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Do real estate agencies now have the obligation to exercise vigilance and diligence when preparing sale/lease contracts?

Real estate agencies are appointed by the owners of a real estate property who wish to sell or to lease their property. In this respect, under applicable French legislation, the real estate agency receives a mandate to enter into a sale/lease contract with a third-party.

Pursuant to an established case law, the real estate agency, acting as a professional, has the obligation to provide information and advice in the performance of its duties. As a result of two judgments rendered by two different courts of appeals, the real estate agency now seems to also have the duty to exercise vigilance and diligence in the preparation of the sale/lease contracts.

A real estate agent is customarily considered as a professional intermediary, negotiator and drafter of legal instruments who has the obligation to ensure that all requirements are met to give full effect to sale/lease contracts, included with respect to the party that has not mandated it[1].

Consequently, French case-law imposed on real estate agents the obligation to provide information and advice in the performance of his/her duties.

The burden of proof that the above obligations have been properly performed lies on the real estate agency.

Wherever the real estate agent fails to provide information and if this omission causes a damage/loss to any of the contracting parties, damages may be awarded to the aggrieved party.

It seems that the real estate agency henceforth also has the obligation to exercise vigilance and diligence.

Indeed, in 2012, a Court of Appeals found a real estate agency liable for not having promptly presented for encashment a check of approximately 28,000 Euros issued by the purchaser of a real estate property in application of a penalty clause set forth in the promise of sale agreement that had been drafted by such agency[2].

The Court of Appeals held that a period of eight months to deposit the check – that proved uncovered – resulted for the sellers in a loss of opportunity to quickly re-take possession of the real estate property on the one hand, and to receive the financial penalty paid by the purchaser for non-compliance with his contractual undertakings.

It should be noted that, in this instance, the real estate agency had served as an escrow agent pending the signature of the authentic deed of sale and that the parties had not agreed on any specific period of time to lapse before cashing the check.

In another judgment recently handed down by the Paris Court of Appeals, a real estate agency was held liable in relation to a clause that had been inserted in the contract that it had prepared and that had been signed by the parties[3].

This contractual clause stipulated that the purchaser was to pay an amount of approximately 13,000 Euros by check to a designated notary and that the latter was to acknowledge due payment of this sum and to grant full discharge to the purchaser in this respect.

The Court of Appeals consequently considered that the real estate agent had, at the very least, the obligation to ensure that the check had been duly deposited at the office of the notary who, as a third-party to the executed contract and unable to attend the signature meeting, could not validly acknowledge deposit of the check and grant discharge to the purchaser in this respect.

The Court of Appeals held that the collateral scheme devised by the real estate agent was ineffective and that the owners of the real estate property had been deprived of the opportunity to immediately receive the amount due to them under the penalty clause.

As a result of these two judgments, it seems apparent that a real estate agency, as a professional involved in the preparation of sale/lease contracts, has now the obligation to exercise vigilance and diligence in the performance of its duties, in addition to its obligation to provide information and advice that has been customarily imposed on it by French case-law.

[1] 1st Civil Chamber of the *Cour de Cassation*, January 17, 1995, Bull. Civ. I, n°29; 1st Civil Chamber of the *Cour de Cassation*, November 25, 1997: Bull. Civ. I, n°321)

[2] 4th Chamber of the Court of Appeals of Rennes, November 29, 2012, case n°09/06473

[3] 1st Chamber, Pole 4 of the Court of Appeals of Paris, June 5, 2014, case n°13/04269