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RECOGNITION OF INVESTOR'S PROPERTY RIGHTS AS A WAY OF PROTECTION IN THE SPHERE OF HOUSING CONSTRUCTION IN UKRAINE

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SUMMARY

The article investigates the practical aspects of applying recognition of the right as one of the ways to protect the property rights of investors in housing construction in Ukraine. A comprehensive analysis of judicial practice about recognition of rights in the case of non-recognition or objection of property rights of investors has been carried out. It has been established that the investor's property right is interpreted by the courts as a right of claim to the investment fund management company and/or construction company. Particular attention is paid to the prerequisites for recognition of the right to housing in Ukraine. It is determined that the prerequisite for the recognition of the right to housing is the commissioning of an object by the state admissions committee.

Key words: recognition of right, disputation, investor's property right, protection of civil rights and interests, housing construction, violation.

ПРИЗНАНИЕ ПРАВ СОБСТВЕННОСТИ ИНВЕСТОРА КАК СПОСОБ ЗАЩИТЫ В СФЕРЕ ЖИЛИЩНОГО СТРОИТЕЛЬСТВА В УКРАИНЕ

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АННОТАЦИЯ

Статья посвящена исследованию практических аспектов применения признания права как одного из способов защиты имущественных прав инвесторов в сфере строительства жилья в Украине. Проведен комплексный анализ судебной практики в части признания права в случае непризнания или оспаривания имущественного права инвестора. Установлено, что имущественное право инвестора трактуется судами как право требования к компании по управлению инвестиционными средствами и / или застройщика. Особое внимание уделено необходимым предпосылкам для признания права на жилье в Украине. Определено, что для признания права на жилье необходимой предпосылкой является введение объекта в эксплуатацию государственной приемочной комиссией.

Ключевые слова: признание права, оспаривание, имущественные права инвестора, защита гражданских прав и интересов, жилищное строительство, нарушение.

Statement of the problem. One of the ways to protect civil rights and interests under Art. 16 of the Civil Code of Ukraine is the recognition of the right. This provision applies to all subjective civil rights. Non-recognition of a right or its objection is one of the forms of encroachment on the civil rights of a person, as a result of which the latter can't realize it. At the same time, in different spheres of social relations, the use of this protection method has its own specifics.

Recognition of the right can be applied as an independent way of protection,

and also can be combined with other means of security and protection of subjective civil rights. The latter depends on the nature of the violation of property rights, its consequences and the purpose of its termination.

The person, whose rights are violated, chooses the way of protection by himself. Applying appropriate way to protect the rights of investors in the construction determines their existence. That is, at the time of violation of the property right, the person must have his legally certified confirmation. However, this



does not exclude the possibility of using this method of protection in the absence of sufficient formal evidence of belonging to a person the subjective law.

Status of research. The theoretical and metrological basis of the research are works of domestic and international scientists that cover a wide range of problems in investor's property right protection in the sphere of housing construction, including works of such scientists as I. Venediktova, O. Voronova, N. Zagorniak, V. Kafarsky, M. Mashchenko, I. Plucar, L. Radchenko, V. Sichevlyuk, I. Chaly and others.

The objective and purpose of the article is to provide appropriate scientific analysis and evaluation of the practical use of such method of investor's property right protection in the sphere of housing construction as recognition of right.

Presentation of the main material. Prerequisites for the protection of property rights by its recognition are: 1) the existence of subjective property right; 2) non-recognition of this right by other persons; 3) uncertainty about the legal status of a person, resulting in doubts about the affiliation of this person with the disputed right; 4) the absence of proper evidence that confirm the affiliation of subjective property right to the person. The above conditions create uncertainty in the legal situation, the emergence of doubts about the affiliation of property rights to the investor and predetermine the application of protecting by recognizing the right.

Non-recognition of investor's property right limits his power for implementation. This can happen when another person also has a property right for the same object, for example, in the case of housing construction and concluding an investment agreement for the same apartment with two investors.

