



Top ten 2012 real estate laws affecting commercial brokers

February 12, 2013 - Front Section

Now that 2013 is here it is important to be aware of the changes in the law for our industry. This is not a list about the best events from 2012, but, instead, a list that highlights the new legal landscape that you face as a commercial real estate professional in 2013. Being familiar with these laws, regulations and opinions may help you to better address your customer's / client's goals and make you money.

Medicare Tax of 3.8%

The Internal Revenue Code at 26 USC Â§1411 is first effective in 2013 and a tax will now be due at the rate of 3.8% on net investment income, inclusive of a passive business such as real estate rentals. However, certain real property professionals may be exempt from this tax pursuant to 26 USC Â§469 if they are able to demonstrate that they spent more than 750 hours working in rental real estate during the subject year as a principal, not an employee, coupled with certain additional qualifications. The takeaway is that real estate professionals who are greatly immersed in renting their holdings should consult with an advanced tax professional and structure their work schedule to avoid this tax as it can greatly impact the profitability of one's holdings.

Partial Eviction, Trivial

Interference & Rent Abatements

The Court of Appeals in *Eastside Exhibition Corp. v. 210 East 86th Street Corp.* reiterated that the remedy for a partial eviction is a full rent abatement before stating that a landlord's placement of cross-bracing between two steel support columns, which minimally impeded the flow of foot traffic and created a slight diminution in a waiting area, was not a partial eviction. Instead, the court held that a trivial interference only gives rise to actual damages to be determined under the circumstances. The takeaway is that a commercial tenant's right to an unbridged possessory interest in their leasehold is no longer absolute and trivial interference by the landlord is permissible without a windfall being bestowed upon the tenant in the form of rent being cancelled. A tenant should be mindful of defining a trivial interference in their lease agreement and identifying what degree of interference should give rise to a full rent abatement; meaning, what would interfere with their possessory interest to an extent that their purpose of the rental is undermined.

Prejudgment Interest in Breach of Contract Suit

The Court of Appeals in *J. D'Addario & Co., Inc. v. Embassy Industries, Inc.* clarified if a vendor was entitled to statutory prejudgment interest at 9% pursuant to CPLR Â§5001(a) when a purchaser defaulted by failing to appear at a closing while the contract of sale had a liquidated damages provision (a/k/a predetermined damages provision) that was the "sole remedy" and did not reference the CPLR section. The court suggested that a contractual clause expressly addressing statutory interest would have prevented the entire lawsuit and suggested that real estate professionals insert such a clause in their future contracts. Yet, the court found that the facts that the deposit was placed

in an interest-bearing account coupled with the "sole remedy" language resulted in an expressed intent by the parties to negate the statutory prejudgment interest default rule under principles of freedom of contract. The takeaway is to expressly state every aspect of your intent concerning statutory interest within a liquidated damages clause of a contract of sale and not leave holes in your contract to be governed by the default statutory rules.

Real Estate Broker's

Duty at an Open House

The Court of Appeals in *Douglas Elliman LLC v. Tretter* defined the scope of a real estate broker's fiduciary duty of undivided loyalty to its client when acting as an exclusive seller's agent.

The case involved a real estate broker suing for its commission in breach of contract and its client's counterclaim for breach of its fiduciary duties. The court held that the broker had no duty to refrain from offering to show other properties to buyers who the broker met while at an open house for its current client pursuant to the standard brokerage agreement utilized. However, the Court expressly stated that the parties were free to agree to any restrictions they desired, but given the absence of a restriction, a broker is free to cultivate other clients at its client's open houses. The takeaway is for sellers to insist that any and all non-compete language that they deem necessary to work with a broker be inserted in a fully executed brokerage agreement. Again, the Court of Appeals is talking in the nature of freedom of contract and basically provides that if you do not ask for a restriction on your broker's work with other clients, you will not get one by statute or regulation. While this case dealt with a residential brokerage agreement, the rules apply uniformly in a commercial setting.

