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The Commission Escrow Act and a New Tool for Brokers of Residential Real Estate

Too often, sellers or lessors of residential real property are unwilling to pay the commission due to the broker with whom they entered a valid and enforceable brokerage agreement. Currently, the only recourse available to an aggrieved broker is to commence an action against the seller or lessor, incurring costs and inconvenience. In August, Governor Patterson signed into law The Commission Escrow Act (the “Act”) which enhances the rights of licensed real estate brokers under brokerage agreements by adding a mechanism to enable a broker to require that a disputed commission amount be deposited into an escrow account.

Presently, NY Real Property Law §294-provides that a licensed real estate broker who has completed the services required under his or her brokerage agreement with a seller or lessor of residential real property may file an affidavit of entitlement to commission with the applicable county recording officer. Under the Act, if the seller or lessor has failed to pay the broker the commission due at closing, and the requirements of the Act have been met by the broker, the seller or lessor must place the lesser of (x) the net sales proceeds or (y) the amount of the unpaid portion of the commission into escrow with the recording office of the county in which the property is located. The money will remain in escrow until a judicial or stipulated resolution of any disputed claims is reached or until they are redistributed back to the seller or lessor.

To assure conformity with the Act, effective January 1, 2009, brokers are urged to comply with the following:

Underlying Requirements:

- The broker should file an affidavit of entitlement with the county recording office. As under the prior law, any broker who has completed services under a brokerage agreement should file an affidavit of entitlement to commission with the appropriate recording officer of the county in which the real property is located.
- The broker must serve seller or lessor. Within five (5) business days after filing the affidavit of entitlement, the broker must serve a copy of the affidavit upon the seller or lessor or its appointed attorney by registered or certified mail, return receipt requested or by personal delivery, to the address listed in the brokerage agreement. If there are multiple sellers or lessors, service upon one is sufficient

for compliance. If closing is to occur within five (5) days of the filing of the affidavit, the broker must serve the seller or lessor by personal delivery. *Failure to properly serve the seller or lessor results in the broker's forfeiture of rights under the Act.*

- The broker should also serve the attorney of the seller or lessor. If the seller or lessor is represented by an attorney and has provided the attorney's contact information to the broker prior to the broker filing its affidavit of entitlement, the broker must provide a copy of the affidavit to the seller's or lessor's attorney by either mail, fax, e-mail or personal delivery within five (5) days of the filing of the affidavit. However, failure to do so will not result in the forfeiture of the broker's rights under the Act.
- The brokerage agreement must include the necessary language. Brokers' rights under the Act are enforceable only if the below language appears in the brokerage agreement in conspicuous and bold type:

“At the time of closing, you may be required to deposit the broker's commission with the county clerk in the event that you do not pay the broker his or her commission as set forth herein. Your obligation to deposit the broker's commission with the county clerk may be waived by the broker.”

It is important to note here that while the current statute refers to a broker being able to file an affidavit of entitlement if he or she is entitled to a commission under a “written or oral” brokerage contract, this requirement of including specific notice of the availability of the escrow remedy clearly necessitates a written brokerage agreement. Brokers are urged to ensure that all agreements be in writing and include the necessary statutory language.

Effect of Compliance with the Underlying Requirements:

- The seller or lessor may not withhold commission. If an affidavit has been properly filed and served and the brokerage agreement contains the necessary language, the seller or lessor may not withhold the commission at closing, despite a dispute over the amount due under the contract.
- Money must be placed in an escrow account. Instead, the lesser of (x) the net proceeds from the sale or (y) any unpaid commission must be placed in an escrow account with the recording office where the affidavit was filed. This amount may be taken from the proceeds of the sale. If there are multiple brokers who have filed affidavits of entitlement, the seller or lessor is required to deposit the lesser of the net proceeds of the sale or the greatest amount of unpaid commission among the brokerage agreements.
 - o Broker must pay a fee. There is a \$25 filing fee due, payable by the broker, to the appropriate county recording officer at the time of deposit.
- Money will remain in escrow until a resolution has been reached. Once this deposit has been made, the recording officer must then deliver the money to the county treasurer within two (2) days of receipt of the funds, pursuant to Article 26 of the New York Civil Practice Law and Rules (the “CPLR”). The money will remain with the county treasurer until an order for payment is entered by a court or until the parties have stipulated its payment in a writing signed by both parties. An order for payment of the

money in escrow may be made in either a pending action or proceeding brought to determine the broker's right to commission or, pursuant to the CPLR, by motion with notice to the other party or by special

- The broker must comply with time limits for commencing an action. If the seller or lessor has complied with the deposit requirements, the broker, if he or she wishes to do so, must commence an action to determine his or her rights to the commission under the brokerage agreement within six (6) months of the date of the escrow deposit.
- The Act does not create a lien or encumbrance. The escrow account itself, or a seller's or lessor's failure to comply with the Act, does not create nor constitute a lien in favor of the broker. A violation of the Act will not invalidate a transfer of property and will not prevent a subsequent buyer from taking good title to the property.

Rights of the Parties:

- The seller or lessor may petition the court for return of deposit. If, within sixty (60) days of the date of the escrow deposit, no action or proceeding has been commenced by either party to determine the rights due under the brokerage agreement, the seller or lessor may petition the court to order payment back to it of money deposited, plus accrued interest. This time limit may not be extended by agreement between the parties.
 - o The broker is still entitled to bring an action. A petition by the seller or lessor for payment back to it of the deposit does not determine the underlying claim for commission due. It also does not affect the six month time limit within which the broker must commence an action on the commission.
- The broker may be entitled to costs and fees. If the seller or lessor fails to comply and the broker ultimately succeeds in his or her claim, the broker is entitled to the amount of commission due, plus costs, filing fees, and attorney fees.
- Broker may waive his or her rights. The broker may waive his or her rights under the Act in a signed writing.

In order to preserve their rights under the Act, brokers are reminded to do the following:

1. Make sure there is a written brokerage agreement and that it contains the necessary language in bold and conspicuous type.
2. Upon dispute over the commission, file an affidavit of entitlement to commission with the appropriate recording officer of the county where the real property is located.
3. Serve the seller or lessor with a copy of the affidavit within five (5) business days of the filing. Failure to do so will result in a forfeiture of rights under the Act.
4. Serve the attorney of the seller or lessor with a copy if such contact information was provided before the filing of the affidavit.

5. Make sure the lesser of (x) the net proceeds from the sale or (y) any unpaid commission is placed in an escrow account with the recording office where the affidavit was filed.
6. Pay the \$25 fee at the time of the deposit.
7. If the parties reach an agreement as to payment of the commission, make certain that such an agreement is in writing and signed by both parties.
8. Commence an action, if necessary, to determine the rights of the parties to the commission under the brokerage agreement within six (6) months of the date of the escrow deposit.
9. Remember: a waiver is effective to terminate all rights under the Act only if it is in a signed writing.

This advisory was written by Christopher P. Daly, partner, and Christine M. Hogan, law clerk, of Farrell Fritz's real estate practice group. If you have questions relating to this advisory, please contact:

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