The recognition of the investor's property rights should be understood as an action or several interrelated actions aimed at establishing the existence of property rights in one of the formal legal forms provided by law. The peculiarity of this protection method in the investment sphere is that for the emergence of a security relationship, the appropriate composition of the offense is not always necessary. For example, in the case of non-recognition or objection

of the investor's property rights, at the time of the commission of the offense may be no damage. Nevertheless, there is a situation in which there are prerequisites for future losses, which are in causal connection with unlawful behaviour.

At the same time, in order to create a need for protection, in case of non-recognition of the right, formal legal consequences of the confirmation of such violation are required. Ignoring the investor's property rights without the legal consequences of his violation can't be considered an offense.

Recognition of the investor's subjective right is the establishment of a legal relationship between the subject of law and the object of property relations. And in many cases, this requires the termination of the offense.

According to Part 2 of Art. 331 of the Civil Code of Ukraine, the ownership of newly created real estate (residential buildings, buildings, structures, etc.) arises from the moment of completion of construction (creation of property) [1].

In this case, if the law establishes the commissioning of such real estate, the right of ownership arises from the moment of commissioning. At the same time, corporeal rights to all real estate objects are subjects to state registration. From that moment, on the basis of the legal documents stipulated by the Law of Ukraine "On State Registration of Corporeal Rights to Real Estate and Their Encumbrances" arises the right of ownership [6].

The judicial practice on consideration and resolution of investors' disputes regarding the recognition of the objects ownership, in particular in relation to unfinished construction objects, goes along the lines that the norms of the current legislation do not provide for judicial recognition of the ownership of such objects if they are not commissioned. The Civil Cassation Court of the Supreme Court in its decision of 28.02.2018 in the case № 352/626/13-c states that the object of unfinished construction is a special kind of immobile thing: its physical creation has begun, but has not been completed. In relation to such thing, it is possible to establish any subjective rights, in cases and in the order determined by acts of civil law [5].

That is, deciding on the occurrence, change or termination of subjective civil

rights in relation to the object of unfinished construction, it is necessary to take into account the features and limitations established by legislative acts. Newly-created real estate acquires legal status of real estate after its commissioning and since the state registration of ownership. By this moment, without being an object of real estate legally, unfinished construction is a set of building materials such as things of the material world, which may give rise to civil rights and obligations.

Such judicial practice can't be considered such that is simultaneously in compliance with the law. The Law of Ukraine "On State Registration of Corporeal Rights to Real Estate and Their Encumbrances" and the same provisions approved by the Cabinet of Ministers of Ukraine, among the legal documents necessary for the registration of real estate ownership, determine the decision to commission of the object and court decision as an independent basis for the emergence of property rights. Therefore, the commissioning of the object of the property is an independent basis for registration of the property right in the presence of documents stipulated by the legislation, which does not require further court decision [6].

Solving disputes relating to the recognition of right to newly created objects it is necessary to distinguish personal property rights, for example, in terms of investment and ownership of a particular property, created by the construction.

In particular, according to the position of the Commercial Cassation Court of the Supreme Court, set forth in the decision in the case № 910/25314/13, the ownership of the disputed object arises only after the completion of the construction, the commissioning of this object, the actual transfer to the investor and the state registration of the property rights which arise from the contract of participation in the financing of construction.

At the time of dispute resolution, the investor did not acquire ownership of the disputed non-residential premises in the order established by law, since the fact of the creation of the corresponding real estate by the completion of its construction and the commissioning in accordance with the procedure established by law, as well



as the transfer to the plaintiff according to the appropriate act did not happen. Thus, according to the conclusions of the Commercial Cassation Court of the Supreme Court in the case № 910/25314/13, the investor's claim is based on the erroneous identification of his property rights on the investment object and ownership of the concrete real estate created as a result of the construction of a non-residential building under a share agreement participation in construction financing [3].

Provisions of Art. 331 of the Civil Code of Ukraine determine the general grounds and procedure for acquiring ownership of newly created property, built in compliance with the procedure established by law (in the presence of all necessary permits and acts), however, they do not regulate the legal regime of unauthorized construction.

