliance with the broker-claimant's obligations under the written agreement referred to in paragraph 2.

4. The amount of the commission or fee to which the broker-claimant is entitled is _____.

5. Choose one or more:

_____ (a) The broker-claimant now claims a lien on the property and all improvements to the property and against all persons interested in the property in the amount of \$_____.

_____ (b) The broker-claimant claims a potential future lien on the property and all improvements to the property and against all persons interested in the property if there is a lease extension or expansion.

_____ (c) The broker-claimant claims a potential future lien on the property and all improvements to the property and against all persons interested in the property if an option to purchase the property is exercised. This lien is only effective if the property is conveyed pursuant to the option to purchase; it may otherwise be disregarded.

6. The information contained in this claim of lien is true and accurate to the best knowledge of the signer.

[Name of Broker]

By: _____

Its: Authorized Agent

Signed and sworn to before me in _____ County, Michigan, on _____, 20____.

_____, Notary Public

Acting in _____ County, _____
My commission expires: _____

Note: This claim of lien is void and unenforceable unless recorded with the register of deeds of the county in which the real estate is located, as required by the commercial real estate broker's lien act.

Prepared By and When Recorded Return to:

EXHIBIT A

[INSERT LEGAL DESCRIPTION]

EXHIBIT B

[INSERT COPY OF COMMISSION AGREEMENT]

EXHIBIT 2

RELEASE OF LIEN

The undersigned is the claimant under a claim of commercial real estate broker's lien recorded on _____, 20__ in the office of the register of deeds of _____ County, Michigan, at Liber _____, Page _____, or at _____ [enter other unique identifying numbers]. The undersigned releases the lien on the following described property:

See attached Exhibit A.

[Name of Broker-Claimant]

By: _____

Its: Authorized Agent

Signed and sworn to before me in _____ County, Michigan, on _____, 20__.

_____, Notary Public
_____ County, _____
Acting in _____ County, _____
My commission expires: _____

Prepared By and When Recorded Return to:

EXHIBIT A

[INSERT LEGAL DESCRIPTION]

EXHIBIT 3

PARTIAL SATISFACTION AND RELEASE OF LIEN

The claimant named below is the claimant under a claim of commercial real estate broker's lien recorded on _____, 20__ in the office of the register of deeds of _____ County, Michigan, at Liber _____, Page _____ on the following described property:

See attached Exhibit A.

The claimant has been paid \$ _____, a portion of the amount of the lien. The remaining amount of the lien is \$ _____.

Therefore, the claimant, for and in consideration of the payment, waives, to the extent of the payment, the claim of or right to a lien under the commercial real estate broker's lien act against the property described above, the building or buildings on the property, and the tenant spaces in the building or buildings.

[Name of Broker-Claimant]

By: _____

Its: Authorized Agent

_____, Notary Public

County, _____
Acting in _____ County, _____
My commission expires: _____

Prepared By and When Recorded Return to:

EXHIBIT A

[INSERT LEGAL DESCRIPTION]