

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011**

**SESSION LAW 2011-165
HOUSE BILL 174**

AN ACT TO ENACT THE COMMERCIAL REAL ESTATE BROKER LIEN ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Article 2 of Chapter 44A of the General Statutes is amended by adding a new Part to read:

"Part 4. Commercial Real Estate Broker Lien Act.

"§ 44A-24.1. Short title.

This Part shall be known and may be cited as the 'Commercial Real Estate Broker Lien Act.'

"§ 44A-24.2. Definitions.

The following definitions apply in this Part:

- (1) Broker. – A real estate broker licensed pursuant to Chapter 93A of the General Statutes.
- (2) Broker services. – Services for which a license issued by the North Carolina Real Estate Commission is required pursuant to Chapter 93A of the General Statutes.
- (3) Commercial real estate. – Any real property or interest therein, whether freehold or nonfreehold, which at the time the property or interest is made the subject of an agreement for broker services:
 - a. Is lawfully used primarily for sales, office, research, institutional, warehouse, manufacturing, industrial, or mining purposes or for multifamily residential purposes involving five or more dwelling units;
 - b. May lawfully be used for any of the purposes listed in subdivision (3) of this section by a zoning ordinance adopted pursuant to the provisions of Article 18 of Chapter 153A or Article 19 of Chapter 160A of the General Statutes or which is the subject of an official application or petition to amend the applicable zoning ordinance to permit any of the uses listed in subdivision (3) of this section which is under consideration by the government agency with authority to approve the amendment; or
 - c. Is in good faith intended to be immediately used for any of the purposes listed in subdivision (3) of this section by the parties to any contract, lease, option, or offer to make any contract, lease, or option.
- (4) Commission. – Any compensation which is due a broker for performance of broker services.
- (5) Lien claimant. – A broker claiming a lien pursuant to this Part.
- (6) Owner. – The owner of record of any interest in commercial real estate.

"§ 44A-24.3. Commercial real estate lien.

(a) A broker shall have a lien upon commercial real estate in the amount that the broker is due under a written agreement for broker services signed by the owner or signed by the owner's duly authorized agent, if:

- (1) The broker has performed under the provisions of the agreement;
- (2) The written agreement for broker services clearly sets forth the broker's duties to the owner; and
- (3) The written agreement for broker services sets forth the conditions upon which the compensation shall be earned and the amount of such compensation.



(b) The lien under this section shall be available only to the broker named in the instrument signed by the owner or the owner's duly authorized agent. A lien under this section shall be available only against the commercial real estate which is the subject of the written agreement for broker services.

(c) When payment of commission to a broker is due in installments, a portion of which is due only after the conveyance or transfer of the commercial real estate, any notice of lien for those payments due after the transfer or conveyance may be recorded at any time subsequent to the transfer or conveyance of the commercial real estate and within 90 days of the date on which the payment is due. The notice of lien shall be effective as a lien against the owner's interest in the commercial real estate only to the extent funds are owed to the owner by the transferee, but the lien shall be effective as a lien against the transferee's interest in the commercial real estate. A single claim for lien filed prior to transfer or conveyance of the commercial real estate claiming all commissions due in installments shall also be valid and enforceable as it pertains to payments due after the transfer or conveyance; provided, however, that as payments or partial payments of commission are received, the broker shall provide partial releases for those payments, thereby reducing the amount due the broker under the broker's lien.

"§ 44A-24.4. When lien attaches to commercial real estate.

A lien authorized by this Part attaches to the commercial real estate only when the lien claimant files a timely notice of the lien conforming to the requirements of G.S. 44A-24.5 and this section in the office of the clerk of superior court. A notice of lien is timely if it is filed after the claimant's performance under the written agreement for broker services and before the conveyance or transfer of the commercial real estate which is the subject of the lien, except that in the case of a lease or transfer of a nonfreehold interest, the notice of a lien shall be filed no later than 90 days following the tenant's possession of the commercial real estate or no later than 60 days following any date or dates set out in the written agreement for broker services for subsequent payment or payments. When a notice of a lien is filed more than 30 days preceding the date for settlement or possession set out in an offer to purchase, sales contract, or lease, which establishes the broker's claim of performance, the lien shall be available only upon grounds of the owner's breach of the written agreement for broker services.