The definition of unauthorized construction, as well as legal grounds and conditions for the recognition of ownership to unauthorized real estate is given in Art. 376 of the Civil Code of Ukraine.

From the contents of the article it follows that a unauthorized real estate object can be issued to the ownership of a person as being constructed lawfully, under the following conditions: a) the provision of a land plot in accordance with the established procedure to a person under the already built unauthorized property and a decision adoption by the court on recognition of this person's ownership; b) upon the request of the owner (user) of the land, the court may recognize the right of the real estate ownership, which is unauthorized, if this does not violate the rights of other persons. This applies to investment in residential and non-residential premises. Investors' rights may be violated by the construction company in case of non-compliance with the design construction documentation and other legal requirements [1].

Thus, in the case № 11/384-06 the Commercial Cassation Court of the Supreme Court considered the application of a private joint-stock company to review the decision of the Supreme Commercial Court of Ukraine, which retained without changes the decision of the appellate commercial court about refusing in satisfaction the claim on the ownership

recognition to unauthorized trade area objects with places for the storage of goods and vehicles.

During the execution of the cassation proceedings in this case, the court come out from that the definition of unauthorized construction, legal grounds and conditions for the recognition of the ownership to unauthorized real estate are defined in Art. 376 of the Civil Code of Ukraine, which is special in regulating disputable relations and normalizes relations that arise in cases where the requirements of the law and other legal acts while creating a new thing (unauthorized construction) were violated.

At the same time, the court also stressed that, according to part 1 and 2 of Art. 331 of the Civil Code of Ukraine, ownership of a new thing, which is made (created) by a person, belongs to her, unless otherwise stipulated by the contract or by law [4].

In turn, Art. 331 of the Civil Code of Ukraine determines the general rule that the ownership to a newly created real estate arises from the moment of state registration of the right after the completion of construction and its commissioning. By the rules of Art. 392 of the Civil Code of Ukraine a claim for the recognition of property rights may be brought by the person who is the owner, but his right is disputed or not recognized, or if the person has lost the document certifying its right of ownership. The specified rules of law determine the procedure for registration of the right of ownership (realization of state registration of the ownership right) to the investment object after commissioning. According to Art. 328 of the Civil Code of Ukraine, the acquisition of property rights is a certain legal form with which the law relates the emergence of a person's subjective right to own certain objects [1].

Therefore, the important question is whether the ownership to the investment object is registered after the commissioning. If not, then it is necessary to apply the general legal ways of protecting the violated civil rights, but not the corporeal in the form of property rights recognition.

At the same time, non-recognition of the right should be manifested in concrete actions that violate property right or create the possibility of its violation in the future. Such behavior leads or may lead

to the impossibility of realizing subjective property right. Consequently, the non-recognition of property right should have certain legal consequences, which manifest themselves in the impossibility of realizing its content, in other words the powers that make up its content.

Recognition of the right is characterized by existence installation of the relationship between the subjects and by existence installation of the subjective right in a particular person. Recognition of investor's subjective property right confirms the authority of this subject in relation to the recognition of the object and eliminates the doubts in the right of the latter. In addition, the recognition of the right or protected by law interest is a means of preventing an offense in the investment sphere of construction and the occurrence of negative consequences.

Indeed, non-recognition of the investor's property right may result the impossibility of realizing this right. The manifestation forms of negative consequences may be different in nature: from interference in the implementation of subjective property right to denial of the property right to a particular person.

Recognition of investor's property right as a way of protection consist in providing of the implementation of this right, which may be carried out independently or in combination with other legal means.

Along with this, one of the grounds for using the commented method of protection is also the disputation about the belonging of property rights to an investor or his successor. The disputation is a type of offense which has similar indications of non-recognition. As with the non-recognition, the disputation is characterized as objection of the subjective right belonging to a particular person. But if the non-recognition of property right is manifested in the ignorance of the investor's subjective civil right, then the disputation is an actions aimed at refuting the existence of this right in a particular person. The consequence of the disputation is the non-recognition of subjective property right. Therefore, the person whose right is disputed should seek for protection by recognizing this right.

