

Senate Bill No. 523

(By Senator Palumbo)

[Introduced February 6, 2012; referred to the Committee on the
Judiciary.]

10 A BILL to amend the Code of West Virginia, 1931, as amended, by
11 adding thereto a new article, designated §38-15-1, §38-15-2,
12 §38-15-3, §38-15-4, §38-15-5, §38-15-6, §38-15-7, §38-15-8,
13 §38-15-9, §38-15-10, §38-15-11, §38-15-12, §38-15-13 and §38-
14 15-14, all relating to creating the Commercial Real Estate
15 Broker Lien Act; defining terms; creating and specifying when
16 a broker lien attaches to commercial real estate; establishing
17 lien notice requirements; adding certain requirements relating
18 to satisfactory standards regarding a claim for a lien;
19 requiring any lien claimant to mail a copy of the notice of
20 the lien to the owner; specifying enforcement procedures;
21 creating procedures for filing a complainant and pursuing a
22 foreclosure action; providing for lien claimant failing to
23 file suit or answer in pending suit; requiring satisfaction or
24 release of lien and discharge of lien in certain situations;

1 establishing requirements for contracts for broker services;
2 and requiring the costs and attorney fees of a proceeding to
3 be paid by the nonprevailing party.

4 *Be it enacted by the Legislature of West Virginia:*

5 That the Code of West Virginia, 1931, as amended, be amended
6 by adding thereto a new article, designated §38-15-1, §38-15-2,
7 §38-15-3, §38-15-4, §38-15-5, §38-15-6, §38-15-7, §38-15-8, §38-15-
8 9, §38-15-10, §38-15-11, §38-15-12, §38-15-13 and §38-15-14, all to
9 read as follows:

10 **ARTICLE 15. COMMERCIAL REAL ESTATE BROKER LIEN ACT.**

11 **§38-15-1. Short title.**

12 This shall be known and may be cited as the "Commercial Real
13 Estate Broker Lien Act."

14 **§38-15-2. Definitions.**

15 The following definitions apply in this article:

16 (a) "Broker" has the same definition as in article forty of
17 chapter thirty of this code.

18 (b) "Broker services" means services for which a licensed
19 broker may perform as defined in article forty of chapter thirty of
20 this code.

21 (c) "Commercial real estate" means any real property or
22 interest therein, whether freehold or nonfreehold, which at the
23 time the property or interest is made the subject of an agreement

1 for broker services:

2 (1) Is lawfully used primarily for sales, office, research,
3 institutional, warehouse, manufacturing, industrial, or mining
4 purposes or for multifamily residential purposes involving five or
5 more dwelling units;

6 (2) May lawfully be used for any of the purposes listed in
7 subdivision (1) of this subsection by a zoning ordinance or which
8 is the subject of an official application or petition to amend the
9 applicable zoning ordinance to permit any of these uses, which
10 application is under consideration by the government agency with
11 authority to approve the amendment; or

12 (3) Is in good faith intended to be immediately used for any
13 of the purposes listed in subdivision (1) of this subsection by the
14 parties to any contract, lease, option, or offer to make any
15 contract, lease or option.

16 (d) "Commission" means any compensation which is due a broker
17 for performance of broker services.

18 (e) "Lien claimant" means a broker claiming a lien pursuant to
19 this article.

20 (f) "Owner" means the owner of record of any interest in
21 commercial real estate.

22 **§38-15-3. Commercial real estate lien.**

23 (a) A broker shall have a lien upon commercial real estate in
24 the amount that the broker is due under a written agreement for

1 broker services signed by the owner or signed by the owner's duly
2 authorized agent, if:

3 (1) The broker has performed under the provisions of the
4 agreement;

5 (2) The written agreement for broker services clearly sets
6 forth the broker's duties to the owner; and

7 (3) The written agreement for broker services sets forth the
8 conditions upon which the compensation is earned and the amount of
9 such compensation.