"§ 44A-24.5. Lien notice; content.

(a) A lien notice under this Part shall be signed by the lien claimant and shall contain an attestation by the lien claimant that the information contained in the notice is true and accurate to the best of the lien claimant's knowledge and belief.

(b) The lien notice shall include all of the following information:

- (1) The name of the lien claimant.
- (2) The name of the owner.
- (3) A description of the commercial real estate upon which the lien is being claimed.
- (4) The amount for which the lien is claimed and whether the amount is due in installments.
- (5) The claimant's grounds for the lien, including a reference to the written agreement for broker services that is the basis for the lien.

"§ 44A-24.6. When lien claim release or satisfaction to be filed.

If a claim for a lien has been filed with the clerk of superior court and a condition occurs that would preclude the lien claimant from receiving compensation under the terms of the written agreement for broker services on which the lien is based, the lien claimant shall file and serve the owner of record a written release or satisfaction of the lien promptly, and in no event more than 30 days after the demand.

"§ 44A-24.7. Lien claimant to mail copy of notice of lien to owner by certified mail.

Any lien claimant who files a lien on commercial real estate pursuant to the provisions of this Part shall mail a copy of the notice of the lien to the owner of the commercial real estate by certified mail, return receipt requested, or shall serve a copy of the notice of the lien in accordance with any of the provisions for service of process set forth in G.S. 1A-1, Rule 4. The lien claimant shall file proof of service with the clerk of the superior court. The lien is void if the lien claimant does not file and serve the lien as provided in this Part.

"§ 44A-24.8. Enforcing lien.

A lien claimant may bring suit to enforce a lien which attaches pursuant to the provisions of this Part in any court of competent jurisdiction in the county where the commercial real estate

is located. The lien claimant shall commence proceedings within 18 months after filing the lien, and failure to commence proceedings within the 18 months shall extinguish the lien. If a claim is based upon an option to purchase the commercial real estate, the lien claimant shall commence proceedings within one year of the option to purchase being exercised. A claim for the same lien extinguished pursuant to this section and G.S. 44A-24.10 may not be asserted in any subsequent proceeding. A lender shall not be made a party to any suit to enforce a lien under this Part unless the lender has willfully caused the nonpayment of the commission giving rise to the lien.

"§ 44A-24.9. Complaint; content; parties' foreclosure action; procedure.

(a) A complaint filed pursuant to the provisions of this section and G.S. 44A-24.8 shall contain all of the following:

- (1) A statement of the terms of the written agreement for broker services on which the lien is based or a copy of the written contract or agreement.
- (2) The date when the written agreement for broker services was made.
- (3) A description of the services performed.
- (4) The amount due and unpaid.
- (5) A description of the property that is subject to the lien.
- (6) Any other facts necessary for a full understanding of the rights of the parties.

(b) The plaintiff shall file the action against all parties that have an interest of record in the commercial real estate; provided that a lender shall not be made a party to any suit to enforce a lien under this Part unless the lender has willfully caused the nonpayment of the commission giving rise to the lien: a foreclosure action for a lien claimed pursuant to this Part shall be brought pursuant to the provisions of this Article.

(c) Valid prior recorded liens or mortgages shall have priority over a lien under this Part.

"§ 44A-24.10. Lien extinguished for lien claimant failing to file suit or answer in pending suit within 30 days after service on owner.

If a lien claimant fails to file a suit to enforce the lien or fails to file an answer in a pending suit to enforce a lien within 30 days after a properly served written demand of the owner, lienee, or other authorized agent, the lien shall be extinguished. Service of the demand shall be by registered or certified mail, return receipt requested, or by personal service. The claimant shall file proof of properly served written demand with the clerk of the superior court. The provisions of this section shall not extend to any other deadline provided by law for the filing of any pleadings or for the foreclosure of any lien governed by this Part.

"§ 44A-24.11. Satisfaction or release of lien.

If a claim for a lien has been filed pursuant to the provisions of this Part with the clerk of superior court and the claim has been paid in full, or if the lien claimant fails to institute a suit to enforce the lien within the time as provided by law, the lien claimant shall acknowledge satisfaction or release of the lien in writing upon written demand of the owner promptly, and in no event more than 30 days after the demand.

