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RENT-TO-BUY CONTRACTS: IS IT EASIER TO BUY A HOUSE NOW?

Coming from the “Unlock-Italy” Decree, the rent-to-buy contract is the new negotiation scheme that makes the right to housing more effective. Attention will be paid to such scheme, which has certainly been approved by most of the Italian notaries, despite many doubts and perplexities.

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IUS/15 - DIRITTO PROCESSUALE CIVILE

Articolo divulgativo - ISSN 2421-7123

Direttore responsabile

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Pubblicato, Mercoledì 17 Febbraio 2016

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1. Rent-to-buy contracts: the right to housing is real

The right to housing, in its constitutional dimension, is certainly one of “the fundamental requirements of sociality established by the Italian Constitution, to which the democratic state conforms” ^[1]. Being aware of the difference between the right to housing and the right of occupancy ^[2], the Italian Constitution has made the state promote the importance of such rights since 1948, therefore art. 47 establishes that housing is a public subjective right and is essential for human development ^[3].

Similarly, the Constitutional Court of Italy has always approved the constitutional significance of the right to housing as one of the essential preconditions of the welfare state (see sentences n. 94/07, 121/10, 166/08, 451/06), a fundamental aspect of protecting human dignity and a responsibility that the state cannot abdicate ^[4].

In such a legal and organisational context, the house, a peaceful place and extension of our body, is at the centre of legislative politics. Consequently, even when respecting the Christian imperative “You shall not covet your neighbour’s house” found in the Book of Exodus, the Unlock-Italy Decree (D.L. 133/2014 converted into Law 164/2014) introduces the so-called “rent-to-buy” contract in the Italian system, a suitable scheme for those who can combine lease and purchase when they do not have enough money or cannot get a mortgage to buy a property.

Indeed, the rent-to-buy contract is a new type of contract, thanks to which the landlord immediately delivers possession of the property to the tenant-buyer, who pays the established instalment, thus being given the opportunity to decide whether to buy or not the property after a fixed period of time, deducting a portion of the paid instalments from the total price.

2. Legal nature of rent-to-buy contracts

While having some features in common with both lease agreement and purchase agreement, a rent-to-buy contract is completely different from a lease by express provision of law (art. 23, par. 1, D.L. 133/2014).

Despite being often used to buy a first home, this type of contract can also work as a negotiation scheme to buy different properties ^[5], with different clarifications especially from the financial point of view, but also from the legal one. Generally speaking, by considering the reason itself of the law coming from Unlock-Italy, as well as the previous laws, it can be seen that the rent-to-buy contract was initially created to facilitate purchase of housing properties in a bad market situation. It is not by chance that specific protections concerning the transcription of the contract or the residential lease ^[6] have been foreseen. It also seems that the same article refers to rent-to-buy contracts dealing with more complex properties like the commercial ones.

As for the contractual structure, attention is paid either to the contract itself, which is defined as a mixed contract, or to related agreements – lease and purchase – which share the same cause, i.e. to transfer the ownership of the property to the tenant ^[7].

However, if a rent-to-buy contract was really used to let a potential purchaser immediately benefit from a property, thus signing a purchase agreement and deducting a portion of the paid instalments from the total price, other types of existing contracts could have been used: a contract for future sale; a preliminary agreement which anticipates the ownership of the property; an instalment sale which reserves ownership; lease and sale with a condition subsequent and a condition precedent ^[8].

Therefore, it is important to consider the buyer's need to apply for deferred payment and have the same advantages as the ones he would have if he benefited from the usual credit instruments. Last but not least, it is worth mentioning that the rent-to-buy contract is also connected with banking contracts: it gives the potential buyer the time to be prepared for bank regulations in order to get a mortgage, creating a history of deposits (of instalments paid in the meantime) to reassure the bank about his reliability as a payer.

By taking this aspect into account, the difference between a rent-to-buy contract and a finance lease is clear: the former aims to get a loan from the bank, proving the buyer's reliability by creating the abovementioned history of deposits; in the latter, a finance company replaces the bank and the credit system, thus becoming a sponsor of the procedure ^[9].

