

SENATE BILL No. 516

By Committee on Judiciary

2-11

9 AN ACT concerning liens; creating the commercial real estate broker
10 lien act.

11

12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. This act shall be known and may be cited as the commer-
14 cial real estate broker lien act.

15 Sec. 2. As used in sections 1 through 5, and amendments thereto:

16 (a) "Commercial real estate" means any real estate other than:

17 (1) Real estate containing one to four residential units; or

18 (2) real estate on which no buildings or structures are located and
19 which is zoned for single-family residential use. Commercial real estate
20 shall not include single-family residential units such as condominiums,
21 townhouses or homes in a subdivision when sold, leased or otherwise
22 conveyed on a unit by unit basis, even though these units may be a part
23 of a larger building or parcel or real estate containing more than four
24 residential units.

25 (b) "Commission" means any and all compensation which may be due
26 a broker for services provided as a licensee.

27 (c) "Licensed services" means services provided to a buyer or tenant
28 as a licensee.

29 (d) "Real estate" and "licensee" have the meanings ascribed thereto
30 in K.S.A. 58-3035, and amendments thereto.

31 Sec. 3. (a) Any licensee shall have a lien, upon commercial real estate
32 or any interest in that commercial real estate which is the subject of a
33 purchase, lease or other conveyance to a buyer or tenant of an interest
34 in the commercial real estate, in the amount that the licensee is due for
35 licensed services which shall include without limitation, brokerage fees,
36 consulting fees and management fees:

37 (1) Under a written instrument signed either by the owner of an
38 interest in the commercial real estate or by the owner's duly authorized
39 agent; or

40 (2) under a written instrument signed by a prospective buyer or pro-
41 spective tenant or their respective duly authorized agent.

42 The lien shall be available to the licensee named in the instrument
43 signed by the owner, buyer or tenant or such person's authorized agents,

1 and not to an employee or independent contractor of the licensee.

2 (b) This lien shall attach to the commercial real estate or any interest
3 in the commercial real estate upon:

4 (1) The licensee being otherwise entitled to a fee or commission un-
5 der a written instrument signed by the owner, buyer, tenant or such
6 person's authorized agent; and

7 (2) except as provided in subsection (c), (d), (e) or (f), the licensee
8 recording a notice of lien in the register of deeds office of the county in
9 which the real property or any interest in the real property is located,
10 prior to the actual conveyance or transfer of the commercial real estate
11 against which the licensee is claiming a lien. The lien shall attach as of
12 the date of the recording of the notice of lien and does not and shall not
13 relate back to the date of the written instrument.

14 (c) Except as provided in subsections (d), (e) or (f), when payment
15 to a licensee is due in installments, a portion of which is due only after
16 the conveyance or transfer of the commercial real estate, any notice of
17 lien for those payments due after the transfer or conveyance may be
18 recorded at any time which is subsequent to the transfer or conveyance
19 of the commercial real estate and which time is within 90 days of the date
20 on which the payment is due. However, such notice of lien shall only be
21 effective as a lien against the transferor's interest in the commercial real
22 estate to the extent moneys are still owed to the transferor by the trans-
23 feree; but the lien shall be effective as a lien against the transferee's
24 interest without limitations described above in this section. A single claim
25 for lien recorded prior to transfer or conveyance of the commercial real
26 estate claiming all moneys due under an installment payment agreement
27 shall be valid and enforceable as it pertains to payments due after the
28 transfer or conveyance; provided however, that as payments or partial
29 payments of commission are received, the licensee shall provide partial
30 releases therefor, thereby reducing the amount due the licensee under
31 its notice of lien.

32 (d) In the case of a lease which shall also include a sublease or as-
33 signment of lease, the notice of lien must be recorded not later than 90
34 days after the tenant takes possession of the leased premises. If the trans-
35 feror personally serves written notice of the intended execution of the
36 lease on the broker entitled to claim a lien at least 10 days prior to the
37 date of the intended execution of the lease, the notice of lien must be
38 recorded before the date indicated in such notice for the execution of the
39 lease. The lien shall attach as of the recording of the notice of lien and
40 does not and shall not relate back to the date of the written instrument.

