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SPECIAL ASPECTS OF RECOVERY PROCEEDINGS AGAINST NON-TYPICAL REAL PROPERTY FACILITIES

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ABSTRACT

The paper provides an analysis of the features concerning recovery proceedings against such non-typical real property facilities as real estate items encumbered by rents, incomplete construction projects, items of common property rights, and also property held by third parties. These objects are poorly studied in the enforcement proceedings theory; however, they are quite common in practice. The authors note that a court-enforced collection against real property secured for life endowment cannot be imposed without the consent of the pensioner. For recovery proceedings against construction in progress, their preliminary state registration as a real estate object must be made. The paper substantiates the feasibility of enshrining the approach according to which a requirement to apportion a participatory share in the common property of spouses when a recovery is applied to it within the framework of enforcement proceedings can be brought to court precisely by a bailiff.

The methodological basis for the study was the dialectical-materialistic method of cognizing legal reality, along with which general scientific methods were also used - analysis and synthesis, the logical method, as well as particular scientific methods - system-structural, formal-legal, comparative-legal, and others.

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1. INTRODUCTION

According to the Federal Law dated 02.10.2007 No. 229-FZ "On Enforcement Proceedings", recovery proceedings against the property of a debtor is a seizure of property and (or) its forced sale or transfer to its plaintiff. The problem under consideration is also found in foreign countries (Brits, 2013).

Real property is, as we know, one of the most common objects of recovery in enforcement

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proceedings. An analysis of the scientific literature shows that most studies are devoted to such objects as residential and non-residential premises, land plots, and real estate owned by the debtor on the basis of sole ownership right, without any special burdens (except for collateral). At the same time, non-typical situations, such as objects encumbered with rents, incomplete construction projects, objects of common property rights, and property in the possession of third parties remain poorly understood, despite the fact that such situations are not uncommon in life and law enforcement practice.

In this regard, the authors attempted to analyse in this paper the features of recovery proceedings against real estate in the above situations.

Today there are no large studies specifically dedicated to recovery proceedings against non-typical real property in enforcement proceedings.

Among the studies where precisely the procedural issues of recovery proceedings against real property are of partial concern, one can distinguish the works of such authors as:

- M.N. Glukhova, "Jurisdictional acts and features of enforcement proceedings in cases arising from legal relations concerning housing law";
- V.A. Mochalova "Civil Law Issues of Recovery proceedings against mortgaged property";
- A.V. Matyushin, "Legal regulation of recovery proceedings against the property of taxpayers. Theory and practice";
- V.A. Petrushkin, "System analysis of the civil law model of real property turnover: problems of theory and practice".

These studies cover only certain issues of recovery proceedings against real property.

The authors of this paper investigated the procedural and legal features of recovery proceedings against non-typical real property facilities within the framework of enforcement proceedings, based on the key features of the civil law status of real property. The paper substantiates the feasibility of enshrining the approach according to which the requirement to apportion a participatory share in the common property of spouses when a recovery is applied within the framework of enforcement proceedings can be brought to court precisely by the bailiff.

The study objective is the identification of the peculiarities of recovery proceedings against non-typical objects of real property in enforcement proceedings, based on the civil status of those objects, and defects in the law governing these issues.

2. METHOD

Being one of the main types of property belonging to legal entities and the most valuable and significant type of property for individuals, real property is also one of the most common objects for levying of execution on them in enforcement proceedings. It causes rule-making and enforcement aspects for the relevance of this study. The presence of a large number of controversial judicial practices and discussions in the scientific literature clearly demonstrates many difficulties in this area and the presence of gaps in the legislation.

The methodological basis of the study was the dialectical-materialistic method of cognition of legal reality, along with which general scientific analysis and synthesis methods were also used. They

allowed the authors to identify the main approaches to understanding the substantive content of the real property category and its implementation in enforcement proceedings. There were also applied logical and particular-scientific methods: systemic-structural, formal-legal, comparative-legal, which were used in assessing the norms that constitute the subject of research and substantiating recommendations for improving the legal regulation of relations that form the subject of research.