However, the aforesaid thesis is proven wrong, since a credit history is not always enough to influence the bank's decision to give the mortgage ^[10]. Standardised parameters dictated even by European laws use strict evaluations to consider the value of the property, the client's earning capacity, indebtedness and solvency.

The same cannot be said about a rent-to-buy contract signed for commercial properties: in this case, the lease of business does not imply the ownership of the property, but rather its productive use and organisation. Therefore, while a history of deposits is not useful for an evaluation of solvency and for proving the buyer's reliability to get a mortgage from the bank, the production of the rental company will certainly help create a business project that can be evaluated by the credit institution to get the loan. Consequently, there is a strong connection between a rent-to-buy contract and a finance contract.

3. Causes, features and effects

The rent-to-buy contract comes from art. 23 of the D.L. 133/14 and its aim is to postpone the passing of title that occurs when selling a property, but it also guarantees the future buyer an immediate availability of the housing and that his payment is knocked off the agreed price for the property.

The legal and economic reasons for the development of such contract are the potential buyer's economic difficulties and his inability to access bank credit ^[11]. Consequently, the rent-to-buy contract satisfies both the housing request and the real estate offer.

Additionally, if it is true that the property is immediately available and it can be later bought thanks to a negotiation between lease or usufruct and purchase, then the rent-to-buy contract can be based on liquidity, as well as investment choices.

Indeed, since a certain amount of money is saved for a future purchase, a kind of savings programme is created for the tenant-buyer and it works like life insurance or purchase fund with accumulation plan. Therefore, the buyer's conditions, market conditions and external factors affecting investment are equally important.

The main features of a rent-to-buy contract concerning the tenant are the following:

The immediate availability of the property; The obligation to pay an instalment that is made of two parts: one pays for the use of the property and the other for the purchase price; The right to buy the property within the terms written in the contract; The opportunity to attribute the portion of the fixed instalment to the sale price. The owner's opportunities are clear: he obtains the instalments coming from the temporary use of the property without paying for the expenses of ordinary administration and without running the risk of being left without a buyer.

The contractual scheme of a rent-to-buy contract is made of two important stages.

The first stage consists in allowing the tenant to use the property. By signing the contract, the owner has the obligation to deliver the property to the tenant, who instead has the obligation to pay a fixed instalment (for the use of the property and for the purchase price).

The second stage is possible: the tenant can decide whether to buy or not the property. It should be pointed out that this is a right to buy and not an obligation to conclude the purchase agreement (like a preliminary agreement) nor an automatic transfer after a certain period of time.

If the tenant decides not to buy the property, the effects of the contract will cease to exist after its expiration date. Consequently, the seller will be entitled to get the property back and retain the instalments paid for its use, but he will have to return the portion of instalments paid by the tenant to potentially buy the property. It is worth stressing that the failure to exercise the right to buy the property does not imply the non-fulfilment on the part of the tenant.

By contrast, if the tenant wants to exercise the right to buy, the seller has to approve the sale and pay the net price of the instalments the former paid to buy the property. If the seller does not agree to sign the deed of assignment, the tenant is entitled to a constitutive judgement that will not conclude the contract (art. 2932 of the Italian Civil Code), as foreseen by the law concerning preliminary agreements.

As far as the object is concerned, the rent-to-buy contract can adapt to any kind of property (productive, commercial, housing, etc.), including land properties and “untreated” buildings. In the latter case, the contract could establish that the seller is in charge of completing the work, thus reducing the instalments for both parties, since the property cannot be used and the expenses for making it usable will be paid by the seller ^[12]. Art. 23, par. 4., D.L. 133/2014 also maintains that if the rent-to-buy contract concerns a property under construction, the ban foreseen by art. 8 of the Italian Legislative Decree 122/2005 is applied when the tenant can use the property: “the notary cannot sign the purchase agreement if, after or during the stipulation, the loan has not been divided into instalments or the mortgage guarantee has not been cancelled or the property is not in foreclosure”.

