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Auctions and Real Estate Brokerage - A Primer

Twenty Questions to Help You Understand the Role of Auctions in Real Estate



By Seth Weissman

The use of auctions usually increases in slower real estate markets as sellers search for new ways to sell their properties. The present slow market is no exception. Auctions are a particular favorite of lenders and developers who have multiple properties that must be disposed of in a short period of time. While auctioning real estate is a form of real estate sales, real estate licensees cannot auction real property unless they have a special license to do so. This article explains, in question and answer format, what REALTORS® need to know about auctions.



1. What is considered an auction, or auction business, in Georgia?

Georgia law defines an “auction business” as “the performing of any of the acts of an auctioneer ... including bid calling for a fee, commission, or any other valuable consideration or with the intention or expectation of receiving the same by means of or by process of an auction ... ” O.C.G.A. § 43-6-1(3).

Based on this definition, a REALTOR® cannot conduct a public auction of real estate where there is bid calling without first being licensed as an auctioneer. The definition of “auction business” also includes negotiating an auction listing without an auctioneer’s license and offering to conduct an auction without an auctioneer’s license. What is not completely clear in the law is whether a REALTOR®, without being licensed as an auctioneer, can conduct a “silent” or online auction of real property where there is no bid calling. Bid calling is normally considered an essential feature of a true auction and involves the use of a specialized skill that was the likely basis for requiring auctioneers to be licensed in the first place. When there is not bid calling, a good argument can be made that no auctioneer’s license is needed. Otherwise, a REALTOR® who merely announces that he or she is accepting written bids on a property through a certain date would be required to obtain an auctioneer’s license.

Imposing such an obligation on REALTORS® in the situation would, in my opinion, go too far and would result in the public being no more protected than they otherwise would be if they worked with a licensed real estate broker or salesperson.

2. Must an auctioneer auctioning real property also be a real estate licensee?

The answer to this question is yes. Georgia law provides that it shall be unlawful for a licensed auctioneer to auction real property without also being licensed as a real estate broker, associate broker or salesperson. (O.C.G.A. § 43-6-9.) Since an auctioneer is permitted to have a salesperson’s license, this can mean that an auctioneer’s real estate license is held by a broker who is not an auctioneer. This raises a number of questions, addressed below, as to the relationship between the broker and the auctioneer in this situation.

3. Can a real estate brokerage firm which holds the salesperson’s license of a licensed auctioneer participate in the real estate auctions?

The answer to this question is no. Georgia law provides that it shall be unlawful for any company to engage in the business of auctioning (or advertising the same) unless such company is registered with the Georgia Auctioneers Commission. This requires the company to fill out an application in a form prescribed by the commission and submit “satisfactory evidence approved by the Commission that the company employs or shall employ an auctioneer licensed ... to conduct any auctions in this state....” (O.C.G.A. § 43-6-11.1(2).)

4. What duties does a Georgia real estate broker have to supervise the auction activities of an affiliated licensee with an auctioneer’s license?

The law does not impose any special duties on a broker to supervise an auctioneer who is also an affiliated licensee of the broker beyond the normal duties a broker owes to its other affiliated licensees. Presumably, this means that a broker will need to do such things as review the auctioneer/licensee’s listing contracts, sales contracts, advertising and trust accounts and do all other things required under O.C.G.A. § 43-40-18. So, for example, if an auctioneer advertises an auction to be held on St. Patrick’s Day and that only persons of Irish descent can bid on the first property being auctioned, the auctioneer and his or her broker will likely be sanctioned by the Georgia Real Estate Commission for violating our fair housing laws. This underscores the point that auctioneers of real property are subject to two sets of laws and regulations — those of the Georgia Real Estate Commission and those of the Georgia Auctioneers Commission.

5. What are the responsibilities of the licensed auctioneer in a real estate auction?

The dual-licensed individual (holding both a real estate license and an auctioneering license) is considered the “supervising auctioneer” of any registered brokerage firm holding an auction. He or she is required to be a full-time auctioneer (either owning the company or

continued on page 52



employed exclusively by it), and is responsible for all of the advertising for the auction and for the management of the actual sale. He or she must account for all proceeds from the auction and maintain for three years from the date of the auction certain records including an executed contract and the closing statement. All circulars or other advertising of auctions by the company must contain the name and license number of the supervising auctioneer.

