THE REAL DEAL

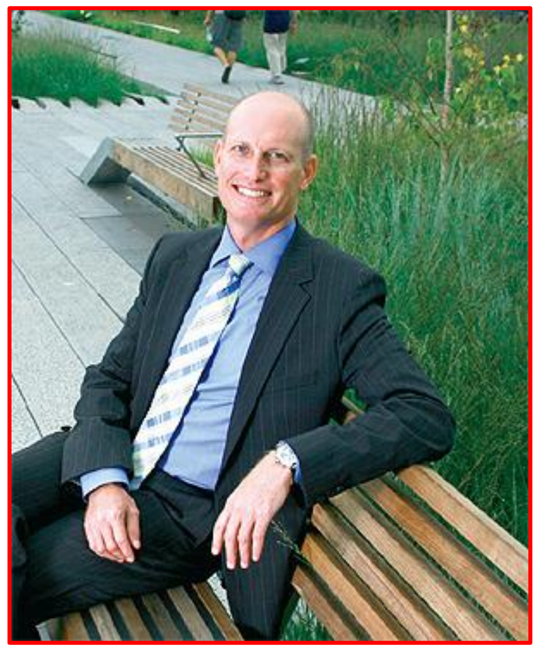
Commercial brokers protect their commission spoils

To prevent landlords from stiffing them on commission, agents tap their tenants

September 1, 2009 1:25PM

By Peter Kiefer

The term "vulnerable" is not typically associated with the alpha dogs of New York City's high-powered commercial real estate world. But that is precisely how a number of top commercial firms are feeling these days, and to compensate, they are taking extra measures to ensure that landlords can't stiff them.



Stuart Siegel of Grubb & Ellis has successfully inserted a new commission protection clause into two recent contracts.

An increasing number of brokers are having legal language inserted into their contracts stating that if their commission is not paid by a certain date, it will come from the tenant they worked with, instead of the landlord. The "rent in lieu of commission" clause, as it is unofficially known, is structured so the payment won't cost the tenant a dime; rather, it will simply be deducted from the rent they would otherwise pay to the landlord.

Last month one of the city's top brokerage firms issued a 10-point memo to its commission-based employees explaining ways that they can best protect their spoils. Number four on the list: insisting on a "rent in lieu of commission" clause. Officials at the firm told *The Real Deal* about the memo but asked that the firm not be identified.

"We have been recommending this to our broker clients for years," said attorney Adam Leitman Bailey. While the clauses are not yet widespread in the commercial leasing world, Bailey noted that they are becoming more common as more building owners default and inch toward foreclosure.

Although the rent deduction clause doesn't impact how much money the tenant pays, the tenant must still agree to the arrangement in the lease with the landlord.

According to several brokers and attorneys, getting the clause included in contracts with large building owners is generally easier because they are traditionally more reliant on brokers and need to maintain good relationships with them. Smaller residential building owners with ground-floor retail spaces are less inclined to agree to the clause because they do not depend on the same level of goodwill. In fact, their listings are often open and do not involve exclusive brokers.

"It is understandable that brokers are concerned about collecting commissions in certain buildings where the owners are underwater or at risk of losing their properties," said Stuart Siegel, an executive managing director at Grubb & Ellis.

Siegel said he has successfully inserted the clause in two recent deals, but he declined to elaborate on the properties and landlords he struck the arrangements with. He also said: "If it comes down to paying a lender or a broker, they are going to pay the lender first and worry about the broker later, so they can at least keep their building."

Meanwhile, the way a standard commission fee is paid out can vary. Depending upon the creditworthiness of the tenant, often the fee will be paid in full at the execution of the lease or a portion will be paid upon the signing of the lease, with the rest paid when the tenant has moved in or when rent commences.

A string of commission-related lawsuits over the past several weeks underscored the need for a more defensive posture on the part of brokerages seeking commission payments.

In July, Goldman Sachs Group filed suit against Almah LLC, a Moinian Group entity which owns 180 Maiden Lane, for a $3.1 million commission for finding a new tenant — AIG Employee Services — to occupy its space in 2008.

For James Famularo, a senior executive managing director at New York Commercial Realty Services, a similar clause to the "rent in lieu of commission" arrangement in his contract saved his commission at 179 Ludlow Street on the Lower East Side.

The building was foreclosed on in 2007, but not before Famularo said he was paid everything he was owed.

"Nowadays, because the market is so tight and retail spaces are trading for 30 to 40 percent less than they were in 2006, a lot of landlords think that they can make it up by not paying a brokerage commission. I have seen it all now," Famularo said.