3. RESULT AND DISCUSSION

As we know, real property is one of the most common objects for levying of execution on them in enforcement proceedings. At the same time, the list, specifics and legal regime of real property are quite diverse. A review of the scientific literature shows that most scientific studies are devoted to the most common objects (residential and non-residential premises, land plots) or the simplest legal regimes (on the basis of sole ownership, without any particular burdens (except for collateral)). At the same time, there are relatively few scientific works devoted to such non-typical situations as objects encumbered with rents, incomplete construction projects, objects of common property rights, property being held by third parties, although such situations are not uncommon in life and law enforcement practice both in the Russian Federation and abroad (Kizilov, 2013). In this regard, this paper focuses on the analysis of the features of recovery proceedings against real property in the above cases.

The debtor's real property may be encumbered with rent and individuals are parties to such an agreement as a rule. Despite the low popularity of the annuity agreement, it cannot be discounted. The relevance of this issue was reflected in the Order of the Main Directorate of the Federal Bailiff Service of the Russian Federation No. 223-r for Moscow dated November 14, 2006 "On Approval of Methodological Explanations on the Possibility of Recovery of Real property which belongs to a Debt Citizen and is Encumbered with Rent on the Basis of a Life estate agreement", as well as in the works of a number of scientists (Valeev & Chelyshev, 2009).

In order to levy of execution on such real property, the rule of Article 604 of the Civil Code of the Russian Federation is of particular importance, according to which real property transferred to secure for life endowment may be alienated, pledged or otherwise encumbered only with the prior consent of annuity recipient. Thus, the execution on such real property cannot be levied without the consent of the annuity recipient.

Peculiarities of recovery proceedings against facilities under construction are related, first of all, preliminary state registration is required for application of recovery against them as real property in accordance with the law "On State Registration of Real property" dated 13.07.2015 No. 218-FZ. So, according to Articles 130 and 219 of the Civil Code of the Russian Federation, a facility under construction is real property, and the ownership of it is subject to state registration. Accordingly, the ownership of this object arises from the moment of its state registration. Here, the norm of article 66 of the Federal Law dated October 2, 2007 "On Enforcement Proceedings" finds its application on the right of a bailiff to apply to the registering authority to conduct state registration of the debtor's ownership of property in the prescribed manner.

A special procedure is envisaged for recovery proceedings against the common property of the

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debtor; this application of recovery is often found within the framework of enforcement proceedings. The problem under consideration is also found in foreign countries (Higginbotham, 2007). We agree with the opinion that "in relation to debtors - individuals, the rule that the execution may be levied on the debtor's share in the common property is especially relevant since this situation arises in relation to debtors who are married" (Reshetnikova et al., 2013). According to part 6 of Article 69 of the Law on Enforcement Proceedings, if a debtor has property belonging to him/her by the right of common ownership, then the execution shall be levied on the share of the debtor, determined in accordance with federal law. It should be noted that now common ownership in real property is quite often found. The bailiff seizes a share in the common real property and makes its assessment according to the general procedure for foreclosing on real property (Odintsova, 2017). The procedure for the sale of such a share is special. Thus, according to Article 255 of the Civil Code of the Russian Federation, if another property of the owner is insufficient, the creditor of the participant in shared or joint property has the right to submit a demand for the allocation of the debtor's share in the common property for recovery proceedings against it. If such an allotment in kind is impossible (as is often the case with real property), or the rest of the participants in shared or joint ownership object to this, the creditor has the right to demand that the debtor sell his/her share to the other participants in the common property with the circulation of the proceeds from the sale to repay the debt. The offer price, in this case, should be proportionate to the market value of such a share. If the other participants in the common ownership have refused to acquire the share of the debtor, the creditor shall have the right to demand in court the recovery of the debtor's share according to the right of common ownership by selling this share at a public auction. But the plaintiff has certain difficulties here. When filing such a claim, he/she must prove in court the existence of debt and the absence of other property processed by the debtor, as well as the impossibility of dividing the real property owned in joint ownership in kind and the allocation of the debtor's share, or disagreeing of the remaining participants in shared ownership to such a division. He/she must also confirm receipt of the refusal from the remaining participants in the common property to acquire the debtor's share since only if there is such a refusal, the creditor has the right to demand recovery proceedings against the debtor's share by selling it at a public auction. If there are several participants in shared ownership, then the collector will have to carry out complex and long work to find them and obtain the necessary securities. Alternatively, the remaining participants in the common share ownership may be involved in the case in the capacity of third parties. According to the Appeal Decision of the Voronezh Regional Court dated September 20, 2012 No. 33-4828, the Law on Enforcement Proceedings does not contain provisions restricting the right to pre-emptive acquisition of shares in the right of property ownership that is forcibly sold at public auctions within the framework of enforcement proceedings.