6. How do I obtain an auctioneer's license?

Obtaining an auctioneer's license requires a similar process to that of obtaining a real estate license. Applicants must be at least 18 years of age, residents of Georgia (with a few exceptions noted below), and either citizens of the United States or persons who have filed their intent to become a U.S. citizen. Non-Georgia residents may also obtain an auctioneer's license under reciprocity rules, if they are licensed in another state with licensing requirements similar to Georgia, or if the state in which they are licensed has a reciprocity agreement with Georgia. Further, applicants must either be a high school graduate or hold a G.E.D. certificate, and be a graduate of an approved auctioneering school. If all of these requirements are met, the applicant must take and pass an examination, and must prove to the Georgia Auctioneers Commission that they are reputable, honest and competent to transact the business of an auctioneer in a manner to safeguard the interest of the public. (O.C.G.A. § 43-6-11.)

7. Must the funds from an auction be deposited in a special trust account?

The answer to this question is yes. An auction company must maintain at all times an active trust account and register the same with the Georgia Auctioneers Commission. However, there is nothing in the law which prohibits an auction company, which is also a real estate brokerage firm, from having a trust account which is registered with both the GREC and the Georgia Auctioneers Commission.

8. Must advertisements of auctions contain special information?

Yes. Any circular or other type of advertisement of an

auction must include both the name and license number of the auctioneer. If the auction is being conducted by a registered company (rather than an individually licensed auctioneer), the name of the company and of the supervising auctioneer (and his/her license number) must be included. Similar identification is required on any executed contract of sale of the property.

9. Must an auction contract contain special information?

Yes. Contracts for the providing of auctioneering services must be in writing, signed and dated, and must include several specific details: the name, address, phone number, and signatures of the seller(s) and the auctioneer; the date of execution; the proposed date and place of the auction; terms of compensation of the auctioneer; and the date of the proposed settlement. Similar information is required on the closing statement: name and address of seller(s); date and place auction was held; list and sales price of all items sold at auction; date proceeds were paid to the seller(s); and the signature of both the auctioneer and the seller(s).

10. What is an "absolute auction" versus an "auction with reserve"?

If an auction is "absolute," there is no minimum bid which must be reached before the seller is obligated to sell the item. That is, if the only bid for a dilapidated home offered at absolute auction is \$1,000.00, the seller would be required to sell at that price. In an absolute auction the seller is not permitted to bid on the property, nor is anyone acting on the seller's behalf.

An auction is "with reserve" if the seller reserves the right to refuse offers below a certain price, or to refuse all offers if he/she chooses. In such cases, the seller is not required to inform bidders of the reserve amount. All auctions are presumed to be with reserve unless otherwise specifically stated.

11. Are absolute auctions ever prohibited?

Absolute auctions are prohibited by statute whenever there is an outstanding lien or encumbrance on the property being sold that is owed to any person or entity other than the seller, except for current tax obligations, easements or restrictions of record. In other words, if there is a deed to secure debt on a piece of real property being auctioned, it cannot be the subject of an absolute auction. Therefore, most auctions of real property are auctions with reserve.

12. Can a seller whose property is exclusively listed for sale with a real estate broker list the property for auction with a separate auction firm?

Based on the language in the GAR Exclusive Seller Listing

Agreement, a seller cannot list property for auction without permission of the listing broker. The auctioning of real estate is one of the activities defined in our statutes as real estate brokerage, and the “exclusive” nature of the listing agreement means that to list property for auction through another licensee would be a breach of the exclusive listing agreement.

13. If the listing broker consents to the property being sold at auction, and the broker is not an auctioneer, what effect does this have on the exclusive listing agreement?

If the listing broker consents to the property being auctioned, the listing agreement should be amended to reflect this change. Essentially, the seller and the listing broker are agreeing to an exception to the exclusive listing agreement. The amendment should address what happens if the property is sold and not sold at auction. Since there is no guarantee that a property will be sold at auction, the amendment to the listing agreement normally provides that it shall remain full force and effect except if the listed property is sold at auction and the sale is thereafter closed.

14. Can a broker without an auctioneer’s license receive a commission as the result of property being auctioned?

It is fairly common for auctioneers to protect to some degree the commission rights of both selling and listing brokers. It is less than clear whether the law allows auctioneers to share their commissions with non-auctioneers. The term “auctioneer” includes “any person who, for a fee, commission ... or with the intention or expectation of receiving the same by means of or by process of an auction or sale at auction offers, negotiates or attempts to negotiate a ... sale, purchase ... of ... real ... property This language is so broadly written, it may prohibit, for example, a buyer’s broker representing the buyer at the auction from sharing in the commission of the auctioneer unless the broker is also a licensed auctioneer. It may also prohibit a buyer’s broker who is not a licensed auctioneer from seeking a commission from the buyer for negotiating the contract on behalf of the buyer of property purchased at auction. Brokers on the other hand can argue that their rights to a commission arise by virtue of contracts that have nothing to do with how a property is sold but instead whether it is sold. Following this logic, they can get paid so long as they themselves don’t conduct the auction. The law will likely not get settled in this area until our courts establish more of a bright line between the commission rights of auctioneers and real estate brokers.