This means that if the rent-to-buy contract deals with a property encumbered by mortgage or foreclosure, the ban is applied from the moment the contract for use has been signed and not just when the subsequent purchase agreement has been signed ^[13].

As for the fixed instalments, the contract has to refer to both the one paid for the use of the property and the other paid to buy the property, in case the right to buy is exercised. The contract is not valid if it does not contain such indications.

Furthermore, there could be a connection between the rent-to-buy contract and the loan drawn up by the seller, which means that the tenant will be able to pay the fixed instalments thanks to this loan.

Overall, the rent-to-buy contract gives both parties autonomy. Indeed, they can determine the duration of use and buy and selling and the kind of instalment, besides termination, penalty/conditional clauses, the opportunity to assign the agreement and to control the effects of non-fulfilment ^[14].

As for the obligations and rights of seller and tenant, the former is in charge of extraordinary repairs, while the latter receives the property in the condition in which it is and pays for the expenses of ordinary conservation, administration and repairs.

4. Transcription of the contract

One of the most interesting features of this contract is that it can be transcribed in land registry offices, thus better protecting the tenant.

Indeed, transcribing a rent-to-buy contract allows the enforcement against third parties, concerning the license to use, and the booking effect similar to that of the transcription of the preliminary agreement, with reference to the seller's obligation to transfer the ownership of the property in case the tenant exercises his right to buy.

An important difference arises between the common lease agreement and the rent-to-buy contract: for the purposes of enforcement against third parties, the former can only be transcribed if it lasts more than nine years, whereas the latter always needs to be transcribed, even if it lasts less than nine years.

The booking effect, instead, makes the effects of the transcription of a possible bill of sale retroact when transcribing the contract itself, thus respecting the tenant, who will be able to buy the property in the condition in which he was when the rent-to-buy contract was arranged. Overall, the booking effect is only produced if the bill of sale has been transcribed before the rent-to-buy contract's expiration date or within ten years since its transcription.

In the case of non-fulfilment on the part of the seller, the tenant is also protected by this transcription: he is entitled to a special privilege with reference to the property, provided that the effects of the contract did not cease to exist (i.e. no more than ten years have passed since the transcription).

By contrast, if the effects of the contract cease to exist, the parties will have to cancel its transcription.

5. Non-fulfilment on the part of the tenant

The tenant's obligation to pay a fixed instalment is one of the first obligations coming from rent-to-buy contracts. In case of non-fulfilment on the part of the tenant, the seller can make a choice from a specific range of possibilities (besides claiming compensation):

He can start court proceedings against the goods of the tenant (art. 2910 of the Italian Civil Code), if the instalments established by the contract have not been paid. Court proceedings can be started easily because the rent-to-buy contract is either a deed or a notarised document, therefore it can be transcribed and it can protect the tenant/buyer. If an "obligation to do" like care and custody of the property is not fulfilled, the seller may obtain that it is performed (art. 2931 of the Italian Civil Code); Besides the right to compensation, he can ask for a dissolution of the contract (art. 1453 et seq. of the Italian Civil Code), provided that the non-fulfilment of either party is important. According to this law, "the contract is dissolved if a minimum number of instalments established by both parties has not been paid and is not below a twentieth of the total amount" ^[15]. Therefore, it is possible to derogate in melius and not in peius for the tenant (a higher number of unpaid instalments); In the case of dissolution of the rent-to-buy contract, the seller will have the right to return the property and obtain the instalments paid for the total amount and for the part attributed to the purchase price, which are his compensation for damages due to the non-fulfilment on the part of the tenant. However, the freedom of negotiation given to the parties during contract preparation does not exclude the possibility that they may consider a different regulation, more favourable to both the tenant (in case a certain amount of money is paid back) and the seller (if a larger amount of money is paid as a penalty ex. art. 1382 of the Italian Civil Code due to the non-fulfilment); The seller is still entitled to obtain the expired and unpaid instalments. Overall, the seller has to return the property due to both the non-fulfilment on the part of the tenant and the failure to exercise the right to buy. Should this not be the case, he can claim the obligation to deliver and release the property. Consequently, a rent-to-buy contract written as a deed can reduce the time needed for execution proceedings.

