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Subordination of the Requirements of Construction Participants in the Bankruptcy Case of the Developer

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Abstract. This article explores the issue of lowering the priority of satisfying the demands of creditors who are participants in construction and have the status of construction participants. The article presents an analysis of changes in the concept of “construction participant” in connection with the gradual inclusion of only citizens who meet their housing needs. The article concludes that participants in construction who have both monetary and non-monetary claims against the developer have a special status in bankruptcy proceedings. The legal positions of the Supreme Court of the Russian Federation regarding the lowering of the priority of construction participants who pursue investment goals rather than meeting their housing needs are analyzed. The article proposes using a higher standard of proof when establishing the demands of a construction participant to confirm the purpose of using the residential premises.

Keywords: bankruptcy procedures, bankruptcy of the developer, construction participant, payment of compensation, subordination of claims, investment nature of the claims, standard of proof.

Research area: private law (civil) sciences.

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Субординация требований участников строительства в деле о банкротстве застройщика

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Аннотация. В статье исследуется проблема понижения очередности удовлетворения требований кредиторов застройщика, имеющих статус участников строительства. Представлен анализ изменения понятия «участник строительства» в связи с последовательным включением в него только граждан, удовлетворяющих свои потребности в жилище. Сделан вывод об особом статусе в процедурах банкротства застройщика участников строительства, имеющих как денежные, так и неденежные притязания к застройщику. Проанализированы правовые позиции Верховного Суда РФ о понижении в очередности участников строительства, преследующих цели инвестирования, а не удовлетворения жилищной потребности. Предложено применять повышенный стандарт доказывания при установлении требования участника строительства для подтверждения цели использования жилого помещения.

Ключевые слова: процедуры банкротства, банкротство застройщика, участник строительства, выплата возмещения, субординация требований, инвестиционный характер требований, стандарт доказывания.

Научная специальность: 5.1.3 – частно-правовые (цивилистические) науки.

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Introduction

In the process of establishing the claims of creditors in a developer's bankruptcy case, the grounds for their emergence are verified and the order of satisfaction is determined. Subordination of claims may occur during the establishment of creditors' claims, i.e. lowering their priority.

A. I. Shaidullin distinguishes between contractual and compulsory (legal) subordination (Shaidullin, 2022). We believe that this classification is incomplete. It is advisable to distinguish a third type of subordination based on the grounds for subordination, when the arbitration court considering the bankruptcy case justifies the need for subordination based on the principles of justice and applies

it when revealing clear unfairness. Let us call it judicial subordination. It seems that in the absence of legal regulation of many situations regarding subordination of claims, this type of subordination is significantly complicated. Judicial discretion and discretionary powers of the court are the basis for the application of this type of subordination.

Problem statement

When discussing the problems of subordination of creditors' claims, subordination of claims of controlling debtors and affiliated persons who provided compensatory financing loans to the debtor are usually distinguished. In our opinion, subordination can be applied in other cases as well. In particular, in bankruptcy

proceedings of a developer, other grounds for subordination are appearing.

Methodology

The following scientific research methods were used as a methodological basis for the study: analysis, synthesis, induction, deduction, teleological interpretation, forecasting.

Discussion

The legal basis for lawful subordination of claims in the Federal Law No. 127-FZ of October 26, 2002 “On Insolvency (Bankruptcy)” (hereinafter – the Bankruptcy Law) is provided for claims of creditors and authorized bodies that are filed after the deadline for filing claims (Article 142), as well as for claims of dishonest counterparties in a transaction declared invalid under Article 61.1, paragraph 2, and Article 61.3, paragraph 2, as indicated in Article 61.9 of the Bankruptcy Law.

Contractual subordination is applied based on an intercreditor agreement on subordination regulated by Article 309.1 of the Civil Code of the Russian Federation. A. I. Shajdullin acknowledges that “such an agreement can be concluded either exclusively by individual creditors among themselves or with the participation of the debtor (internal subordination). In addition, absolute contractual subordination is possible by agreement between the creditor and the debtor” (Shajdullin, 2022).

At the same time, the legal position reflected in paragraph 4 of the resolution of the Plenum of the Supreme Court of the Russian Federation of November 22, 2016 No. 54 “On Some Issues of Application of the General Provisions of the Civil Code of the Russian Federation”, should be taken into account according to which contractual subordination is not applicable when bankruptcy procedures are introduced, and the order of satisfaction of creditors’ claims when bankruptcy procedures are introduced is established exclusively by the Bankruptcy Law. However, in some cases, judicial practice still recognizes the possibility of applying contractual subordination (for example, in the case of bankruptcy of LLC “Anchor Development”). The Economic Disputes Collegium of the Supreme Court of the Rus-

sian Federation pointed to the absence of any grounds for not applying the conditions of an agreement between creditors (determination of February 4, 2019 No. 304-ES 18–14031 in case No. A81–7027/20).

