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THE FORECLOSURE OF PLEDGED REAL ESTATE PROPERTY: STATEMENT OF THE PROBLEM

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Abstract. *The article formulates the concept of foreclosure on pledged. The analysis of the legal nature of foreclosure of pledged property has been carried out in property. The authors reveals the problems of collision of creditors' rights.*

Keywords: *foreclosure, pledge, real estate property, creditor.*

The foreclosure on the debtor's property is the main measure of enforcing property-related documents. According to the current Federal Law "On enforcement proceedings", Paragraph 1 of Article 69 states that foreclosure on the property of the debtor includes seizure of property and (or) its forced sale, or transferring it to the claimant.

In contrast to the Law "On enforcement proceedings" of 1997, the current Law does not include the seizure procedure in the institution of foreclosure, since according to the meaning of Article 80 of the Federal Law "On enforcement proceedings" seizure by making a ruling is in general a security measure aimed primarily at ensuring the safety of the property to be realized or handed over to the claimant (Paragraph 1 Part 3 Article 80 of the Federal Law "On enforcement proceedings").

For the first time, the institute of foreclosure became officially applied in the course of the judicial reform of 1864 with the introduction of the Statute of Civil Proceedings. Historically, its formation and development were connected with the need to protect the rights and legitimate interests of creditors.

The Statute introduced new methods of enforcement which included, in particular, foreclosure on movable property of the debtor and foreclosure on immovable property of the debtor. According to the Statute of civil legal procedure of 1864, the choice of the way of execution (transfer of property in kind, performance of actions and works at the expense of the defendant, the foreclosure on movable and real estate property) depended on the claimant (Article 935 of the Statute of Civil Proceedings)[1].

However, it is interesting to note that in the rather long history of the institution of foreclosure, which includes more than a hundred years, neither doctrine nor legislation has developed the notion of foreclosure of property. Currently, the Federal Law "On enforcement proceedings" provides only a list of measures (means) that are part of the foreclosure procedure.

It seems a fair theoretical position, according to which foreclosure on property should be defined through its aim. In this case, since the purpose of enforcement proceedings is the fastest and correct execution of the requirements contained in a writ of execution, therefore, this aim should be consistently reflected in all procedures of enforcement proceedings, including the foreclosure of property.

This means that foreclosure is, above all, a type of method of satisfying the claims of the claimant, which consists in committing a particular set of legal actions.

Thus, it seems appropriate to understand foreclosure as a measure of enforcement, applied to the debtor in order to meet the requirements of the recoverer by seizure of property, and its forced sale or transfer to the recoverer.

Foreclosure on pledged property has a number of specific features that allow to distinguish it from other measures of enforcement, in particular, from the foreclosure on the property not encumbered by collateral obligations.

Pledge is one of the methods of securing the fulfillment of an obligation, because unlike personal security, in the fulfillment of which the creditor depends primarily on the solvency of the debtor, in pledge the creditor's interest is satisfied at the expense of the subject of pledge[2].

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[1] Ustav grazhdanskogo sudoproizvodstva (Sv. Zak. t. XVI ch. I, izd. 1892 g., po Prod. 1906 goda). S zakonodatelnymi motivami, razyasneniyami Pravitelstvuyushchego Senata i kommentariyami russkikh yuristov, izvlechennykh iz nauchnykh i prakticheskikh trudov po grazhdanskomu pravu i sudoproizvodstvu (po 1 Noyabrya 1907 goda) [Statute of Civil Procedure (Code of Laws volume XVI part I, edition 1892, as continued in 1906). With legislative motives, explanations of the Governing Senate, and commentaries by Russian lawyers, extracted from scholarly and practical works on civil law and legal procedure (up to November 1, 1907)] / Sost.: *Tyutryumov I. M.* — S.-Pb.: Izd. S.-Pb. T-va Pechati i Izd. dela Trud, 1908. — 1891 p.

[2] *Rasskazova N. Yu.* Zalog dvizhimogo imushchestva [Pledge of movable property] // Mery obespecheniya i mery otvetstvennosti v grazhdanskom prave: Sbornik statey [Measures of security and measures of responsibility in civil law: Collection of essays]. — M.: Statut, 2010. — Pp. 7–42.

The legislator classifies the parties to enforcement proceedings into three groups. The classification is based on the legal status of the party to the enforcement proceedings. Thus, when foreclosing on pledged property the parties to the enforcement proceedings are the pledge recoverer and the pledge debtor; when foreclosing on the property of the debtor at the request of the pledgee, who is the pledgee of this property, the parties to the enforcement proceedings are the pledge recoverer and the main pledge debtor, and when foreclosing on the property of a debtor encumbered by a third person's rights of lien, at the request of an unpledge recoverer, the parties are the unpledge recoverer and the pledged debtor.

The legal status of recoverers can also be classified on the following criteria:

1) depending on the security of recoverers' claims (the legal status of secured creditors and the legal status of creditors whose claims are not secured by collateral);

2) depending on the content of the legal status (substantive legal status and procedural legal status of the recoverers)

3) depending on the type of enforcement measures (the legal status of enforcers in foreclosure of property, sale of property, distribution of money and transfer of unrealized property to the recoverer).

