

LEGISLATIVE BILL 3

Approved by the Governor May 16, 2013

Introduced by Krist, 10.

FOR AN ACT relating to liens; to amend sections 52-1901 and 52-1902, Reissue Revised Statutes of Nebraska, and section 28-101, Revised Statutes Cumulative Supplement, 2012; to create the offense of fraudulently filing a financing statement, lien, or document; to provide a penalty; to provide and change provisions relating to nonconsensual common-law liens; to adopt the Commercial Real Estate Broker Lien Act; to harmonize provisions; to repeal the original sections; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 28-101, Revised Statutes Cumulative Supplement, 2012, is amended to read:

28-101 Sections 28-101 to 28-1356 and section 2 of this act shall be known and may be cited as the Nebraska Criminal Code.

Sec. 2. (1) A person commits the offense of fraudulently filing a financing statement, lien, or document if the person directly, or through an intermediary, submits for filing or recording in the public record, as defined in section 28-911:

(a) Any document purporting to create a nonconsensual common-law lien, as defined in section 52-1901, knowing or having reason to know that the lien is a nonconsensual common-law lien;

(b) A financing statement pursuant to article 9, Uniform Commercial Code, knowing or having reason to know that the financing statement is not based on a bona fide security agreement or was not authorized or authenticated by the alleged debtor identified in the financing statement or an authorized representative of the alleged debtor; or

(c) Any document filed in an attempt to harass an entity, individual, or public official or obstruct a government operation or judicial proceeding, knowing or having reason to know such document contained false information.

(2) Fraudulently filing a financing statement, lien, or document is a Class IV felony.

(3) Lack of belief in the jurisdiction or authority of the state or of the government of the United States is no defense to prosecution under this section.

Sec. 3. Section 52-1901, Reissue Revised Statutes of Nebraska, is amended to read:

52-1901 For purposes of sections 52-1901 to 52-1904 and sections 4 to 6 of this act, nonconsensual common-law lien means a document that purports to assert a lien against real or personal property of any person or entity and:

(1) Is not expressly provided for by a specific state or federal statute;

(2) Does not depend on the consent of the owner of the real or personal property affected; and

(3) Is not an equitable or constructive lien imposed by a state or federal court of competent jurisdiction.

Sec. 4. A nonconsensual common-law lien is not binding or enforceable at law or in equity. Any nonconsensual common-law lien that is recorded is void and unenforceable.

Sec. 5. In order that the owner of real property upon which a nonconsensual common-law lien is recorded shall have notice of the recording of the lien, the claimant shall cause the sheriff to serve a copy of the recorded lien upon the owner of the real property upon which the nonconsensual common-law lien is recorded and the sheriff shall make return thereof without delay by filing proof of service with the register of deeds as provided in subsection (1) of section 25-507.01. There shall be no filing fee for filing the proof of service. A judicial proceeding to enforce a nonconsensual common-law lien shall be instituted by the claimant within ten days after recording the lien. Failure to serve a copy of the recorded lien upon the owner or failure to file a judicial proceeding to enforce the lien shall cause the lien to lapse and be of no legal effect.

Sec. 6. Section 52-1902, Reissue Revised Statutes of Nebraska, is amended to read:

52-1902 If a person submits for filing or recording to the Secretary of State, county clerk, register of deeds, or clerk of any court any document

purporting to create a nonconsensual common-law lien against real or personal property in violation of ~~this~~ section 52-1901 and sections 4 to 6 of this act or section 76-296 and such document is so filed or recorded, the ~~person~~ claimant submitting the document is liable to the person or entity against whom the lien is claimed for actual damages plus costs and reasonable attorney's fees.

Sec. 7. Sections 7 to 14 of this act shall be known and may be cited as the Commercial Real Estate Broker Lien Act.

