

Delaware Joins Other States in Permitting Commercial Real Estate Broker's Liens

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Regardless of your view of whether commercial real estate brokers need a right to impose a special lien against real estate, the time for debate on the subject is over in Delaware, as the Delaware Commercial Real Estate Broker's Lien Act became effective August 1, 2013. This new law gives brokers the ability to quickly place a lien on real estate for commissions – previously brokers had to sue for payment and attain a court judgment first. While Delaware waited longer than its two closest neighboring states to establish a statutory lien for commercial real estate brokers – Pennsylvania did so in 1998 and Maryland in 1994 – in certain respects the protections for brokers in Delaware are the broadest of the three.

The Delaware Commercial Real Estate Broker's Lien Act is codified in the Delaware Code as Title 25, Chapter 26, available at <http://delcode.delaware.gov/title25/c026/index.shtml> (I'll refer to it as the "Act"). Maryland's commercial real estate broker's lien statute applies only to leasing commissions, but similar to Pennsylvania's, Delaware's Act pertains to both sale and leasing transactions. Unlike Pennsylvania's law, the Act can also be used to enforce payments to a broker for "management" and other services for "conveyance or acquisition of commercial real estate." The "broker" claiming the lien must be an individual who holds a broker license from the Delaware Real Estate Commission and who is self-employed or employed directly or indirectly by a brokerage organization. The broker's agreement must have been signed on or after August 1, 2013 (or earlier only if the parties agree in writing). Delaware's definition of "commercial real estate" to which the Act applies includes any real estate with improvements other than one to four residential units; unimproved land zoned or available for commercial, manufacturing, industrial, retail or multi-family use; unimproved land of any zoning classification being purchased for development or subdivision other than land with four or fewer single-family residential lots; and even real estate used for agricultural purposes unless the purchaser is buying the property for the purpose of continuing agricultural use. This is broader than in Maryland (where the lien applies only to real estate with building floor space intended to be used by the tenant for non-residential use). Pennsylvania defines "commercial real estate" subject to a broker's lien more simply – any real estate other than real estate containing one to

four residential units or real estate zoned agricultural not subject to an agreement of sale contingent upon rezoning to non-agricultural uses. Delaware clarifies that its Act also applies to mixed-use real estate, including real estate with one to four residential units that also has another non-residential portion. The Act's lien cannot be imposed on residential condominiums, town homes, mobile homes or other homes sold or leased on a unit-by-unit basis even if part of a larger building with more than four residential units.

Unlike in Maryland and Pennsylvania, under the Act the "brokerage agreement" must meet certain requirements for the lien right to apply: it must state the amount or calculation of the broker's compensation; that it is a binding contract under state law; and identify the real estate by description or tax parcel number. This could be a stumbling block for brokers wishing to claim liens, so they should dust off their brokerage agreements to make sure they are in correct form.

The commercial broker's lien is established by recording the required form of affidavit and notice with the recorder of deeds in the county where the commercial real estate is located. To guard against spurious filings, the recording must be made by an attorney admitted to the Delaware bar. The lien must be recorded within 90 days of the failure to pay upon completion of the broker's duties (which means the performance of the duties of the broker per the brokerage agreement except for completing settlement) or the agreed-upon payment schedule. As in Pennsylvania, for selling brokers the lien has to be recorded prior to the actual conveyance of the real estate to the buyer; unlike Pennsylvania, there is no additional requirement of providing a notice of intent to claim a lien to the owner and buyer prior to the conveyance. A lien for a buyer's broker is instead filed after the deed of the commercial real estate is recorded and does not attach to the seller's interest in the property. The lien for tenant brokers attaches only after the signing of the new lease and only to the tenant's interest in the property.

Liens for leasing commissions due upon renewal of lease terms (which in my experience are the commissions least likely to be paid) do not need to be filed until before the end of the 90-day period following the failure to pay the required compensation.

The broker must send a copy of the affidavit and notice of broker's lien to the owner by certified mail, return receipt requested, or may use a process server for notice. There is no need

to commence a legal action to establish the lien, such as is the case in Maryland, unless the owner demands that the broker file suit in Delaware Superior Court; the lien is deemed released if the broker does not sue within 20 days of demand. The owner also has the right to release the lien from the real estate by depositing funds in escrow equal to the full amount stated in the notice of the lien plus 10%. The conditions for the release of such funds in escrow can be agreed upon in the brokerage agreement or otherwise; if not the disposition of the escrow is determined a court interpleader action.

The priority of the broker's lien (which attaches only to the commercial real estate that is the subject of the brokerage agreement) is based on when the notice of lien is recorded, except the lien is subordinate to and payable after all mortgages (whenever recorded), mechanics liens, other liens imposed or created by statute, and taxes, and similar liens of the federal government, state government and political subdivisions. The Act does put the broker's lien ahead of judgments subsequently entered against the owner.

Finally, the broker cannot waive its right to claim a broker's lien, under written agreement or otherwise, and the lien is effective only for a period of one year following the date of filing and during any active litigation regarding the lien. The broker can enforce the lien by filing a debt action in Superior Court.

Supporters of Delaware's Act have said that the Act will "level the playing field" for commercial brokers encountering last-minute pre-settlement pressure to re-negotiate their commissions. Only experience will tell if the Act achieves this goal, and in a way that does not unduly interfere with the sale and leasing of real estate.

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