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What to do when it's time to litigate over unpaid commission - by Michael Albano

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In my first article for the NEREJ (July 15-21, 2016: "Consider Revising Your Standard Listing Agreements to Include Arbitration Provisions"), I discussed the benefits of including an arbitration provision in commercial listing agreements. A subsequent article (Nov. 18-24, 2016: "Broker's Lien: What to Do When Your Commission is at Risk") discussed the timing and procedure to be followed when preparing a broker's lien pursuant to Connecticut law. In this article, I will discuss the procedure a broker might follow when a commission goes unpaid, the listing agreement does not contain an arbitration provision, and it is too late to file a broker's lien.

Suing the client is not necessarily the first or the best option. If a personal phone call or two to the client prove unproductive, a letter from an attorney (a "nasty gram," even when politely written) might do the trick. Such a letter would articulate what is due to the broker, attach copies of relevant documents, and outline what legal steps the broker might take if payment is not promptly made. Many clients come to the table when threatened with litigation. But should an attorney's letter prove ineffective, the broker might conclude that litigation in Superior Court must surely be the next step. But that may not necessarily be advisable. If the commission owed is under \$10,000, a broker should consider bringing a claim in small claims court. Although recovery is limited to \$5,000, the procedure is simpler and quicker than a lawsuit brought to the Superior Court. Thus, although a broker may recover less in small claims court, the savings in attorney's fees could more than make up for the loss (of course, a broker could recover those fees as part of a judgment in small claims or Superior Court if the listing agreement called for reimbursement of attorney's fees when the broker has to enforce the agreement in court).

Another alternative to filing a lawsuit in Superior Court is the simplest, but perhaps the most painful alternative: the broker does absolutely nothing. If the commission owed is too large to qualify for small claims court, but too small to justify the expense of a full-blown lawsuit in Superior Court, the broker could simply elect to write off the commission as a business loss – especially if the listing agreement does not provide for the recovery of attorney's fees. In my experience, this is often the alternative of choice when commissions under \$15,000 are at stake. Complicating this decision, however, is the fact that the outstanding commission is usually split between a broker and the agent personally involved in the transaction, as well as the fact that legal expenses are usually borne solely by the broker.

If the unpaid commission is for more than \$15,000, initiating a lawsuit may make sense because often merely the filing of a complaint will bring a reluctant or argumentative client to the negotiating table. But even before a lawsuit is officially initiated, a broker's attorney can file an application for the prejudgment remedy (PJR) of attachment. PJRs – which are granted after a probable cause hearing

– can secure a client's assets during the pendency of a lawsuit. The court will generally also schedule a pretrial conference with a judge whose goal is to encourage the parties to settle so the lawsuit can be removed from the court's docket. Depending on the skills of the judge and the willingness of the parties to negotiate, a dispute has a decent chance of settling at such a conference.

Even if the broker is not seeking a PJR, the court will schedule a pretrial settlement conference, but usually not before several months have passed and the client has responded to the complaint. If a settlement is not reached at that conference, additional conferences may be scheduled if settlement is at all feasible. If it is not, then the slow, inexorable, and expensive path to trial may be the broker's only option.

Remember, that even if the broker wins at trial and secures a judgment, the broker will only leave the courthouse with a piece of paper. Unless the client is willing to pay off the judgment fully and quickly – which often is not the case – the broker will need the assistance of its attorney to obtain information about the client's assets via any of a number of available post-judgment proceedings, which can include the client's deposition and the demand for a sworn statement of financial interests. Armed with this information, the attorney can obtain an execution on the client's bank accounts or wages, and/or can place a judgment lien on the client's real property, subject to certain statutory exemptions. Where a substantial commission is at issue and the client possesses real property with sufficient equity, the broker could bring a judgment lien foreclosure action. After the superior lien holders are paid off with the proceeds from the foreclosure sale, any remaining funds would be available to satisfy the broker's judgment lien.

Litigating over an unpaid commission can be a time-consuming, expensive proposition. As I have argued in a prior article, such time and expense can be avoided if brokers are careful to include arbitration provisions in their listing agreements. Absent such provisions, brokers can protect themselves by including an attorney's fees provision in their listing agreements and by filing, whenever possible, a broker's lien.

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