LEGAL HOTLINE

By Zelms, Erlich & Mack | Copyright© 2022, all rights reserved.

The following is for informational purposes only and is not intended as definitive legal or tax advice. You should not act upon this information without seeking independent legal counsel. If you desire legal, tax or other professional advice, please contact your attorney, tax advisor or other professional consultant.

Q&As are not "black and white," so experienced attorneys and brokers may disagree. Agents are advised to talk to their brokers/managers when they have questions.

Licensee Has No Liability for Failing to Predict Increase in Material Costs and Builder's Ultimate Inability to Perform

FACTS: The agent represented the buyer and a reputable builder/developer as a fully disclosed dual agent in the transaction for a home to be constructed. The buyer and builder/developer executed a contract selecting the model to be constructed and the price. Six months after the contract was signed, the builder/developer advised the buyer that due to "supply chain" problems, the cost of construction materials had increased 300%. The builder/developer advised the buyer that he could not construct the house for the agreed upon price and gave the buyer the option of either cancelling the transaction and receiving the return of all monies paid to date, or amending the contract. The buyer refused both options. The builder/developer ultimately filed bankruptcy and is no longer in business and has no funds. The buyer has demanded that the agent and his brokerage firm "make arrangements to build the house originally planned" at their expense because they were dual agents and misrepresented/omitted the builder/developer's ability to perform.

ISSUE: Are the agent and brokerage firm required to build the house at their expense?

ANSWER: No.

DISCUSSION: Based on the facts presented, the buyer's real claim is against the builder/developer. Licensees are not guarantors of a builder's performance. Additionally, as to the alleged misrepresentation/omission, the standard of care for real estate licensees does not include predicting future events. See Denbo v. Badger, 18 Ariz. App. 426, 503 P.2d 384 (1972); McAlister vs. Citibank, 171 Ariz. 207, 215, 829 P.2d 1253, 1261 (App. 1992). The buyer's contention that agent and brokerage were obligated to predict a 300% increase in materials costs, that was to occur at some time after the contract was signed, resulting in a reputable builder refusing to perform, is not a viable legal claim. The agent and brokerage have no obligation to build the house at their expense as demanded by the buyer.

Listing Agent Must Disclose Deed of Trust Recorded Against the Property While Escrow is Pending

FACTS: The buyer and seller entered into the Arizona REALTORS® Residential Resale Real Estate Purchase Contract. While escrow was pending, the owner took out a HELOC secured by a deed of trust against the property. She intends to use the HELOC proceeds to fund a down payment on a different property. The listing agent discovered the HELOC and advised the seller that the new loan must be disclosed to the buyer immediately. The seller is resisting the advice, claiming the HELOC in no way affects the buyer.

ISSUE: If the seller remains steadfast in her refusal to disclose the HELOC, must the listing agent make the disclosure?

ANSWER: See discussion.

DISCUSSION: Although the seller may justifiably believe she need not disclose the HELOC because it does not affect the buyer, the obligation of the listing agent is different than the seller's in this instance. Specifically, A.A.C. R4-28-1101(B)(4) requires a licensee to disclose the existence of a "lien or encumbrance on the property being transferred." The listing agent should therefore disclose the new HELOC.

Note: The Deed of Trust securing the HELOC will appear in the title commitment as well, providing the buyer another source of information.

Licensee Must Disclose a Drunk Driving Charge to the Department of Real Estate Within 10 Days of the Judgment of Conviction

FACTS: After leaving a holiday party, an agent was arrested for driving under the influence. The agent was released from jail the following morning. The trial date is set for April.

ISSUE: Is the agent required to disclose the arrest and pending trial to the Arizona Department of Real Estate?