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LEGAL PROBLEMS OF FORECLOSURE ON MORTGAGED PROPERTY

Abstract: In the article, the author formulates the concept of foreclosure on pledged property, examines the features of the judicial and extrajudicial procedure for foreclosure on pledged property, analyzes the legal nature of foreclosure on pledged property. The problem of foreclosure of the mortgaged property and the definition of the parties involved.

Key words: Foreclosure: judicial and extrajudicial order of foreclosure, grounds for foreclosure on the subject of pledge.

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Introduction

The Kyrgyz Republic considers the rights of everyone to housing as one of the constitutionally significant values and has formulated the legal doctrine of this right in a separate article of the Constitution. In accordance with Art. 46 of the Constitution: 1. Everyone has the right to housing; 2. No one may be arbitrarily deprived of his home.

According to clause 2, clause 2 of item 12, the seizure of property against the will of the owner is allowed only by a court decision.

The establishment by the legislator of only a judicial procedure for the foreclosure of a mortgaged dwelling, which is the only one for a citizen to live, implies increased protection of the rights of family members of the owner, is not only economic in nature, but also due to the social significance of the specified subject of pledge. In this regard, pursuing the goals of a legal social state, taking into account the properties of the subject of pledge, the state has the right to establish a special jurisdiction over issues and disputes arising from contractual relations [2].

On the bottom of the main objectives of the pledge, by the time the debtor fails to fulfill his obligation, the creditor has a real opportunity to foreclose on the pledged property.

The investor wants to receive money quickly without cost, delay, uncertainty and litigation. The secured lender also wants to be sure that if the borrower defaults on its obligations, the loan will be repaid from the value of the pledged assets before other claims against the borrower are settled.

Real estate pledge (mortgage) is the most effective way to ensure the fulfillment of obligations. It allows the creditor to satisfy his claims against the debtor at the expense of the value of the mortgaged real estate. And most importantly, he will be able to do this primarily in front of other creditors, which increases the guarantees of debt repayment [3].

Domestic lawyer Alya Tsarnaeva writes about the satisfaction of the pledgee's claims as follows: "The pledgee's claims are satisfied at the expense of the pledged movable property by a court decision, unless otherwise provided by law or by agreement of the pledgor with the pledgee. However, the foreclosure may be levied on the subject of pledge transferred to the pledgee in the manner prescribed by the pledge agreement, unless otherwise established by law.

Collection on the subject of a pledge can be levied only by a court decision in the event that the pledged property is classified in the manner prescribed

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by law to property that has significant historical, artistic or other cultural value for society, and also if the subject of the pledge is the only housing belonging to the right of ownership to an individual [4].

Collection on the subject of pledge to satisfy the claims of the pledgee (creditor) specified in the Law of the Kyrgyz Republic "On Pledge" may be levied in the event of default and / or improper performance by the debtor of the obligation secured by the pledge, in particular:

violation of the term of payment of the obligation;

failure of the debtor to fulfill the pledgee's requirements for the early performance of the obligation secured by the pledge in the cases provided for in Article 56 of the Law of the Kyrgyz Republic "On Pledge".

The foreclosure on pledged property is carried out in the manner prescribed by the pledge agreement or other agreement establishing a mortgage by virtue of law, unless otherwise provided by this Law [5]. In the event of a discrepancy between the terms of a pledge agreement or other agreement establishing a mortgage by virtue of law, and the terms of an obligation secured by a pledge with respect to claims that can be satisfied by foreclosure on the pledged property, preference is given to the terms of a pledge agreement or other agreement establishing a mortgage in force law "[1].

The pledgee, in accordance with the current legislation of the Kyrgyz Republic, has the right to demand early fulfillment of the obligation secured by the pledge, and if his demand is not satisfied, to foreclose on the subject of the pledge in the event of [6]:

- violation by the pledger of the rules on the disposal of the pledged item or if the pledged item has left the possession of the pledger;
- violation by the pledger of the rules on replacement or restoration of the pledged item;
- loss of the pledged item due to circumstances for which the pledger is not responsible, if the pledger did not exercise the right to replace or restore the pledged item [7];
- violation by the pledger of the rules on subsequent pledge;
- violation by the pledger of obligations for the maintenance and safety of the pledged item;
- violation by the pledger of obligations to warn the pledgee of the rights of third parties to the subject of the pledge;
- in other cases stipulated by a law or a pledge agreement, or other agreement establishing a pledge [8].

As already noted, the essence of the pledge and its meaning lies in the fact that the pledgee, in the event of default by the debtor of his obligations, gets the opportunity to satisfy his claims at the expense of the pledged property by levying a penalty on him. Not

every failure to fulfill or improper fulfillment of an obligation on the part of the debtor gives the pledgee such a right [9]. This requires that the obligation has been violated by the debtor due to circumstances for which the latter is responsible. For example, it is impossible to foreclose on pledged property if the obligation was not fulfilled by the debtor for reasons related to force majeure (except for a monetary obligation).