41 (e) If a licensee may be due additional commission either as a result
42 of future actions, including, but not limited to, the exercise of an option
43 to expand the leased premises, to renew or extend a lease, or to purchase

1 the property, or otherwise, pursuant to a written instrument signed by
2 the then owner or tenant, the licensee may record its notice of lien at any
3 time after execution of the lease or other written instrument which con-
4 tains such option but not later than 90 days after the event or occurrence
5 on which the additional commission is claimed occurs. Notwithstanding
6 subsection (i), an action to foreclose a lien to collect additional commis-
7 sions must be commenced within two years of the occurrence or trans-
8 action on which the additional commission is claimed.

9 (f) In the event that the property is sold or otherwise conveyed prior
10 to the date on which an additional commission is due, if the broker has
11 filed a valid notice of lien prior to the sale or other conveyance of the
12 property, then the purchaser or transferee shall be deemed to have notice
13 of and shall take title to the property subject to the notice of lien. If a
14 broker claiming an additional commission fails to record its notice of lien
15 for additional commission prior to the recording of a deed conveying legal
16 title to the property to the purchaser or transferee, then such licensee
17 may not claim a lien on the property. The foregoing provisions of this
18 subsection shall not limit or otherwise affect claims or defenses a licensee
19 or owner or any other party may have on any other basis, in law or in
20 equity.

21 (g) If a licensee has a written agreement with a prospective buyer or
22 tenant as described in subsection (a) (2), then the lien shall attach upon
23 the prospective buyer purchasing or otherwise accepting a conveyance or
24 transfer of the commercial real estate and the recording of a notice of
25 lien by the broker in the register of deeds office of the county in which
26 the real property, or any interest in the real property is located, within
27 90 days after the purchase or other conveyance or transfer to the buyer
28 or tenant. The lien shall attach as of the date of the recording of the
29 notice of lien and does not and shall not relate back to the date of the
30 written instrument.

31 (h) The licensee shall, within 10 days of recording its notice of lien,
32 either mail a copy of the notice of lien to the owner of record on the
33 commercial real estate by registered mail, or the agent of the owner of
34 record at the address of the owner stated in the written instrument on
35 which the claim for lien is based, or if no such address is given, then to
36 the address of the property on which the claim of lien is based. If the
37 notice of lien is recorded within 10 days prior to closing, the broker is
38 not required to mail or personally serve a copy of the notice of lien.
39 Mailing of the copy of the notice of lien is effective when deposited in
40 the United States mail box with postage prepaid. The broker's lien shall
41 be unenforceable if mailing or service of the copy of notice of lien does
42 not occur at the time and in the manner required by this section.

43 (i) (1) A licensee may bring suit to enforce a lien in the district court

1 in the county where the property is located by filing a complaint and
2 sworn affidavit that the notice of lien has been recorded.

3 (2) The licensee claiming a lien, within two years after recording the
4 notice of lien, shall commence proceedings, by filing a complaint. Failure
5 to commence proceedings as required herein within two years after re-
6 cording the notice of lien shall extinguish the lien. No subsequent notice
7 of lien may be given for the same claim nor may that claim be asserted
8 in any proceedings under this act.

9 (3) A licensee claiming a lien based upon an option or other right to
10 purchase or lease, within two years after the transfer or conveyance of
11 the commercial real state under the exercise of the option to purchase or
12 lease, shall commence proceedings by filing a complaint. Failure to com-
13 mence proceedings within this time shall extinguish the lien. No subse-
14 quent notice of lien may be given for the same claim nor may that claim
15 be asserted in any proceedings under this act.

16 (4) A complaint under this section shall contain a brief statement of
17 the contract or instrument on which the lien is founded the date when
18 the contract or instrument was made, a description of the services per-
19 formed, the amount due and unpaid, a description of the property that
20 is subject to the lien, and other facts necessary for a full understanding
21 of the rights of the parties. The plaintiff shall make all interested parties,
22 of whose interest the plaintiff is notified or has knowledge, defendants to
23 the actions, and shall issue summons and provide service as in other civil
24 actions. When any defendant resides or has gone out of the state, or on
25 inquiry cannot be found, or is concealed within the state so that process
26 cannot be served on that defendant, the plaintiff shall cause a notice to
27 be given to that defendant, or cause a copy of the complaint to be served
28 upon that defendant in the manner and upon the same conditions as in
29 other civil actions. Failure of the plaintiff to provide proper summons or
30 notice shall be grounds for judgment against the plaintiff and in favor of
31 the defendant who is not properly served with summons or notice with
32 prejudice. All liens claimed under this act shall be foreclosed as provided
33 for in article 24 of chapter 60 of the Kansas Statutes Annotated, and
34 amendments thereto.