Real Estate Broker's Due Diligence Report & Commissions

The Court of Appeals in *Georgia Malone & Co., Inc. v. Rieder* clarified when a real estate broker earns a commission by holding that merely creating due diligence reports for a buyer does not give rise to earning a brokerage commission. In fact, the case states that the procuring broker who utilized said reports in earning its commission does not owe a share of the commission in unjust enrichment (an equitable remedy) to another broker who created due diligence reports on the property that were utilized in the brokered deal. The takeaway is that absent being the procuring cause of a transaction, a real estate broker will find it difficult to claim a commission. Further, and more pertinently, real estate agents should guard their due diligence reports prepared for their clients by way of nondisclosure agreements to minimize the possibility that they will be cut out of the deal only to find a competitor utilizing their report in order to procure a purchaser on their sweat.

Purchaser's Burden in Vendor's Repudiation Damages Suit

The Court of Appeals in *Pesa v. Yoma Development Group, Inc.* emphatically declared that a purchaser has the burden to demonstrate that they were ready, willing and able to close in order to prevail in a damages lawsuit where they alleged that the vendor repudiated the contract of sale. The takeaway is that a purchaser should continue with their fulfillment of their contractual obligations in the face of a vendor's repudiation until such time as the purchaser can demonstrate through objective evidence that they were, in fact, ready, willing and able to close the transaction prior to bringing a suit for monetary damages.

Green Guides for Marketing

The Federal Trade Commission has promulgated regulations to help marketers avoid making environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. Â§45. These guides are especially important for developers, landlords and brokers promoting both the benefits of their buildings and compliance with certifications. The takeaway is

that we are leaving the Wild West in tagging a property as green. Instead, real estate professionals must look to third-parties, whether governmental or nonprofit, to verify their claims and meet objective standards that qualify both the building and those performing services thereon as being green. Moreover, construction contracts, contracts of sale and lease agreements should clearly designate the third-party source that is agreed upon to verify a claim that a building is green.

Government Induced Flooding and the Takings Clause

The United States Supreme Court in *Arkansas Game and Fish Com'n v. U.S.* held that there is no automatic rule that a government induced flooding of limited duration is exempt from the Takings Clause of the Fifth Amendment and that instead such a flooding may be compensable dependent on the facts of a given situation. The Supreme Court then laid forth factors relevant to the issue of compensation, including: Time; Degree to which the invasion is intended or is the foreseeable result of authorized government action; Character of the land at issue; Owner's reasonable investment-backed expectations regarding the land's use; and Severity of the interference. The takeaway is in the field of condemnation law and should give property owners security that they have rights to compensation in the face of government induced flooding. Therefore, property values in areas that are most likely to be disturbed by the government, such as those in the vicinity of a dam, should realize an increase in value.

LEED Real Property Tax Exemption

The Real Property Tax Law added a new Â§470 to authorize a municipal corporation to provide a real property tax exemption for improvements to real property meeting LEED certification standards for green buildings, the green building initiative's green globes rating system, the American National Standards Institute, or substantially equivalent standards for certification using a similar program for green buildings as determined by the municipal corporation. To qualify, the green construction must have commenced on or after January 1, 2013 and comply with the local law. Unfortunately, New York City had not yet opted into this exemption as of the date of this article, but certain local suburbs, such as Suffolk County, have. The takeaway though is not about the explicit exemption, but instead about how greatly green buildings have penetrated our industry to the extent that LEED certification is encouraged by the State through its taxing powers.

Dual Practice; Real Estate Broker and Law

In Opinion 933, the New York State Bar Association's Committee on Professional Ethics advised that a lawyer may conduct a law practice and a real estate brokerage business in the same office, and may advertise them together provided that the advertising is neither false nor misleading, but may not act as lawyer and broker in the same transaction. The takeaway is that the brick and mortar form in which a professional hangs his shingle is becoming less important in our digital world and instead, the professional's actions are what matters. The Opinion recognizes the need to consolidate space, but reasserts the longstanding rule that a real estate attorney cannot be motivated by the closing of a transaction in representing their client by way of the availability of a brokerage commission being paid to them at closing.

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