15. If a REALTOR® agrees to an auction, may the REALTOR® (who is not a licensed auctioneer)

mention in the “notes” section of listing agreement that the property will be auctioned on a certain date?

My answer to this question is yes. Sections 43-6-9(a) and (c) make it unlawful for a person or a company, directly or indirectly to engage in, conduct, advertise, hold [himself/herself] out as engaging in or conducting the business of auctioning” without first being licensed or registered, as applicable, by the Georgia Auctioneers Commission. However, when a non-auctioneer notifies other real estate licensees that a listed property is going to be auctioned, the non-auctioneer licensee is not, in my opinion, holding himself as being in the auction business. Instead, he or she is merely announcing that an auction of the property is going to take place. Out of an abundance of caution, however, it is probably a good idea for the non-auctioneer licensee to name the auctioneer conducting the auction and provide his or her auctioneer’s license number in the advertisement to make it clear that the auction is being conducted by a licensed auctioneer in accordance with state law.

16. Can an agent/auctioneer whose real estate salesperson license is held by ABC Realty perform auctions for XYZ Realty?

No. Auctioneering regulations require that any company performing auctioneering services must be registered with the Auctioneers Commission, and in order to be registered it must either be owned by or employ an auctioneer who performs auctioneering services exclusively for that company.

17. How is an auctioneer paid?

Auctioneers are paid on both a flat fee and commission basis. However, it is not unusual for auctioneers to be paid by both the seller and the buyer on the same transaction. The seller may pay a fee to the auctioneer if the property is sold at auction and the buyer may also pay the auctioneer an additional fee known as a buyer’s premium if the property is purchased at auction. Agreements to pay the auctioneer a fee are normally set forth in writing and include a disclosure that the auctioneer is not representing the buyer in the auction.

18. What are the penalties for engaging in any auctioneering activities without a license?

Violation of the requirement to have an auctioneer’s license is a misdemeanor in Georgia, and carries fines up to \$1,000.00 and/or up to 90 days in jail per violation.

19. Are auctions of condominium units different from other types of auctions?

The answer to this question is yes. In the initial sale of condominium units to owner-occupants, buyers have a seven day right to rescind any purchase and sale contract, beginning from when the buyer has received a condominium disclosure package and the buyer and seller enter into a real estate sales contract. This right of rescission applies even if the property is being purchased at auction. As a result, a buyer of a condominium unit who is buying the unit to live in can be the winning bidder at the auction and then void the purchase and sale agreement within seven days.

It should be noted that this right of rescission only applies to the first bona fide sale of each condominium unit for residential occupancy by the buyer, any member of the buyer's family, or any employee of the buyer. So, for example, if the buyer is buying the unit to rent to others, the buyer does not have this statutory right of rescission. Some auctioneers will have bidders identify themselves as investor buyers or buyers who are purchasing to live in their units and only give buyers in the latter group a right of rescission.

20. What is a "Dutch auction?"

A Dutch auction is a type of auction where normally a lot of an identical product is being auctioned at the same time. Normally, the auctioneer begins with a high auction price which is lowered until a bidder is willing to meet the auctioneer's price. So, for example, let's say a bank is auctioning 20 identical condominium units in a Dutch auction. Three bidders really want units in the building and bid \$160,000.00 per unit. These bidders are assured of ending up with units as the first bidders and may be willing to pay more than others for the privilege. If there are no other bidders at this price, the auctioneer then reduces the price to let's say \$155,000.00 and then to \$150,000.00 and so on until all of the units are sold. The brave souls who wait until then and may get a great deal on a unit or may get shut out completely and end up without any unit at all.

Conclusion

In these challenging economic times, auctions of real property will certainly be far more commonplace than in the past. Companies engaged in real estate brokerage and real estate auctioning can largely stay out of trouble by following the double rules of the Georgia Real Estate Commission and the Georgia Auctioneers Commission.

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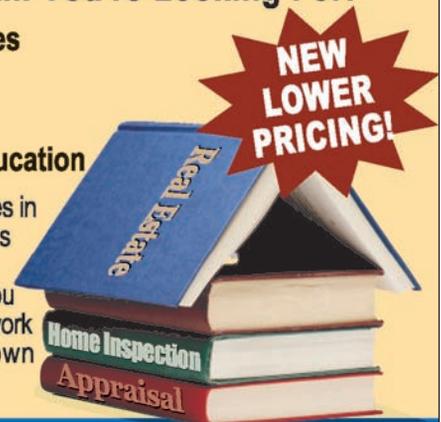
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