"§ 44A-24.12. Cost of proceeding to be paid by nonprevailing party.

The costs of any proceeding brought to enforce a lien filed pursuant to this Part, including reasonable attorneys' fees and prejudgment interest due to the prevailing party, shall be paid by the nonprevailing party or parties. If more than one party is responsible for costs, fees, and prejudgment interest, the costs, fees, and prejudgment interest shall be equitably apportioned by the court among the responsible parties.

"§ 44A-24.13. Discharge of lien.

(a) Unless an alternative procedure is available and is acceptable to the transferee in a real estate transaction, any claim of lien on commercial real estate filed under this Article may be discharged by any of the following methods:

- (1) The lien claimant of record, the claimant's agent, or attorney, in the presence of the clerk of superior court, may acknowledge the satisfaction of the claim of lien on the commercial real estate indebtedness, whereupon the clerk of superior court shall enter on the record of the claim of lien on the commercial real estate the acknowledgment of satisfaction, which shall be signed by the lien claimant of record, the claimant's agent, or attorney, and witnessed by the clerk of superior court.
- (2) The owner may exhibit an instrument of satisfaction signed and acknowledged by the lien claimant of record, which instrument states that

the claim of lien on the commercial real estate indebtedness has been paid or satisfied, whereupon the clerk of superior court shall cancel the claim of lien on the commercial real estate by entry of satisfaction on the record of the claim of lien on the commercial real estate.

- (3) By failure to enforce the claim of lien on the commercial real estate within the time prescribed in this Article.
- (4) By filing in the office of the clerk of superior court the original or certified copy of a judgment or decree of a court of competent jurisdiction showing that the action by the claimant to enforce the claim of lien on the commercial real estate has been dismissed or finally determined adversely to the claimant.
- (5) Whenever funds in an amount equal to one hundred twenty-five percent (125%) of the amount of the claim of lien on the commercial real estate is deposited with the clerk of superior court to be applied to the payment finally determined to be due, whereupon the clerk of superior court shall cancel the claim of lien on the commercial real estate.
- (6) Whenever a corporate surety bond, in an amount equal to one hundred twenty-five percent (125%) of the amount of the claim of lien on the commercial real estate and conditioned upon the payment of the amount finally determined to be due in satisfaction of the claim of lien on the commercial real estate is deposited with the clerk of superior court, whereupon the clerk of superior court shall cancel the claim of lien on the commercial real estate.
- (7) By failure to file documentation if required pursuant to G.S. 44A-24.6 or G.S. 44A-24.10.

(b) If funds in an amount equal to one hundred twenty-five percent (125%) of the amount that is sufficient to release the claim of lien have been deposited with the clerk of superior court, or a bond in an equal amount has been secured, the lien claimant shall release the claim for the lien on the commercial real estate, and the lien claimant shall have a lien on the funds deposited with the clerk of superior court.

"§ 44A-24.14. Priority of lien under this Part.

Any claim of lien on real property or claim of lien on funds allowed under Part 1 or Part 2 of this Article shall be deemed superior in all respects to any lien asserted under this Part, regardless of the effective date of the competing liens and shall survive notwithstanding any judgment awarding a lien under this Part. No lien claimant filing a lien pursuant to this Part shall be entitled to participate in any pro rata distributions to claimants proceeding under G.S. 44A-21."

SECTION 2. Article 1 of Chapter 93A of the General Statutes is amended by adding a new section to read:

"§ 93A-13. Contracts for broker services.

No action between a broker and the broker's client for recovery under an agreement for broker services is valid unless the contract is reduced to writing and signed by the party to be charged or by some other person lawfully authorized by the party to sign."

SECTION 3. This act becomes effective October 1, 2011, and applies to written agreements signed by the owner of commercial real estate or the owner's duly authorized agent on or after that date.

In the General Assembly read three times and ratified this the 15th day of June, 2011.

s/ Walter H. Dalton
President of the Senate

s/ Thom Tillis
Speaker of the House of Representatives

s/ Beverly E. Perdue
Governor

Approved 5:11 p.m. this 17th day of June, 2011