And one more obstacle may be encountered on the way of the pledgee wishing to foreclose on the pledged property: the violation of the obligation secured by the pledge committed by the debtor may be extremely insignificant, and therefore the amount of the pledgee's claims may turn out to be disproportionate to the value of the pledged property. And in this case, the court has the right to refuse the pledgee to foreclose on the pledged property.

In accordance with article 62 of the Law and the Kyrgyz Republic "On mortgage" foreclosure on the mortgaged property is made out of court and court procedures. The out-of-court procedure for foreclosure on pledged property, assumes, when grounds arise for the foreclosure on the pledged property, the transfer of the initiative to dispose of the pledged property to the pledgee, who has the right to determine the methods for the sale of this property in accordance with the agreement on the procedure for foreclosure on the subject of pledge out of court, including acquisition of this property into the ownership of the mortgagee. This procedure does not provide for the possibility of resolving disputes that arose between the pledger and the pledgee in the process of fulfilling the main obligation and foreclosure on the pledged property, but only contains a way to satisfy the claims of the creditor / pledgee based on the concluded agreement [10].

At the same time, the legislator, fixing in the Law "On Pledge" in relation to the order of foreclosure on pledged property the formulas " *on the basis of a court decision* ", " *in court* ", thereby does not exclude the right to consider these disputes in an arbitration court, but excludes the possibility of alienation of pledged property out of court, provided for in Articles 60-61 of the Law "On Pledge" by means of out-of-court implementation mechanisms, the use of which allows the creditor to independently alienate the subject of pledge, without considering this issue by an independent body on the basis of the principles of fairness and impartiality. Arbitration proceedings are fully inherent in the principles of independence and impartiality of an arbitrator, equality and adversarial nature of the parties, and the obligation to enforce an arbitral award. Accordingly, the arbitration court is able to provide the necessary level of guarantees for the rights of the creditor and the debtor.

The decision of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic dated December 9, 2015 No. 16-r also notes that the term

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"court" should not necessarily be understood as a classical type of court built into the system of state bodies, and may imply a body established to resolve a limited number of disputes, under the constant condition that the necessary guarantees are observed.

The use of an extrajudicial procedure, on the one hand, is a justified exception from the general rules of judicial protection, which helps to simplify and speed up the procedure for protecting the interests of the pledgee and allows the pledger to avoid possible legal costs [11]. On the other hand, the pledgor is deprived of the opportunity to use a set of measures to protect his rights and legitimate interests, which can only be implemented by a court. This order of foreclosure on pledged property, provided for (Article 62 of the Law "On Pledge"), cannot be equated with an out-of-court method of resolving disputes arising from civil relations, which is carried out by arbitration courts, acting as an alternative form of judicial dispute resolution.

It should be noted that the legislation initially laid the foundations for such an approach to the problem under consideration. Thus, according to article 59 of the Civil Code of the Kyrgyz Republic, a citizen is liable for his obligations with all property belonging to him, with the exception of property that cannot be foreclosed and the list of which is established by civil procedural legislation. However, this legal mechanism did not find further development in the civil procedural legislation. An attempt to solve this problem in half by adopting an annex to the Law "On the Status of Bailiffs and Enforcement Proceedings" is a violation of the above-mentioned normative provision of the Code. Ultimately, the limits of the courts' authority to independently change the method and procedure for the execution of judicial acts should not apply to property with a special purpose, possessing certain characteristics and properties, the list of which should be established by procedural legislation [12].

The introduction of such restrictions is due to the need to protect constitutionally significant and internationally recognized values for a dignified life and free human development, an integral part of which is the right of everyone to adequate housing.

Undoubtedly, in this case, it is necessary to specify the criteria for property immunity in relation to residential premises so that law enforcement practice is not limited only to the establishment of the fact that the residential premises is the only one for the residence of the debtor and his family members and excludes the possibility of abuse by unscrupulous debtors who can use property immunity for the purpose of non-fulfillment or improper fulfillment of their civil obligations to creditors [13]. Criteria for the suitability of a dwelling for one person in accordance with established international standards should be established by law.

If we consider the rights of the creditor, on the one hand, and the right to housing of the debtor and his family members, on the other, from the point of view of the equality of all before the law and the court, the values that are constitutionally significant and recognized by international law are proportionate to the introduction of special restrictions. It is impossible to ignore the fact that while satisfying the property interests of the creditor, the legislator is associated with the international legal and constitutional guarantee of the right to adequate housing for the debtor and his family members. The foreclosure of a dwelling must be carried out on the basis of a court decision.

Accordingly, the judicial procedure for foreclosure on mortgaged property, initiated by both the mortgagee and the mortgagor, with the effective force of the principle of equality and adversariality of the parties, is more aimed at protecting the rights and legitimate interests of the parties to an agreement on mortgage of real estate, in the event of grounds for appeal foreclosure on mortgaged property. At the same time, the legislator needs to differentiate the measure of responsibility depending on the nature of the obligation and the legal consequences of the concluded agreement. We are talking about the peculiarities of civil obligations arising from the mortgage agreement, when a person clearly expresses his will for a security obligation and the dwelling itself is the object of a contractual relationship, in this case, he is obliged to bear responsibility in full. And under other civil law obligations, when the owner may underestimate the risk of the seizure of his home, the legislator is obliged to provide for the limitation of the creditor's rights to seize the dwelling if it is the only habitable dwelling for the owner and his family. In other words, the debtor should be granted property immunity in order to preserve him and his family members the minimum conditions necessary for a dignified existence.