A special enforcement procedure is also provided for the debtor's share in the common property of the spouses since in this case, the family law begins to apply.

According to Article 45 of the Family Code of the Russian Federation, for the obligations of one of the spouses, a penalty can be levied only on the property of this spouse, and if it is insufficient, the creditor has the right to demand the allocation of a share of the debtor spouse (which would be due to him/her when sharing the common property of the spouses) for levying of execution on it. Regarding the question of who can file such a claim, the following opinions exist. According to

paragraph 2 of the Order No. 816 by the Office of the Federal Bailiff Service in Moscow dated October 6, 2010 “On approval of the Methodological recommendations on the procedure to levy of execution on jointly acquired property of spouses”, in case of identification of property jointly acquired by spouses, the bailiff shall arrest it in the general manner. After that, he/she notifies the plaintiff of the need to apply to the court for the allocation of a share of the jointly acquired property, with setting the plaintiff a certain period for this. At the same time, according to the ruling of the Primorsky Regional Court dated 03.03.2014 in case No. 33-1698, the conclusions that a bailiff is not granted the right to appeal to the court with such a statement are erroneous.

It should be noted that it would be advisable to consolidate the possibility of such a claim by the bailiff. This would allow avoiding unnecessarily delayed enforcement proceedings because in this process the role of the plaintiff is minimal.

With regard to the application in the legal relations under consideration of the rule from part 3, article 35 of the Family Code of the Russian Federation on the need to obtain the notarized consent of the other spouse in order for one of the spouses to complete a real property transaction and a transaction requiring notarization and (or) registration in the manner prescribed by law, it is possible to bring conclusions from the ruling of the Moscow Regional Court dated 30.08.2011, in case No. 33-16422. So, according to the specified judicial act, in the case provided for by paragraph 3, Article 35 of the Family Code of the Russian Federation, we are talking about transactions concluded on the basis of the voluntary will of one of the spouses. At the same time, when concluding a transaction at the auction for the sale of the seized property as part of the execution of a judicial act, such consent cannot be.



Figure 1: Property price index of private residential properties.

Despite the seemingly fairly clear regulation of the recovery proceedings against the debtor's share in the joint property of the spouses, in practice, this procedure has certain difficulties. So, A.I. Hikmatullin notes the following problem: “in the case when the jointly acquired property of the spouses has not been identified, bailiffs unlawfully refuse to plaintiffs in sending requests to the registration authorities to establish the property registered for the debtor spouse. They argue this with the fact that the debtor's spouse is not a party to enforcement proceedings and the revealing of his/her

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property status exceeds the official authority of the bailiff" (Ali Zadeh et al., 2011).

Thus, we can conclude that the recovery proceedings against the common property right of a debtor are often used within the framework of enforcement proceedings, but the peculiarity of this procedure is that it requires the particularly active participation of the collector. Fig.1 compares the Prices of private residential properties decreased by 0.7% in 1st Quarter 2019, with a 0.1% decrease in the previous quarter.