The disputation of subjective property right creates difficulties and obstacles that make impossible to exercise this right. Property right



is associated with a particular object. The content of the subjective property right is the authority of the investor. The disputation without legal adverse consequences for the legal status of the investor cannot be considered as a violation.

At the same time, if there is no substantive right based on the grounds determined by law or the contract, then it is impossible to speak about the disputation of right in the context of its violation. In any case, it is necessary to establish which subjective civil right is violated by its non-recognition or disputation.

As an example is the case that was the subject of consideration by the Chamber of Civil Cases of the Supreme Court of Ukraine, where the Person_3 appealed to the court with a claim stating that there was a cession agreement between Person_4 and LLC "Avers-City" under the terms of which the person acquired the right to claim from LLC "Avers-City" property rights to the real estate object – an integral part of the capital construction object in the form of apartment № 1 in the building Address_1 in accordance with the sale contract dated September 17, 2010 between Person_4 and LLC "Avers-City" and an additional agreement to it. The plaintiff noted that she had fully paid for the property rights. The house, part of which is a disputed apartment, was already commissioned. On September 16, 2011, she appealed to the defendant with the requirement to comply the terms of the agreement, including the signing of the relevant act. However, no response was received.

Referring to the mentioned circumstances, the plaintiff requested the court to recognize for her the ownership of the apartment, to oblige the registration service to register her ownership of the disputed property and to issue a certificate of ownership on her behalf.

In accordance with the decision of the Ukrainian city Court of the Kyiv region dated June 17, 2013, which was left unchanged by the decision of the Appeal Court of Kyiv region dated February 12, 2015, the a claim filed by Person_3 was partially satisfied. In particular, the right to ownership of the apartment № 1 in the building Address-1 was recognized as belonging to the Person-3, and the registration service of the Ukrainian city Department

of Justice of the Kiev region was obliged to register for the Person-3 the ownership right on the mentioned real estate.

The Chamber of Civil Cases of the Supreme Court of Ukraine, reviewing courts' decisions, found that, in accordance with clauses 3.1, 3.2, 3.6, 3.7.1 of the aforementioned agreements, property rights to real estate objects are transferring by the seller according to the relevant act of acceptance-transfer of property rights. Ownership of property rights goes from seller to buyer after signing this act. Simultaneously with the signing of the mentioned act, the seller provides the buyer with the documents necessary for the state registration of the property ownership, namely a certified copy of the act of commissioning the relevant part of the capital construction object and a technical passport on the property.

On February 23, 2012, between the Person-4 (assignor), LLC "Avers-City" (debtor) and Person-3 (cessionary) was signed the cession agreement, under which the Person-3 acquired the right to require from LLC "Avers-City" the property rights to the real estate object – apartment № 1 in the building Address_1 as an integral part of the capital construction object. Clause 1.3 of the mentioned agreement, the parties agreed that the right to require is owned by the assignor as the acquirer of the rights under the sale contract dated October 17, 2010 and concluded between the debtor and the assignor.

Property rights are defined as any property-related rights, other than ownership rights, including powers constituting the content of ownership rights. The holder of the property rights has the right to dispose of them, in particular to transfer them to other persons, including the cession rules. Rights are related to a certain object, in our case, with the created construction object, to the construction of which attracted funds of the investor-plaintiff.

At the same time Art. 331 of the Civil Code of Ukraine establishes that the right to own a newly created real estate arises from the moment of state registration of rights to it after the completion of construction and commissioning.

The court found that on August 3, 2007 LLC "Regional Construction Investments" concluded with the LLC "Mioli-Invest-Ukraine" an agreement on the reservation of the real estate object,

according to which the latter reserved an apartment for the construction № 1 section 2 in 454-apartment 22-storey residential complex Address-1.