Sec. 8. For purposes of the Commercial Real Estate Broker Lien Act:

(1) Commercial real estate means any real estate other than real estate containing no more than four residential units or real estate on which no buildings or structures are located and that is zoned for single-family residential use. Commercial real estate does not include single-family residential units such as condominiums, townhouses, or homes in a subdivision when sold, leased, or otherwise conveyed on a unit-by-unit basis, even though these units may be a part of a larger building or parcel of real estate containing more than four residential units;

(2) Commission means any and all compensation that may be due a commercial real estate broker for performance of licensed services; and

(3) Commission agreement means a written agreement with a designated commercial real estate broker as required by subsections (2) through (6) of section 76-2422.

Sec. 9. (1)(a) A commercial real estate broker shall have a lien upon commercial real estate or any interest in that commercial real estate that is the subject of a purchase, lease, or other conveyance to a buyer or tenant of an interest in the commercial real estate in the amount of commissions that the commercial real estate broker is due.

(b) The lien shall be available only to the commercial real estate broker named in a commission agreement signed by an owner or buyer or their respective authorized agents as applicable and is not available to an employee, agent, subagent, or independent contractor of a commercial real estate broker.

(2) A lien under this section shall attach to commercial real estate or any interest in the commercial real estate when:

(a) The commercial real estate broker is entitled to a commission provided in a commission agreement signed by the owner, buyer, or their respective authorized agents, as applicable; and

(b) The commercial real estate broker records a notice of lien in the office of the register of deeds of the county in which the commercial real estate is located, prior to the actual conveyance or transfer of the commercial real estate against which the commercial real estate broker is claiming a lien, except as provided in this section. The lien shall attach as of the date of the recording of the notice of lien and shall not relate back to the date of the commission agreement.

(3) In the case of a lease, including a sublease or an assignment of a lease, the notice of lien shall be recorded not later than ninety days after the tenant takes possession of the leased premises. The lien shall attach as of the recording of the notice of lien and shall not relate back to the date of the commission agreement.

(4)(a) If a commercial real estate broker is due an additional commission as a result of future actions, including, but not limited to, the exercise of an option to expand the leased premises or to renew or extend a lease pursuant to a commission agreement signed by the then owner, the commercial real estate broker may record its notice of lien at any time after execution of the lease or other commission agreement which contains such option, but not later than ninety days after the event or occurrence on which the future commission is claimed occurs.

(b) In the event that the commercial real estate is sold or otherwise conveyed prior to the date on which a future commission is due, and if the commercial real estate broker has filed a valid notice of lien prior to the sale or other conveyance of the commercial real estate, then the purchaser or transferee shall be deemed to have notice of and shall take title to the commercial real estate subject to the notice of lien. If a commercial real estate broker claiming a future commission fails to record its notice of lien for future commission prior to the recording of a deed conveying legal title to the commercial real estate to the purchaser or transferee, then such commercial real estate broker shall not claim a lien on the commercial real estate. This subsection shall not limit or otherwise affect claims or defenses a commercial real estate broker or owner or any other party may have on any other basis, in law or in equity.

(5) If a commercial real estate broker has a commission agreement as described in subdivision (4)(a) of this section with a prospective buyer,

then the lien shall attach upon the prospective buyer purchasing or otherwise accepting a conveyance or transfer of the commercial real estate and the recording of a notice of lien by the commercial real estate broker in the office of the register of deeds of the county in which the commercial real estate, or any interest in the commercial real estate, is located, within ninety days after the purchase or other conveyance or transfer to the buyer or tenant. The lien shall attach as of the date of the recording of the notice of lien and shall not relate back to the date of the commission agreement.

Sec. 10. The commercial real estate broker shall, within ten days after recording its notice of lien, either mail a copy of the notice of lien to the owner of record of the commercial real estate by registered or certified mail at the address of the owner stated in the commission agreement on which the claim for lien is based or, if no such address is given, then to the address of the commercial real estate on which the claim of lien is based. Mailing of the copy of the notice of lien is effective when deposited in a United States mailbox with postage prepaid. The commercial real estate broker's lien shall be unenforceable if mailing or service of the copy of notice of lien does not occur at the time and in the manner required by this section.

