

Commission Escrow Act Effective January 1, 2009

Real Estate In-Depth January, 2009
By Edward I. Sumber, Board Counsel

The Westchester-Putnam Multiple Listing Service, Inc. has amended its exclusive listing agreements to include provisions which enable listing agents to comply with Section 294 of the Real Property Law which became effective January 1, 2009. The New York State Association of Realtors worked actively for more than 15 years to provide the residential brokerage community with some means of protection when sellers do not pay agreed upon commissions under listing agreements.

Language in Listing Agreement

In order to enable a licensee to utilize the new Commission Escrow Act (the "Act") listings taken after January 1, 2009 must include the following mandatory verbiage in "clear and conspicuous bold face 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."

A licensee may not seek to utilize the benefits of the Act without including this provision in the listing agreement. The new WPMLS forms include the required statement. Realtors should immediately cease the use of forms in use prior to December 31, 2008.

Must a Realtor Utilize the Commission Escrow Act?

The Commission Escrow Act represents a tool for Realtors threatened with the loss of a commission. It is not however, the option of first choice. While the Act was intended to protect real estate licensees, the legislature built in significant consumer protections which make the utilization of the Act a vehicle of last resort. The MLS forms provide for an escrow with a title company or attorney of choice followed by the arbitration of the dispute between the broker and owner. If that option is not available the Commission Escrow Act represents a viable alternative.

How to Comply with the Act

In order to utilize the Commission Escrow Act, the licensee must comply with the provisions of Section 294 which provides that:

1. The written contract of broker employment (the listing agreement) contains the mandatory language. Utilization of the WPMLS forms will ensure such compliance.

2. The broker must have earned the commission in accordance with the terms of the listing agreement. The broker must have procured a ready, willing and able purchaser and a purchase contract must have been executed between the parties.
3. The broker must complete an affidavit of entitlement to commission for completed brokerage services. Acceptable forms which comply with Section 294-b (2) of the Real Property Law have been prepared by the New York State Association Counsel Michael T. Wallender and are available online at www.wcbr.net or www.NYSAR.com. These affidavits of entitlement must be duly notarized and completed by the principal broker. A salesperson cannot sign on behalf of the principal broker. A copy of the signed listing agreement should be annexed to the affidavit of entitlement.
4. The broker should then determine whether service of the document upon the seller can be performed within five (5) days. Provided that service can be effectuated, the broker must then file the affidavit of entitlement with the county clerk's office in the county in which the real property is located. Three (3) copies of the affidavit with the attached listing agreement should be presented to the county clerk's office, one of which will be filed in the lien docket, a copy will be retained by the broker and the third (3rd) copy will be served upon the seller. [Note: Even though the affidavit of entitlement is filed in the lien docket, the affidavit of entitlement does not create a lien in favor of the broker.]
5. Within five (5) business days of the filing of the affidavit with the county clerk, the broker must cause the service of the affidavit of entitlement upon the seller along with a Twenty-Five (\$25) Dollar fee made payable to the recording officer (usually the county clerk) which the seller will be required to use for payment of the commission into the county clerk's possession. Service may be made by registered or certified mail or by personal delivery to the seller's address set forth in the listing agreement.

In the event that the broker knows that the closing will take place less than five (5) days after the filing of the affidavit of entitlement, the broker must personally serve the seller and not use certified or registered mail. If there is more than one seller, service upon one will satisfy the statutory requirement. The failure to serve the seller with the affidavit of entitlement will result in a forfeiture of all of the rights under the statute. If the licensee knows the name of the seller's attorney a copy of the affidavit must be sent or served on seller's counsel as well.

6. If the commission is not paid at the closing, the seller must then deposit the disputed funds with the county clerk. The amount of the funds is limited to the amount of the commission due and payable but not more than the net proceeds that are available from the closing. In other words, if the seller has been in financial difficulty and is not paying the commission because there are insufficient proceeds available, the seller is only responsible to deposit the available proceeds and not the full commission.

7. The broker must initiate an action to recover the commission within sixty (60) days of the deposit of the funds by the seller. In the absence of an action commenced by the broker, the owner can request return of the funds from the county clerk after such sixty (60) day period.
8. If for any reason the broker fails to commence a legal action within six (6) months of the time of the deposit by the owner, the broker loses the broker's claim for commission. In effect, the statute of limitations (6 years on contracts) is shortened to a period of six (6) months in the event that the Commission Escrow Act is utilized.

What if the Seller Refuses to Deposit the Disputed Commission?

If a broker complies with Section 294 and serves the seller with the affidavit of entitlement, the seller can still avoid depositing the disputed commission into escrow with the county clerk. When the owner refuses to do so, the only penalty which accrues to the owner is the requirement that the owner pay for the legal fees of the broker. Such fees become payable to the broker by the owner if the broker is successful in the subsequent legal action. In addition, the seller must return the Twenty-Five (\$25) Dollar fee which was delivered by the broker at the time the affidavit of entitlement was served upon the seller.

Does the Broker have Any Recourse against the Buyer?

The Commission Escrow Act is targeted specifically to the listing agreement between the owner and the listing agent. The broker will have no recourse against buyers under the provisions of the Commission Escrow Act.

For More Information

Realtors desiring more information will find same at www.wcbr.net or at www.NYSAR.com, each of which contains links to the Commission Escrow Act itself. Extensive material prepared by NYSAR in-house counsel S. Anthony Gatto as well as access to a commission escrow webinar through the NYSAR media center, is also available online.

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