Moreover, legal positions have been developed in the summary of court rulings regarding the subordination of claims of controlling debtors and affiliated persons in the event of a loan being granted to a debtor in conditions where the debtor is experiencing financial difficulties in fulfilling its civil obligations and/or public duties, which was reflected in the Review of Judicial Practice for Disputes Related to Establishing Claims of Controlling Debtors and Affiliated Persons in Bankruptcy Proceedings, issued by the Supreme Court of the Russian Federation on January 29, 2020. In other legal systems, this type of subordination is usually regulated in insolvency legislation using various subordination models.

In Russian legislation, granting a loan to a debtor by controlling debtors and affiliated persons is not prohibited, but such creditors, unlike independent creditors, have greater knowledge of the debtor’s affairs, determine its actions, and are interrelated with it because they carry out entrepreneurial activities together. Therefore, the general principle in establishing claims of such creditors is to place the risk of the debtor’s insolvency on them and, accordingly, subordinate their claims when initiating bankruptcy proceedings, while, on the contrary, allowing independent creditors to satisfy their claims to a greater extent.

In the summary of court rulings, there are other cases of subordination of creditors’ claims that were not reflected in the aforementioned Review of January 29, 2020.

In the ruling of August 22, 2022, No. 305-ES 22–7163 in case No. A41–34210/2020, the Supreme Court of the Russian Federation stated that in the bankruptcy case of a developer, claims of individuals with investment character are satisfied in the fourth queue.

The validity of this position raises questions. One of the features of considering bankruptcy cases of persons who, in essence, are developers under the Bankruptcy Law, is a different order of satisfying claims of bankruptcy

creditors (compared to other categories of debtors), established by Article 201.9 of the said Law, in conditions where the unfinished construction object and land plot, which serve as the subject of lawful or contractual mortgage, are not sold at auctions.

The legislator allocates a privileged queue for citizens recognized as participants in construction, whose claims are satisfied in a priority order in relation to the claims of other bankruptcy creditors, namely, in the first subqueue of the third queue.

According to subparagraph 2 of paragraph 1 of article 201.1 of the Bankruptcy Law, participants in construction include individuals who have claims against the debtor for:

1) the transfer of residential premises, as well as parking spaces and non-residential premises up to 7 square meters, of a non-monetary nature;

2) monetary claims in the following cases: a) when the developer undertakes to pay damages and penalties if the contractual relationship between the participant in construction and the developer was terminated due to the participant in construction's refusal to participate in shared construction or as a result of termination of the contract for participation in shared construction or other contracts, both unilaterally and by mutual agreement; b) compensation for damages in the form of real damage in case of impossibility of the developer's obligation to transfer residential premises in kind; c) refund of funds transferred by the participant in construction, or funds in the amount of the value of the property transferred under the contract, when the contract concluded with the developer is recognized by the court as invalid (restitution claim); d) refund of funds paid under the contract when the contract is recognized by the court as not concluded (condictio claim); e) transformation of a non-monetary claim into a monetary claim due to the refusal of participants in construction to fulfill the contract for the transfer of residential premises and (or) parking spaces and non-residential premises (paragraph 1 of article 201.5); refusal to conclude the contract of those participants in construction whose claims cannot be satisfied due to the lack of residential premises or the

claims of several participants for one residential premises (paragraph 7 of article 201.10).

If the developer cannot fulfill the obligation to transfer residential and non-residential premises and parking spaces, the bankruptcy trustee carries out settlements in monetary form if the arbitration court does not make a decision on the transfer of an unfinished construction object or if the transfer of the developer's property to another developer is not made one month before the end of the bankruptcy proceedings.

The legal status of participants in construction with non-monetary claims is a matter of debate among higher judicial bodies. The Constitutional Court of the Russian Federation, following the provisions of the Bankruptcy Law, recognizes the status of bankruptcy creditors exclusively for participants in construction who have monetary claims against the debtor (determination of March 29, 2016, No. 529-O). At the same time, the Supreme Arbitration Court of the Russian Federation and the Supreme Court of the Russian Federation believe that participants with both monetary and non-monetary claims have an identical status (determination of the Supreme Arbitration Court of the Russian Federation of March 3, 2014, No. VAS-1461/14). In the legal doctrine, the status of these creditors is recognized as equal, since there are different ways to protect their rights (Rogova, 2020).