Constitutional Chamber of 30 October 2019 examined the case on the constitutionality of subparagraph 9 of paragraph 21 of the Regulations on the minimum requirements for the procedure of financial services and the consideration of consumer complaints, approved by the Board of the National Bank of the Kyrgyz Republic from June 24, 2015 number 35/10 and set a purely judicial procedure foreclosure on real estate, thereby excluding the possibility of resolving such issues out of court.

Taking into account the fact that the judicial procedure for foreclosure on pledged real estate at the moment seems to be well-established and sufficiently regulated - partly by regulatory legal acts, partly by judicial practice - we believe that the legislator should pay special attention to improving the provisions of the current legislation on extrajudicial procedure about rashchenija foreclosure on mortgages. So, among other things, it is necessary to exclude from the

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text of the Civil Code of the Kyrgyz Republic and the Law of the Kyrgyz Republic "On Notaries" the term "agreement on extrajudicial foreclosure on mortgaged real estate" that does not correspond to its actual content [14].

Problematic and not fully resolved remains the issue of a pledge agreement with the participation of a person who is not a debtor under an obligation by a third party, i.e. surety. Often, in the course of action in the courts of general jurisdiction, the parties are guarantors to foreclose on the pledged property, i.e. third parties who are not debtors of the main obligation.

We believe that separate rules on the termination of surety apply to a pledge agreement with the participation of a non-obligated third party. The rule on the termination of the surety, which does not allow the indefinite existence of the obligation of the surety, is aimed at ensuring certainty in the legal relationship with his participation. A pledgor who is not a debtor on an obligation, the performance of which is secured by a pledge, must also be able to reasonably foresee the property consequences of providing security. The absence of a time frame for satisfying the claim to foreclose on the subject of a pledge, the term of which is not specified in the agreement, would lead to an indefinite encumbrance of the pledger's property right for reasons beyond his control. The application of separate rules on surety to the relationship between the debtor, the pledgee and the pledgor who is not the debtor under the main obligation, taking into account the similarity of these methods of securing the performance of obligations. In particular, this concerns the rule that if the pledger is a third party, and the term of the pledge is not specified in the agreement, the pledge is terminated, provided that the creditor, within a year from the date of the due date for the fulfillment of the obligation secured by the pledge, does not submit a claim to foreclose on the subject collateral [15].

In accordance with Clause 1 of Article 326 of the Civil Code of the Kyrgyz Republic, the pledger may be the debtor himself under the obligation secured by the pledge, or a third party not participating in this obligation. According to clause 1 of Article 343 of the Civil Code of the Kyrgyz Republic, under a surety (guarantee) agreement, the surety (guarantor) is obliged to the creditor of another person to be responsible for the performance of the latter's obligations in full or in part in solidarity with the debtor. Article 348 indicates the grounds for the termination of the surety, according to clause 4, the surety is terminated upon the expiration of the period for which it was given, specified in the surety

agreement. If such a period has not been established, it shall terminate if the creditor, within one year from the date of the due date for the performance of the obligation secured by the surety, does not bring a claim against the surety. When the deadline for the fulfillment of the main obligation is not specified and cannot be determined or determined by the moment of demand, the surety is terminated if the creditor does not bring a claim against the surety within two years from the date of the conclusion of the surety agreement.

The court does not have the right to make decisions that affect the rights and legitimate interests of persons not involved in the case. To ensure the correct consideration of the case and the adoption of a legal decision, the court must correctly determine the circle of persons involved in the case.

Thus, foreclosure on pledged property may affect the rights of owners of property in common joint ownership or a governing body chosen by the owners to manage their property, participants in common shared ownership (Article 7 of the Law "On Pledge"), rights of pledgees for subsequent pledge (Article 11 of the Law "On Pledge"), persons or body giving consent to the pledge (Article 62 of the Law "On Pledge"). These persons should be given the opportunity to participate in the case of foreclosure on the subject of pledge as defendants. Persons who have a right to use pledged property based on a law or a contract (tenants, tenants, adult family members of the owner of a residential premises and other persons) or a real right to this property (easement, land use right and other rights) (Article 62 of the Law "On Pledge").

In cases of debt collection and foreclosure on pledged property, the plaintiffs are the creditors for the main loan obligation, who were simultaneously the pledgees, and the defendants are borrowers and pledgers. If the mortgagor under the contract of pledge advocated a third person who is not a debtor under the loan agreement (loan agreement), he was involved as a respondent, on the requirements m lender were provided by the contract of guarantee, to participate in the case as a respondent attracting repent guarantors.

However, regardless of the compensatory properties of the pledged property, the obligee under the obligation secured by the pledge, for the purpose of satisfying his claims, must exercise his right of pledge by sequential foreclosure on the pledged property and the sale of the pledged item. The procedural aspects of the implementation of the right of pledge should be as clearly regulated by law. Otherwise, the pledge will cease to be any effective way of securing obligations.

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