6. Non-fulfilment on the part of the seller

Furthermore, the rent-to-buy contract inevitably requires some obligations from the seller, the most important of which is to deliver possession of the property to the tenant.

Another essential obligation is to sell the property if the tenant is willing to exercise the right to buy within the set time limits.

In this case, the tenant is entitled to claim not only compensation, but also the following:

The fulfilment in question (art. 2931 of the Italian Civil Code), if the non-fulfilment concerns an “obligation to do something”; The fulfilment in question (art. 2932 of the Italian Civil Code), if the non-fulfilment concerns the obligation to sell the property. In order to give the tenant the opportunity to buy the property at a later stage, the court action ex. art. 2932 of the Italian Civil Code needs to be transcribed within the terms of the contract and, in any case, not later than ten years from the original transcription. The seller will have a constitutive judgement that will not conclude the contract; The dissolution of the contract (art. 1453 et seq. of the Italian Civil Code), if the non-fulfilment is not important. The seller can retain the instalments made up to the dissolution of the contract, provided that they belong to the rental period, while he will need to pay back the instalments made to that point, related to the sale and increased by legal interests. In order to protect the tenant, the seller needs to respect this law. **7. Failure of both parties**

Finally, paragraph 6 deals with the failure of the seller and the tenant: in the former case, the contract continues, except for the application of art. 67, par. 3, lett. c) of the Personal Bankruptcy Law concerning bankruptcy clawback; in the latter, art. 72 of the Personal Bankruptcy Law is applied, therefore the trustee in bankruptcy is entitled to decide whether to dissolve or not the contract.

References

[1] Constitutional Court of Italy, sentence n. 217, 1988.

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[3] M. CIOCIA, *Il diritto all'abitazione tra interessi privati e valori costituzionali*, Napoli, Esi, 2009, p. 43.

[4] See Constitutional Court of Italy, sentence n. 217, 25th February 1988.

[5] The rent-to-buy contract can also refer to commercial properties.

[6] See Court of Verona, Bankruptcy Section, authorisation, 12th December 2014, in www.ilcaso.it, analysed by G. Ascheri, G. Fiori, *Rent to buy e fallimento. Note a margine di un provvedimento del Tribunale di Verona*. In dottrina v., A. Busani, E. Lucchini Guastalla, *Il «rent to buy» non è affitto*, in *Il Sole 24 Ore*, 24th September 2014.

[7] A. CIRLA, *Il rent to buy: una grande occasione che però ancora non riesce a decollare*, in *Immobili e proprietà*, 2013, 12, p. 721 et seq.

[8] A. C. NAZZARO, *Il rent to buy tra finanziamento e investimento*, in *Riv. Dir. Banc.*, www.dirittobancario.it, 4, 2015.

[9] See S. MARINO, *Rent to buy: nuovo strumento contrattuale per favorire la ripresa delle transazioni immobiliari*, in *Vita notarile*, 2014, p. 1143 et seq.

[10] A. Testa, *Il rent to buy: la tipizzazione sociale di un contratto atipico*, quote, p. 384 et seq.

[11] See S. MARINO, *Rent to buy: nuovo strumento contrattuale per favorire la ripresa delle transazioni immobiliari*, in *Vita notarile*, 2014, p.1144 et seq. Opposite theory by A. FUSARO, *Rent to buy, Help to buy, Buy to rent tra modelli legislativi e rielaborazioni della prassi*, quote, p. 425 et seq.

[12] Guida Nazionale del Notariato, *Il rent to buy e altri modi per comprare casa*, 2015.

[13] *Ibidem*.

[14] C. VIVENZI, *Il contratto “rent to buy”: analisi ed approfondimento degli aspetti civili e fiscali*, in *Centro Studi ANCL*.

[15] D.L. 133/2014, art. 23, par. 2.

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