

## Featured EDITORIAL

# WHAT RIGHTS DO REAL ESTATE BROKERS HAVE TO ASSERT A LIEN TO PROTECT THEIR COMMISSIONS?

by Barry S. Goodman, Esq.

The closing is fast approaching and the sellers have just indicated that they do not believe you have earned a commission. As a result, even though you have an executed listing agreement, the sellers have instructed the title agent or attorney who will handle the closing not to pay your commission or place any money in escrow with regard to your commission. What rights do you, as a licensed real estate broker, have to place a lien on the closing proceeds so that your commission will be paid or, at the very least, put in escrow until the dispute has been resolved?

### General Background Concerning Liens

The general rule in most states, including New Jersey, is that a listing agreement between the broker and seller is for personal services and does not "run with the land or, more appropriately, with title to the land."<sup>1</sup> In fact, brokers in New Jersey and virtually all other states have no statutory right to file a lien to ensure that their commission is paid.<sup>2</sup>

Courts in New Jersey therefore have focused on whether or not brokers have an equitable lien on the property or the proceeds from the sale of the property to protect their commissions. An equitable lien is "a right of a special nature in a fund (or property) and constitutes a charge or encumbrance upon the fund" or property.<sup>3</sup> The New Jersey Supreme Court has explained that, generally, "(the) theory of equitable liens has its ultimate foundation...in contracts, express or implied, which either

deal with or in some manner relate to specific property, such as a tract of land..."<sup>4</sup>

In determining whether or not a broker has the right to assert an equitable lien, the overriding issue is whether or not the parties intended for the broker to have such a lien. In rendering their decision, Courts will look at such factors as whether or not 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, the conduct of the parties (including correspondence between the parties), etc.

### Equitable Liens On The Property and Sales Proceeds

The key case in New Jersey dealing with a broker's right to an equitable lien to protect its commission is *Cohen v. Estate of Sheridan*.<sup>5</sup> In *Cohen*, liens on the property exceeded the purchase price. The buyers therefore filed suit seeking a declaration by the Court that the commissions due to the listing and selling brokers were not a lien on the property that had to be satisfied so that the buyers could receive clear title. The Court rejected the buyers' position and held that the brokers had an equitable lien on the property until closing and on the funds due to the seller at closing, stating that the broker is entitled to the protection of an equitable lien on the property of the seller until closing (to protect against any unscrupulous activity on the part of the seller) and, at closing, to an equitable lien on the fund due to the seller.<sup>6</sup>

### Equitable Liens Regarding Leases

Subsequent to *Cohen*, the New Jersey Supreme Court was faced with whether or not a broker had the right to assert an equitable lien on rent payments due under commercial leases for a shopping center. The case, *VRG Corp. v. GKN Realty Corp.*,<sup>7</sup> involved a commission agreement that provided for the broker, VRG, to be paid its commission in an amount "equal to six (6%) percent of each monthly gross base rental payment under the initial term of such lease." When the shopping center was sold, the seller filed for bankruptcy and the new owner, GKN, refused to pay any further commissions to VRG.

The Court examined several factors to determine whether or not the parties intended for the broker to have an equitable lien on the rent payments. For example, the Court found that the commission agreement did not provide for such a lien but only provided that the broker would be paid at the rate of six (6%) percent of the rental payments. In addition, the broker had demanded that the remainder of its commission be paid at the closing, which undermined its claim that it believed that it had an equitable lien on the rent payments. Furthermore, the sales contract did not provide for GKN to assume responsibility for payment of the commissions. Finally, there was no evidence that it was customary practice regarding commercial leases for the broker to have a right to encumber rent

## What Rights Do Brokers Have

continued from page 6

payments. As a result, the Court held that VRG had no right to an equitable lien on the rent payments.

### Other Issues Relating to Brokers' Liens

Other cases have refined the scope of a broker's right to an equitable lien. In one case, it was held that an equitable lien under a listing agreement is valid against subsequent judgment creditors.<sup>8</sup> Another Court held that a broker's equitable lien is not superior to previously recorded liens, including by way of example, mortgages and mechanics' liens.<sup>9</sup> Similarly, a Court held that a bonafide purchaser who perfects title to the property takes the title free of any equitable lien by the broker.<sup>10</sup> A federal court also noted that a broker's equitable lien does not attach to the funds that the buyer ultimately will use to purchase the home.<sup>11</sup>

### Conclusion

Thus, absent a showing that the parties intended otherwise, real estate brokers in sales transactions have an equitable lien on the property until closing and on the proceeds to be paid to the sellers at the closing. Similarly, brokers may have an equitable lien on rent proceeds if the broker can demonstrate that the parties intended that there should be such a lien.

As a result, where an attorney or title agent who is closing the title fails to pay the broker's commission from the closing proceeds (or put the money in escrow if there is a dispute), the person handling the closing (and his/her company or firm) may be liable for the commission, especially where the broker has provided written notice of its right to an equitable lien on those proceeds. It therefore is in the best interest of the person handling the closing to place any amount in dispute concerning the commission in escrow pending resolution of the dispute.

It therefore is recommended that listing agreements provide in clear and unambiguous terms that the broker has

an equitable lien on the property to be sold and on the proceeds from the sale of the property and/or the rent payments, which will be paid before the seller/landlord receives any money. Brokers may want to provide written notice to the attorney or title agent closing title of their right to an equitable lien, and certainly should provide such a notice if there is any question whether or not the sellers intend to pay their commission.



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1. Barlowe Burke, Jr., Law of Real Estate Brokers § 6.2, at 6:8 n1 (2d ed. 1992).
2. See In re L.D. Patella Construction Corp., 114 B.R. 53, 58-59 (Bkcty. D.N.J. 1990). See also N.J.S.A. 46:16-1 (statute lists all documents relating to a real estate closing, including sales contracts, that are recordable but does not include listing agreements); N.J.S.A. 46:16-2 (instruments affecting title to real estate are recordable).
3. In re Hoffman, 63 N.J. 69, 77 (1973).
4. VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 546 (1994), quoting John N. Pomeroy, Treatise on Equity Jurisprudence § 1234, at 695 (Spencer W. Symons 5th ed. 1941).
5. 218 N.J. Super. 565 (Ch. Div. 1987).
6. d. at 570 (citation omitted).
7. 135 N.J. 546 (1994).
8. In re L.D. Patella Construction Corp., 114 B.R. 53, 58 (Bkcty. D.N.J. 1990).
9. Burke v. Hoffman, 28 N.J. 467 (1958).
10. Bridge v. Midlantic National Bank, 18 F.3d 195 (3d Cir. 1994).
11. Batt v. Scully, 168 B.R. 541, 550 (D.N.J. 1994). No reported New Jersey cases have dealt with a broker's right to assert an equitable lien where the broker is a buyer broker.

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