35 (j) The notice of lien shall state the name of the claimant, the name
36 of the owner, a description of the property upon which the lien is being
37 claimed, the amount for which the lien is claimed, and the licensee's
38 license number. The notice of lien shall recite that the information con-
39 tained in the notice is true and accurate to the knowledge of the signator.
40 The notice of lien shall be signed by the licensee or the authorized agent
41 of the licensee and shall be verified.

42 (k) Whenever a notice of lien has been filed with the register of deeds
43 and a condition occurs that would preclude the licensee from receiving

1 compensation under the terms of the written agreement on which the
2 lien is based, the licensee shall provide to the owner of record, within 10
3 days following written demand by the owner of record, a written release
4 or satisfaction of the lien.

5 (l) Upon written demand of the owner, licensee or other authorized
6 agent of the owner or licensee, which demand shall be served on the li-
7 censee claiming the lien requiring suit to be commenced to enforce the
8 lien or answer to be filed in a pending suit, a suit shall be commenced or
9 answer filed within 30 days thereafter, or the lien shall be extinguished.
10 Service of such written demand may be made by registered mail, return
11 receipt requested, or by personal service.

12 (m) Whenever a notice of lien has been filed with the register of
13 deeds and such claimed commission has been paid to the licensee claim-
14 ing the lien, or where there is failure to institute a suit to enforce the lien
15 within the time provided by this act, the licensee shall acknowledge sat-
16 isfaction or release of the notice of lien in writing, on written demand of
17 the owner within five days after payment or within five days of expiration
18 of the time in which the notice of lien was to be filed.

19 (n) If the licensee and the party or parties from whom the commis-
20 sion is claimed agree to alternative dispute resolution, the claim shall be
21 heard and resolved in the forum on which these parties have agreed. The
22 court before which the lien foreclosure proceeding is brought shall retain
23 jurisdiction to enter judgment on the award or other result made or
24 reached by alternative dispute resolution on all parties to the foreclosure.
25 The licensee's notice of lien shall remain of record and the foreclosure
26 and the proceeding shall be stayed during the pendency of the alternative
27 dispute resolution process.

28 (o) The cost of proceedings brought under this act including reason-
29 able attorney fees, costs and prejudgment interest due to the prevailing
30 party shall be borne by the non-prevailing party or parties. When more
31 than one party is responsible for costs, fees and prejudgment interest, the
32 costs, fees and prejudgment interest shall be equitably apportioned by
33 the court or mediator among those responsible parties.

34 (p) Except for a waiver or release of lien provided in consideration
35 of payment of the fee claimed by the licensee, or pursuant to subsections
36 (k) and (m), any waiver of a broker's right to lien commercial property
37 under this statute, any other waiver or release of lien shall be void.

38 Sec. 4. Prior valid recorded liens, mortgages and other encum-
39 brances shall have priority over a licensee's lien. Such prior recorded liens,
40 mortgages and encumbrances shall include, without limitation: (a) A valid
41 mechanic's lien claim that is recorded subsequent to the licensee's notice
42 of lien but which relates back to a date prior to the recording date of the
43 licensee's notice of lien; and (b) prior recorded liens securing revolving

1 credit and future advances of construction loans.
2 Sec. 5. Except as otherwise provided in this section, whenever a
3 claim for lien has been filed with the register of deeds, and an escrow
4 account is established either from the proceeds from the transaction con-
5 veyance or any other source of funds in an amount computed as 125% of
6 the amount of the claim for lien then the lien against the real estate shall
7 be extinguished and becomes a lien on the funds contained in the escrow
8 account. The requirement to establish an escrow account, as provided for
9 in this section, shall not be cause for any party to refuse to close the
10 transaction.
11 Sec. 6. This act shall take effect and be in force from and after its
12 publication in the statute book.