

SERVICING MANAGEMENT®

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Are You Obligated To Pay A Broker?

Servicers who believe that a broker's involvement in the foreclosure process cannot result in a commission should pay close attention to their agreements.

BY BRUCE BERGMAN

Brokers' commissions can accompany foreclosures, but under circumstances which need to be carefully understood. There is nuance here that can bedevil the unwary.

Although commissions may indeed be payable, that can come as a surprise to a lender or servicer who is unexpectedly charged with the responsibility of sending the broker a check. How that might happen - and how to avoid it - is part of the focus of this article.

Initially, there is what might be perceived as the easier part - things servicers understand well. Assuming the mortgage is held by an institution, when a person's home is in foreclosure, it is extremely unlikely that the action can be defeated. Almost invariably, the borrower is genuinely in default and will have to either reinstate (remit the arrears) or pay off the mortgage to solve the problem.

Because the availability of reinstatement depends either upon what the applicable law of a particular state may provide, or the language of the mortgage itself, whether reinstatement is a remedy may not be immediately discernible. The especially common form of mortgage in use throughout the country (the Fannie Mae/Freddie Mac version) does permit reinstatement through much

of the foreclosure process. So, most often, reinstatement will be allowable.

But that is accomplished by the borrower/property owner finding some funds - not selling the property - and should not involve the services of a real estate broker. (That is, except in the rare instance of a borrower engaging a broker to sell some other property as a source of the funds to reinstate the mortgage. But that has no bearing upon the issues here.)

Enter the broker

If reinstating the mortgage is essentially unrelated to any role of the real estate broker, payoff of the mortgage could readily have a direct relationship. To satisfy the mortgage - which is to pay it in full - the property owner will typically either refinance via a new mortgage or sell the property. Obviously, sale of the property is the most fertile arena for involvement of the real estate broker.

First, when an owner has defaulted upon a mortgage, there is typically some patent financial distress. This is often broader than merely missing a few mortgage payments, and it may be manifested in some combination of additional mortgages on the property, judgments and any variety of other liens.

While a foreclosure sale is designed to extinguish all these encumbrances, an arms-length or "regular" sale does not. If the aggregate amount of these sundry mortgages and judgments exceeds the market value of the property, even the most dedicated broker will be unable to bring about a sale. No buyer will want to become the owner of property burdened with a continuing responsibility to satisfy all these other interests. So, experienced brokers will immediately determine the status of title when contemplating sale of

a property enmeshed in foreclosure.

Next, a real estate broker most often needs some reasonable duration to find a purchaser. There are exceptions, of course, where a quick sale is necessary, but most often there is room to do the job properly.

The foreclosure situation, however, can impose severe time constraints. In non-judicial foreclosure states (which is just less than half the states in the country), the foreclosure process is rapid. Without a court's involvement, the advertising of sale requirements

can consume but a month or a few months. In those areas, the broker has a very limited period in which to succeed.

However, in judicial foreclosure states (such as New York, New Jersey and Florida), foreclosures can consume up to a year - and sometimes considerably longer. There is much less of a time problem for brokers there.

But in other judicial foreclosure states, the action might consume four or five months. So, time can, in fact, be a concern.

Lien versus title

Where all this becomes somewhat more obscure is the idea of engagement of a broker by the foreclosing lender or servicer seeking to maximize the return at the foreclosure sale. That notion seems askew, though, upon recognizing that the lender only has a lien on the property, not the title. Ownership of the property continues with the borrower - who is usually, but not always, the owner - until the moment a foreclosure sale is conducted. Before the foreclosure sale, while the borrower's title is in imminent danger of extinguishment, it remains where it is.

If the lender has no property to sell -



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and it doesn't - what might be the role of a real estate broker? The real estate professional could still represent the lender for one of two endeavors - neither of which is immediate ownership of the property.

Should a foreclosure action not be settled, the ultimate conclusion is a foreclosure sale. Either a third party buys the property at that sale - thereby ending the lender's involvement - or the lender itself becomes the purchaser, seeking then to re-sell the property to recoup its loss.

So, a broker could be the procuring cause of a contract to purchase the property from the lender if the lender becomes the successful bidder at the foreclosure sale. An alternative scenario prior to the foreclosure sale is conveyance of the mortgage position - assignment of the mortgage itself.

Not surprisingly, these circumstances sometimes yield commissions and sometimes do not. Actual cases where a broker was obliged to sue can be helpful in analyzing how to understand what can happen in this arena.

