

CAN A BROKER EARN A COMMISSION AT A FORECLOSURE SALE?

By Bruce J. Bergman



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immediate ownership of the premises. There could be, as noted earlier, a contract to purchase the property from the lender, should the latter become the successful bidder at the foreclosure sale. It can be impractical to assure that this result will eventuate, but it is something which can be negotiated and accomplished, albeit somewhat more complex than can be readily discussed here. Because this conclusion tends to be infrequent, certainly in the residential sector, it is perhaps uneconomical to dwell upon it

further.

Another readily discernible alternative is sale of the mortgage position - that is, assignment of the mortgage. Because, however, this has limited value to a purchaser, unless it is being bought at a reasonable or, better yet, substantial discount, this is a subject best left to exploration on another occasion.

In the maelstrom of all the activity and confusion as the foreclosure sale approach possibility that a broker's involvement could lead to a claim that somehow there is entitlement to a commission if a person to whom the property was pointed out by the broker is eventually the successful bidder. One reason potential danger lurks in this area is because in some states, a

licensed real estate broker does not need a written commission agreement as a prerequisite to earning that commission. Rather, the broker has to be the procuring cause of the sale and then an oral agreement will suffice.

Although a scenario in which a broker would demand a commission from the foreclosing plaintiff seems comparatively remote, creativity where substantial sums of money may be involved can be quite remarkable. That this is nevertheless perhaps not a dilemma for lenders is comfortably highlighted by the decision in a case where the object of the commission was the foreclosure sale purchaser, not the foreclosing plaintiff.¹ Even though

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The immediate answer to the question offered by the title is "yes," although it won't so often happen that way. Foreclosing plaintiffs will rarely engage a broker to bring someone to an openly advertised judicial sale. What a lender might sometimes do is enter into a pre-foreclosure sale contract with someone who either promises to bid up to a certain price or pledges to buy the property from the lender when it is that lender who becomes the successful bidder. But there is another scenario when a commission is not available.

Lenders are aware that as the date of a foreclosure sale approaches, so too typically does the borrower's frenzy to find some resolution to the dilemma. Orders to show cause and bankruptcy filings, in addition to floods of desperate calls and correspondence, are among the frequent onslaughts. Far more welcome, though, is the intent to sell the property - certainly if it is sincere. That at least portends partial or full payment of the mortgage rather than contentious litigation.

Sometimes this apparent desire to sell emerges through a call from a real estate broker to the lender or lender's counsel seeking a price to purchase the premises. Surprisingly many people do not understand what lenders know well: the mortgagee is not the owner of the property. The lender has a lien on the property, but not the title. The ownership still remains with the borrower (who most often, of course, continues to be the owner) until such time as the hammer falls at the foreclosure auction sale. Prior to the sale, while the borrower's title is in imminent danger of being taken away, it stays precisely where it is.

Thus, the real estate broker, or anyone else who is interested, can negotiate with the lender for one of two things - neither of which is

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the decision emanates from New York, the point is well taken and it might quite properly serve as guidance in other states as well. At a minimum, it is instructive.

There, a broker had appraised a prospective purchaser about a property in foreclosure. The broker may indeed have performed considerable work in attempting to bring together the owner (who was being foreclosed upon) and the purchaser. Such efforts notwithstanding, eventually there was a foreclosure sale and that same prospective purchaser was the successful bidder. It was on that basis that the broker sought to impose the obligation to pay the commission upon that purchaser.

The court rejected the broker's contention, ruling that in the absence of an agreement to the contrary, a broker employed by a purchaser earns a commission when he finds a ready, willing and able seller. That didn't happen in this case. Except when a broker enjoys the benefit of a special agreement, he does not automatically, and without more, demonstrate a case for a commission simply because he initially called the property to the attention of the ultimate purchaser.

In this instance, the broker did not bring together the minds of the

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

If the purchaser could not have been liable for the commission in this case, it certainly seems to remove any obligation from the foreclosing plaintiff if the lender or servicer had been targeted for the broker's assault.

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The views expressed in the article are those of the author.

¹Garritano v. McNamara, N.Y.L.J., July 14, 1993, at 29, col. 3 (Sup. Ct., Suffolk Co., Luciano, J.)

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	A/80	1st-2nd's add 80 bps	9.30% #	180,180/360,240	80%	50%	2
B PROGRAM	B+	1st-2nd add 80 bps	10.05%	180,180/360,240	75%, 80% add 75 bps	80%	2
	B/360	1st - ONLY	11.99%, x	360	80%	45% HIGHER BY EXCEPTION	4
C PROGRAM	C	1st-2nd add 50 bps	12.99%	180/360,360	75%	50%	2
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