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

15 (c) When payment of commission to a broker is due in
16 installments, a portion of which is due only after the conveyance
17 or transfer of the commercial real estate, any notice of lien for
18 those payments due after the transfer or conveyance may be recorded
19 at any time subsequent to the transfer or conveyance of the
20 commercial real estate and within ninety days of the date on which
21 the payment is due. The notice of lien shall be effective as a lien
22 against the owner's interest in the commercial real estate only to
23 the extent funds are owed to the owner by the transferee, but the
24 lien shall be effective as a lien against the transferee's interest

1 in the commercial real estate. A single claim for lien filed prior
2 to transfer or conveyance of the commercial real estate claiming
3 all commissions due in installments shall also be valid and
4 enforceable as it pertains to payments due after the transfer or
5 conveyance; *Provided*, That as payments or partial payments of
6 commission are received, the broker shall provide partial releases
7 for those payments, thereby reducing the amount due the broker
8 under the broker's lien.

9 **§38-15-4. When lien attaches to commercial real estate.**

10 A lien authorized by this article attaches to the commercial
11 real estate only when the lien claimant files a timely notice of
12 the lien conforming to the requirements of this article in the
13 office of the clerk of the county commission for the county where
14 the real estate is located. A notice of lien is timely if it is
15 filed after the claimant's performance under the written agreement
16 for broker services and before the conveyance or transfer of the
17 commercial real estate which is the subject of the lien, except
18 that in the case of a lease or transfer of a nonfreehold interest,
19 the notice of a lien shall be filed no later than ninety days
20 following the tenant's possession of the commercial real estate or
21 no later than sixty days following any date or dates set out in the
22 written agreement for broker services for subsequent payment or
23 payments. When a notice of a lien is filed more than thirty days
24 preceding the date for settlement or possession set out in an offer

1 to purchase, sales contract, or lease, which establishes the
2 broker's claim of performance, the lien shall be available only
3 upon grounds of the owner's breach of the written agreement for
4 broker services.

5 **§38-15-5. Lien notice; content.**

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

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

12 (1) The name of the lien claimant;

13 (2) The name of the owner;

14 (3) A description of the commercial real estate upon which the
15 lien is being claimed;

16 (4) The amount for which the lien is claimed and whether the
17 amount is due in installments; and

18 (5) The claimant's grounds for the lien, including a reference
19 to the written agreement for broker services that is the basis for
20 the lien.

21 **§38-15-6. When lien claim release or satisfaction to be filed.**

22 If a claim for a lien has been filed with the clerk of the
23 county commission and a condition occurs that would preclude the
24 lien claimant from receiving compensation under the terms of the

1 written agreement for broker services on which the lien is based,
2 the lien claimant shall file with the clerk of the county
3 commission and serve the owner of record a written release or
4 satisfaction of the lien promptly, and in no event more than thirty
5 days after the demand.

6 **§38-15-7. Lien claimant to mail copy of notice of lien to owner by**
7 **certified mail.**

8 Any lien claimant who files a lien on commercial real estate
9 pursuant to the provisions of this article shall mail a copy of the
10 notice of the lien to the owner of the commercial real estate by
11 certified mail, return receipt requested. The lien claimant shall
12 file proof of service with the clerk of the county commission. The
13 lien is void if the lien claimant does not file and serve the lien
14 as provided in this article.

15 **§38-15-8. Enforcing lien.**

16 A lien claimant may bring suit to enforce a lien which
17 attaches pursuant to the provisions of this article in any court of
18 competent jurisdiction in the county where the commercial real
19 estate is located. The lien claimant shall commence proceedings
20 within eighteen months after filing the lien, and failure to
21 commence proceedings within the eighteen months shall extinguish
22 the lien. If a claim is based upon an option to purchase the
23 commercial real estate, the lien claimant shall commence
24 proceedings within one year of the option to purchase being

1 exercised. A claim for the same lien extinguished pursuant to this
2 section may not be asserted in any subsequent proceeding. A lender
3 may not be made a party to any suit to enforce a lien under this
4 article unless the lender has willfully caused the nonpayment of
5 the commission giving rise to the lien.

6 **§38-15-9. Complaint; content; parties' foreclosure action;**
7 **procedure.**

8 (a) A complaint filed pursuant to the provisions of this
9 article shall contain all of the following:

10 (1) A statement of the terms of the written agreement for
11 broker services on which the lien is based or a copy of the written
12 contract or agreement;

13 (2) The date when the written agreement for broker services
14 was made;

15 (3) A description of the services performed;

16 (4) The amount due and unpaid;

17 (5) A description of the property that is subject to the lien;

18 and

19 (6) Any other facts necessary for a full understanding of the
20 rights of the parties.