Successful bidder

Mindful of the possibility that a broker's involvement in a foreclosure case might generate a commission if a person to whom the property was shown by the broker becomes the successful bidder at a foreclosure sale, there was a case (in New York) where the commission was denied.

The court's view was that a broker employed by a purchaser earns a commission when he finds a ready, willing and able seller. Moreover, except when a broker enjoys the benefit of a special agreement, he does not automatically demonstrate a case for a commission simply because he initially called the property to the attention of the ultimate purchaser.

It was found that the broker did not bring together the minds of the buyer and seller resulting in the sale. Instead, the foreclosure sale, with its own terms of sale and for a price different than stated in the commission agreement between broker and purchaser, was an independent occurrence - not a sale for which the broker was the procuring cause.

Returning to the relationship between a broker and a lender, the latter understands that the foreclosure sale methodology is already in place and is intended to maximize bids for the property.

Statutes in the various states provide strict rules for how often the sale advertising must appear and which newspapers will print the legal ads. Real estate professionals who deal in such properties are among those who bid at these sales.

Find me a buyer

Knowing that prospective bidders will be generated in the normal course by the legal advertising process, lenders or servicers would not usually retain brokers to bring buyers to the sale. Instead, they would only look to a broker to obtain a buyer after the sale - when the lender was the successful bidder - or if the lender wanted no involvement in the eventual foreclosure sale process, but rather preferred to sell its lien position.

Could a broker still earn a commission arising directly from the foreclosure itself? Legal cases (again, from New York) enlighten the path.

In one instance, during the course of a foreclosure, the foreclosing plaintiff (it happened to be a bank) signed a letter-agreement prepared by the broker. The agreement stated that the broker would be due a defined commission for either the sale of the property or the assignment of the bank's mortgage to the broker's client or the client's nominee. The commission was to be due at the time of title closing if the deal entailed the sale of the property, or upon assignment of the mortgage if that was the form which eventuated.

A nominee of the broker's client did bid at the foreclosure sale and closed title. In rejecting the broker's commission demand, the bank understandably argued the agreement's meaning to be that a commission was earned only if the bank first obtained title through the foreclosure sale and only then sold it to the nominee of the broker's client.

Because the purchase followed a different scenario, the bank asserted that no commission could be due the broker.

But the court analyzed the agreement as a whole and concluded that its purpose was to be satisfactory liquidation of the bank's interest in the property rather than the design of the transaction which might lead to that result.

In addition, the court reasoned that because the brokerage agreement contemplated a possible assignment of the mortgage, it supported the idea that the bank's goal was to secure return of the loan proceeds rather than title to the property.

So, if the bank was committed to the broker wearing two hats - one as an as-

signee of a mortgage and another as an owner which could sell its title - then a foreclosure sale as the middle ground between these two positions had to be an alternative reasonably envisioned by the brokerage agreement. Surely, the lender was shocked by this result.

More court action

A broker was victorious in another case in which the broker's mutually signed letter agreement to the foreclosing bank stated that the broker was to be paid a commission for the sale of the property if and when title closed. The agreement also provided that the bank would make a loan to the purchaser to facilitate the sale, and would assign its bid to the broker's client (the purchaser) if the bank were the highest bidder at the foreclosure sale.

None of those eventualities occurred. Instead, the broker's client became the highest bidder at the foreclosure sale. Title did close, and the bank made the loan.

When the broker sued for his commission, the bank argued that payment of a commission was contingent upon the sale of the property from the bank to the broker's client. Because the broker's client was himself the highest bidder at the foreclosure sale, the type of sale contemplated by the agreement never occurred.

But the court disagreed, finding it apparent that the bank's main goal was to locate a purchaser and assure that the defaulted loan would be paid. That was achieved, and even though title to the purchaser traveled through the foreclosure sale rather than from the bank, the conclusion did not change. Then, too, the letter agreement granted a commission upon the closing of title.

In the absence of an express provision conditioning payment of a commission upon the identity of the seller, the broker's claim was upheld.

In the end, the problem for lenders and servicers is that they generally perceive the foreclosure process as the source of a purchaser, thereby assuming that a broker's involvement with that process is not the variety of participation which can earn a commission.

But it depends upon what the brokerage agreement says, precisely. Because this realm can be so technical, lenders and servicers may wish to have any broker's agreement relating to the foreclosure sale itself reviewed by counsel. Unexpected obligations may lurk here. **SM**