According to our investigation conducted on the course of one year, Prices of landed properties increased by 1.1% in 1st Quarter 2019, compared with the 2.0% decrease in the previous quarter Prices of non-landed properties decreased by 1.1% in 1st Quarter 2019, compared with the 0.5% increase in the previous quarter.

In this regard, prices of non-landed properties in Core Central Region (CCR) decreased by 3.0% in 1st Quarter 2019, in comparison with the 1.0% decrease in the previous quarter. Prices of non-landed properties in the Rest of Central Region (RCR) decreased by 0.7%, in comparison with the previous quarter. Prices of non-landed properties in Outside Central Region (OCR) increased by 0.2%, compared with the 0.7% increase in the previous quarter. All of these properties back to the possession of third party. The Federal Law "On Enforcement Proceedings" specifically sets out a levy of execution on the property held by third parties (Article 77 of the Law "On Enforcement Proceedings"). When foreclosing a real property, this article is relevant to a group of real property "by law" - ships and aircraft, inland navigation vessels, space objects. Pursuant to Part 1 of this article, recovery proceedings against the debtor's property held by third parties are based as a general rule on a judicial act and, in some cases, it can be done on the basis of the executive inscription by a notary. Application to the court to foreclose the property held by third parties is made by a collector or bailiff and considered by the court within ten days from the date of its receipt. A judicial act on foreclosure of debtor's property held by third parties that have entered into legal force is subject to immediate execution (Gayfutdinova, 2016).

4. REMARK

Analysing the above, the authors of the paper come to the following conclusions.

Recovery against real property transferred to secure life endowment cannot be levied without the consent of the pensioner since upon the alienation of such property by the annuity payer his/her obligations under the annuity contract are transferred to the property acquirer.

Peculiarities of recovery proceedings against facilities under construction are connected, first of all, with the fact that recovery proceedings against them as real property requires its preliminary state registration in accordance with the law "On state registration of real property". Ownership of buildings, structures and other newly created real property subject to state registration arises from the moment of such registration. Prior to registration, the ownership of the newly created real property is not considered as a real property item.

According to article 45 of the Family Code of the Russian Federation, an execution on the obligations of one of the spouses can only be levied on the property of that spouse, and if it is insufficient, the creditor has the right to demand the allocation of a share of the debtor spouse (which

would be due to him/her when sharing the common property of the spouses) for application of recovery against it. When resolving the issue of who can file a claim for the allocation of a share in the common property of the spouses: a bailiff or a plaintiff, it is proposed to consolidate the approach according to which the requirement to apportion a participatory share in the common property of spouses when a recover is applied against it within the enforcement proceedings, may be applied to court by the bailiff.

5. CONCLUSION

In the course of the study, it was revealed that the recovery proceedings against real property need special legal regulation, taking into account the nuances of the real property status as a whole and its individual types. The recovery proceedings against real property, in general, are subject to the general rules of enforcement proceedings and include three standard stages: an arrest, assessment, and implementation (Odintsova, 2017).

Seizure of real property transferred to secure life endowment cannot be levied without the consent of the recipient of the annuity. Peculiarities of recovery proceedings against facilities under construction are related, first of all, to recovery proceedings against them as real property, and preliminary state registration is mandatory since in accordance with current legislation state registration is the only evidence of the existence of a registered right.

According to the norms of family law, for the obligations of one of the spouses, an execution can be levied only on the property of that spouse, and if it is insufficient, the plaintiff has the right to demand the allocation of a share of the debtor spouse (which would be due to him/her when sharing the common property of the spouses) to recover it. A problem has been identified - who: a bailiff or a plaintiff can file a request for the allocation of a share in the common property of the spouses. It is proposed to consolidate the approach according to which the requirement to apportion a participatory share in the common property of spouses when a recover is applied against it within the enforcement proceedings, may be applied to court by the bailiff. These measures will contribute to both further improvement of the legislation, and the formation of a uniform practice in the field of recovery against real property in enforcement proceedings.

6. AVAILABILITY OF DATA AND MATERIAL

All information used or generated from this work is already included in this article.

7. ACKNOWLEDGEMENT

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