Sec. 11. The notice of lien shall state the name of the commercial real estate broker, the name as reflected in the commercial real estate broker's records of any person the commercial real estate broker believes to be an owner of the commercial real estate on which the lien is claimed, the name as reflected in the commercial real estate broker's records of any person whom the commercial real estate broker believes to be obligated to pay the commission under the commission agreement, a description legally sufficient for identification of the commercial real estate upon which the lien is claimed, and the amount for which the lien is claimed. The notice of lien shall recite that the information contained in the notice is true and accurate to the knowledge of the signatories. The notice of lien shall be signed by the commercial real estate broker or by a person authorized to sign on behalf of the commercial real estate broker and shall be notarized.

Sec. 12. (1) Except as provided in subsections (2) and (3) of this section, a lien that has become enforceable as provided in section 9 of this act shall continue to be enforceable for two years after the recording of the lien.

(2) Except as provided in subsection (3) of this section, if an owner, holder of a security interest, mortgage, or trust deed, or other person having an interest in the commercial real estate gives the commercial real estate broker written demand to institute a judicial proceeding within thirty days, the lien lapses unless, within thirty days after receipt of the written demand, the commercial real estate broker institutes judicial proceedings.

(3) If a judicial proceeding to enforce a lien is instituted while a lien is effective under subsection (1) or (2) of this section, the lien continues during the pendency of the proceeding.

Sec. 13. (1) Recorded liens, mortgages, trust deeds, and other encumbrances on commercial real estate, including a recorded lien securing revolving credit and future advances for a loan, recorded before the date the commercial real estate broker's lien is recorded, shall have priority over the commercial real estate broker's lien.

(2) A construction lien claim that is recorded after the commercial real estate broker's notice of lien but that relates back to a date prior to the recording date of the commercial real estate broker's notice of lien has priority over the commercial real estate broker's lien.

(3) A purchase-money lien executed by the buyer of commercial real estate in connection with a loan for which any part of the proceeds are used to pay the purchase price of the commercial real estate has priority over a commercial real estate broker's lien claimed for the commission owed by the buyer against the commercial real estate purchased by the buyer.

Sec. 14. (1) Whenever a notice of a commercial real estate broker's lien has been recorded, the record owner of the commercial real estate may have the lien released by depositing funds equal to the full amount stated in the notice of lien plus fifteen percent to be applied towards any lien under section 9 of this act. These funds shall be held in escrow by such person and by such process which may be agreed to by the parties, either in the commission agreement or otherwise, for the payment to the commercial real estate broker or otherwise for resolution for their dispute or, in the absence of any such mutually agreed person or process, the funds may be deposited with the district court by the filing of an interpleader. Upon such deposit of funds by interpleader, the commercial real estate shall be considered released from such lien or claim of lien. Upon written notice to the commercial real estate broker that the funds have been escrowed or an interpleader filed, the

commercial real estate broker shall, within ten business days, record in the office of the register of deeds where the notice of commercial real estate broker's lien was filed pursuant to section 9 of this act a document stating that the lien is released and the commercial real estate released by an escrow established pursuant to this section or by interpleader. If the commercial real estate broker fails to file such document, the person holding the funds may sign and file such document and deduct from the escrow the reasonable cost of preparing and filing the document. Upon the filing of such document, the commercial real estate broker shall be deemed to have an equitable lien on the escrow funds pending a resolution of the commercial real estate broker's claim for payment and the funds shall not be paid to any person, except for such payment to the holder of the funds as set forth in this section, until a resolution of the commercial real estate broker's claim for payment has been agreed to by all necessary parties or ordered by a court having jurisdiction.

(2) Except as otherwise provided in this section, whenever a commercial real estate broker's lien has been recorded and an escrow account is established either from the proceeds from the transaction, conveyance, or any other source of funds computed as one hundred fifteen percent of the amount of the claim for lien, then the lien against the commercial real estate shall be extinguished and immediately become a lien on the funds contained in the escrow account. The requirement to establish an escrow account, as provided in this section, shall not be cause for any party to refuse to complete or close the transaction.

Sec. 15. Original sections 52-1901 and 52-1902, Reissue Revised Statutes of Nebraska, and section 28-101, Revised Statutes Cumulative Supplement, 2012, are repealed.

Sec. 16. Since an emergency exists, this act takes effect when passed and approved according to law.