By an act of contractual obligations reconciliation of June 30, 2010, signed between LLC "Avers-City" and LLC "Regional Construction Investments", the parties attested and guaranteed that the objects included in the act and the list, including the disputed apartment № 1, purchased by LLC "Mioli-Invest-Ukraine" may not be subject to a sale contract, cannot be used as a contribution to a statutory fund of legal entities, transferred, alienated otherwise, cannot be used by the parties as a legal address, etc.

The court also found that LLC "Mioli-Invest-Ukraine" had invested in the construction of the disputed apartment earlier than Person-4 had entered into a sale contract of the property rights, under which Person-3 had acquired the rights to claim. According to Art. 7 of the Law of Ukraine "On Investment Activity", a company has the right to own, use and dispose of objects and results of investments in accordance with the legislation of Ukraine, since the objects and results of investments are the investor's property.

At the same time, Person-4 fulfilled the monetary obligations under the sale contract of property rights, under which Person-3 acquired the right to claim, fully paying the value stipulated by mentioned contracts, that is, took actions aimed at the emergence of legal facts necessary for granting property rights [2].

That is, in this case there is a violation of the investor's subjective property right. Disputation, as a form of violation, means the creation of a legal situation where the subjective right cannot be exercised or realized by the person under the threat of impossibility of its implementation. Housing construction investment is the basis for the emergence of property rights to the object specified in the investment contract. A paradoxical situation arises when a property right in the form of a property claim for the transfer of an object (apartment) is recognized, but it is impossible to realize this right. Accordingly, the ability of such person to exercise his or her right is narrowed.

Under the current legal mechanism, the investor cannot fully protect the interest by recognizing the ownership



of the measurable construction object defined in the contract. At the same time, recognition of the subjective property right to the object, which is the subject of the investment contract as a way of protection, remains relevant in case of non-recognition of this right by the construction company or other persons.

In our case, the non-recognition of the investor's property right to a construction object requires protection by confirming the existence of the subjective right, which is not recognized or disputed by other participants in the investment process. In the end, maintaining this situation does not allow the investor to acquire the construction object. This is especially relevant in the case of cession on the basis of administrative transactions or contracts with other persons. In the event of a dispute over the ownership of property rights on the same object, it is necessary to proceed from the legitimacy of the grounds for the acquisition of property rights and from the moment when the subjective civil right arises.

Protection in the case of disputation about belonging of property right is intended to confirm not only the existence of civil right, but also its belonging to a specific person. An interested person who positions himself or herself as the owner of a subjective property right must confirm that there are circumstances in which the acquisition of the relevant subjective civil right is disputed or not recognized.

At the same time, this situation does not contribute to the protection of investors' rights in the construction sector. It seems that Art. 392 of the Civil Code of Ukraine does not cover all the actual subjective composition of the claim for recognition of ownership in the investment process. Based on a literal understanding of the content of the stated norm, the plaintiff in case of the claim for recognition of the property right can act only the person who positions himself with the status of the owner. But such conclusion is premature, since the legal situation remains uncertain without the court decision. In fact, by applying to the court for recognition of the property right, the investor aims to confirm his status of the owner, which is not recognized by other entities of investment activity.

Conclusions. Thus, summing up the above, it should be noted that the analysis of judicial practice in the investment sphere of housing construction shows that an investor cannot effectively protect his rights and interests. It is determined that for the recognition of property rights the prerequisite is the commissioning of the object. Before the signing of the act of acceptance, the construction object has no legal regime of completed construction. The investor's property right is interpreted by the courts as a right of claim to the investment fund management company and/or construction company. In case of violation of the design and estimate documentation or the construction conditions, the object may not be commissioning. Accordingly, the investor cannot recognize the ownership of the subject of the investment agreement, for example, the apartment as an integral part of the object.

In other words, an investor cannot effectively protect his property right, which is directly related to the object that is the subject of the contract. The moment of occurrence of the right to own real estate is the registration in the State Register. State registration is an act of a state body that is not aimed at creating subjective civil law, but only consolidates, confirms, certifies it.

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