21 (b) The plaintiff shall file the action against all parties
22 that have an interest of record in the commercial real estate:
23 *Provided*, That a lender may not be made a party to any suit to
24 enforce a lien under this article unless the lender has willfully

1 caused the nonpayment of the commission giving rise to the lien.

2 (c) Valid prior recorded liens or mortgages have priority over
3 a lien under this article.

4 §38-15-10. Lien extinguished for lien claimant failing to file
5 suit or answer in pending suit within thirty days
6 after service on owner.

7 If a lien claimant fails to file a suit to enforce the lien or
8 fails to file an answer in a pending suit to enforce a lien within
9 thirty days after a properly served written demand of the owner,
10 lienee, or other authorized agent, the lien shall be extinguished.
11 Service of the demand shall be by certified mail, return receipt
12 requested, and proof of service shall be filed with the clerk of
13 the county commission.

14 **§38-15-11. Satisfaction or release of lien.**

15 If a claim for a lien has been filed pursuant to the
16 provisions of this article with the clerk of the county commission
17 and the claim has been paid in full, or if the lien claimant fails
18 to institute a suit to enforce the lien within the time as provided
19 by law, the lien claimant shall acknowledge satisfaction or release
20 of the lien in writing upon written demand of the owner promptly,
21 and in no event more than thirty days after the demand.

22 **§38-15-12. Cost of proceeding to be paid by nonprevailing party.**

23 The costs of any proceeding brought to enforce a lien filed
24 pursuant to this article, including reasonable attorneys' fees and

1 prejudgment interest due to the prevailing party, shall be paid by
2 the nonprevailing party or parties. If more than one party is
3 responsible for costs, fees, and prejudgment interest, the costs,
4 fees, and prejudgment interest shall be equitably apportioned by
5 the court among the responsible parties.

6 **§38-15-13. Discharge of lien.**

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

11 (1) The lien claimant of record, the claimant's agent, or
12 attorney, in the presence of the clerk of the county commission,
13 may acknowledge the satisfaction of the claim of lien on the
14 commercial real estate indebtedness, whereupon the clerk of the
15 county commission shall enter on the record of the claim of lien on
16 the commercial real estate the acknowledgment of satisfaction,
17 which shall be signed by the lien claimant of record, the
18 claimant's agent, or attorney, and witnessed by the clerk of the
19 county commission;

20 (2) The owner may exhibit an instrument of satisfaction signed
21 and acknowledged by the lien claimant of record, which instrument
22 states that the claim of lien on the commercial real estate
23 indebtedness has been paid or satisfied, whereupon the clerk of the
24 county commission shall cancel the claim of lien on the commercial

1 real estate by entry of satisfaction on the record of the claim of
2 lien on the commercial real estate;

3 (3) By failure to enforce the claim of lien on the commercial
4 real estate within the time prescribed in this article;

5 (4) By filing in the office of the clerk of the county
6 commission the original or certified copy of a judgment or decree
7 of a court of competent jurisdiction showing that the action by the
8 claimant to enforce the claim of lien on the commercial real estate
9 has been dismissed or finally determined adversely to the claimant;

10 (5) Whenever funds in an amount equal to one hundred twenty-
11 five percent (125%) of the amount of the claim of lien on the
12 commercial real estate is deposited with the clerk of the county
13 commission to be applied to the payment finally determined to be
14 due, whereupon the clerk of the county commission shall cancel the
15 claim of lien on the commercial real estate;

16 (6) Whenever a corporate surety bond, in an amount equal to
17 one hundred twenty-five percent (125%) of the amount of the claim
18 of lien on the commercial real estate and conditioned upon the
19 payment of the amount finally determined to be due in satisfaction
20 of the claim of lien on the commercial real estate is deposited
21 with the clerk of the county commission, whereupon the clerk of the
22 county commission shall cancel the claim of lien on the commercial
23 real estate; or

24 (7) By failure to file documentation if required pursuant this

1 article.

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

9 **§38-15-14. Contracts for broker services.**

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

15 This act becomes effective July 1, 2012 and applies to written
16 agreements signed by the owner of commercial real estate or the
17 owner's duly authorized agent on or after that date.

NOTE: The purpose of this bill is to establish the Commercial
Real Estate Broker Lien Act.

This article is new; therefore, strike-throughs and
underscoring have been omitted.