The fact that foreclosure of pledged property includes not only the seizure, but also the sale of pledged property, it represents nothing less than a special basis for ending ownership rights to pledged property in the event of its sale[1].

Identifying this case, G. F. Shershenevich pointed out that "the court cannot, as a general rule, deprive someone of his property right or create such a right for a known person. Its task is limited to determining the ownership of the right. However, there are cases where the court not only awards, but also deprives the right of ownership, namely, in foreclosure of the defendant's property and in divisions of common property"[2].

A court act of foreclosure on pledged property, made at the request of the pledgeholder, is the basis for enforcement actions against the pledgeholder, the procedure of which is regulated by the procedural law. Herewith, in order to increase the efficiency of enforcement actions, in particular foreclosure of pledged property, the legislator stipulates that foreclosure of pledged property in favor of the pledgeholder. The execution of the claim can be carried out without a court act of foreclosure.

The main problem of non-pledged creditors as compared to pledged creditors is to determine the ratio of their claims. The claims of a non-pledged creditor and,

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[1] Grazhdanskoe pravo. Uchebnik. T. 1 [Civil Law. Textbook. T. 1] / *Agarkov M. M., Bratus S. N., Genkin D. M., Serebrovskiy V. I.,* i dr.; Pod red.: *Agarkov M. M., Genkin D. M.* — M.: Yurid. izd-vo NKYu SSSR, 1944. — 419 p.

[2] Kurs grazhdanskogo prava: Vvedenie. T. 1: Vyp. 1-2 [A course in Civil Law: Introduction. T. 1: Vol. 1-2] / *Shershenevich G. F.* — Kazan: Tipo-lit. Imp. Kazan. un-ta, 1901. — 474 p.

accordingly, the debtor's obligations are not guaranteed by anything. The existence of a non-pledged creditor's right of claim against the debtor is not sufficient to recognize his right to foreclose on the collateral. Theory and practice require a number of actions, which should result in obtaining an enforcement document on foreclosure of collateral and submitting it for execution to the bailiff service. The bailiff, in turn, is entitled to foreclose on the pledged property in favor of a non-collateral creditor only on the basis of a court act. In this regard, the legal character of such a court act is of interest both from a theoretical and practical point of view.

The rule set forth by Part 1 Article 78 of the Federal Law "On Enforcement Proceedings" says that the possibility of foreclosure of the pledged property exists only if the enforcement proceedings have been initiated on the basis of a writ of execution, which is a writ of execution (Paragraph 1, Part 1, Article 12), or on the basis of a court act (court order), which is also in accordance with Paragraph 2, Part 1, Article 12 is an enforcement document.

In the Federal Law "On enforcement proceedings" the legal character of the court order is contradictory. On the one hand, the legislator indicates a court order among the enforcement documents, on the basis of which foreclosure on pledged property can be enforced. On the other hand, it seems that in this case there is an unresolved contradiction between the provisions of the Civil Procedure Code and the Federal Law "On enforcement proceedings".

Thus, in accordance with Article 122 of the Civil Procedural Code of the Russian Federation, a court order may be issued in strictly defined cases, the list of which does not include the foreclosure of pledged property, because the court needs to resolve a number of issues related to foreclosure of pledged property as collateral. At the same time, the court should not blindly follow the will of the claimant (pledged creditor) in deciding on the foreclosure of the pledged property. The inseparability of the procedural form from the procedure of foreclosure on pledged property is due to the need to establish judicial control by the state in this sphere of public life. In this regard, the court, when deciding on the issue of foreclosure on pledged property, must carefully investigate the circumstances and the existence of grounds for foreclosure in order to make a legal and reasonable decision.

It follows that foreclosure on the pledged property is possible only on the basis of a writ of execution. Therefore, if a recoverer, whose claims to recover the amount from the debtor have been satisfied in an order, subsequently wishes to foreclose on the pledged property, he must file a statement of claim in court and only on the basis of the court decision may obtain a writ of execution in the general order. This means that non-collateral creditors, when filing a court order for the recovery of money from the debtor, are not entitled to resort to the institution of foreclosure of the pledged property to satisfy their claims.

As L. A. Novoselova truthfully points out, this is justified by the fact that "the judicial act has already indicated the property which is subject to foreclosure, so there is no need to observe the order of foreclosure of the debtor's property established by law"[1]. This means that the foreclosure of pledged property to the pledgeholder is a procedure, which precedes other measures of enforcement.

However, the main problem of non-pledged creditors in comparison with pledged creditors is that their claims cannot be satisfied by the pledged property due to the absence of a mechanism for the realization of such a right and the possibility of foreclosure only by an executive document.

Therefore, the absence of a mechanism for exercising the rights of non-pledge creditors through foreclosure on pledged property in conditions of their collision with the rights of pledge creditors in practice leads to the creation of unjustified advantages between these creditors and contradictions between the laws on enforcement proceedings and the Civil Code of the Russian Federation. In this regard, it seems appropriate to resolve these contradictions taking into account the thesis, the essence of which is that the pledge creditor has the right to obtain satisfaction of their claims at the expense of the pledged property in the first place (predominantly). However, this does not mean that non-collateral creditors do not have the right to enforce the pledged property on an equal basis with creditors whose claims are secured by pledge.

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