Public-law entities are also participants in construction, but this category of creditors is not granted priority for satisfying their claims in the first queue, based on the grammatical and teleological interpretation of the relevant norm.

The legislature consistently changes the concept of a construction participant. When introducing amendments to the Bankruptcy Law by Federal Law No. 151-FZ of June 27, 2019 "On Amendments to the Federal Law "On Participation in the Shared Construction of Apartment Buildings and Other Real Estate Objects and on Amendments to Certain Legislative Acts of the Russian Federation" and Certain Legislative Acts of the Russian Federation" the concept of a "construction participant" was changed by excluding legal entities from it. The

purpose of such a change is to establish a priority for protecting the property rights of citizens who have become investors in the construction of apartment buildings, satisfying their housing needs.

Meanwhile, disputes arise in judicial practice regarding the inclusion in the registry of creditors' claims of assignments from citizens who acquired them under a contract of assignment of the right to demand from assignors – legal entities who entered into a shared construction agreement with the developer after the entry into force of Federal Law No. 151-FZ of June 27, 2019, as a construction participant.

For example, assignee Z. acquired at auction the right to demand the transfer of residential premises under a shared construction agreement from a legal entity and applied to the bankruptcy trustee of the developer for its inclusion in the registry. After the bankruptcy trustee refused, the dispute was resolved in court. The Arbitration Court did not recognize the assignee as a construction participant, stating that the assignment agreement was concluded after the entry into force of Federal Law No. 151-FZ of June 27, 2019 (resolution of the Arbitration Court of the Moscow District of December 6, 2021, No. F05–26665/2021 in case No. A41–615/2020).

The requirement of the assignee cannot be satisfied as part of the priority queue of construction participants, since legal entities, in the court's opinion, do not have the goal of satisfying their basic social need for their own housing, and the claims of the assignor could not be included in the register as the claims of a construction participant of the first sub-priority of the third priority.

It should be noted that when a transaction for the assignment of a claim is made, the assignor has the right to transfer the claim of the initial creditor to the assignee to the extent and on the conditions that existed at the time of the transfer of the right to the claim (paragraph 4 of the Plenum of the Supreme Court of the Russian Federation of December 21, 2017 No. 54 “On Some Issues of the Application of the Provisions of Chapter 24 of the Civil Code of the Russian Federation on the Change of Persons in an Obligation Based on a Transaction”).

However, the court stated that the assignee may have additional rights that were not available to the original creditor.

The provision of such priority to construction participants is primarily due to the goal of special regulation of the bankruptcy of developers – protecting the property rights of citizens as non-professional investors. Thus, in the resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation dated April 23, 2013 No. 13239/2012, the achievement of this goal by the legislator is emphasized.

It is known that the protection of property rights of construction participants has been an acute social problem in Russia since the 90s, which has not found its final resolution, despite the repeated attempts of the legislator to change the legal paradigm in the relevant area. Perhaps only the transition to escrow accounts to some extent reduced the severity of the crisis.

In light of the foregoing, the question of the criteria for determining the order of satisfying the claims of creditors of an insolvent developer becomes particularly important. As noted earlier, only individuals, the Russian Federation, subjects of the Russian Federation, and municipalities can be participants in construction (Article 201.1 of the Bankruptcy Law). The type of claims made by the creditor also affects their status as a participant in construction. Only claims for the transfer of residential premises or monetary claims can be considered, and for individuals, claims for the transfer of non-residential premises with an area not exceeding 7 square meters, as well as parking spaces.

Until recently, the courts did not take into account the status of individual entrepreneur, the number of residential premises acquired under the contract with the developer, or the motives for their acquisition when determining the status of a participant in construction. For example, in case No. A41–60101/13, a claim for the transfer of 7 apartments is included in the register (resolution of the Moscow District Arbitration Court of March 20, 2020), and in case No. A12–21397/2019, a claim of an individual entrepreneur for the transfer of 15 apartments is included in the register (resolution of the Volga District Arbitration Court of May 19, 2021).

However, in judicial practice, a different approach gradually began to prevail, according to which it is necessary to take into account the purpose of acquiring a residential premises when establishing the status of a participant in construction (see the resolutions of the Twentieth Arbitration Appellate Court of February 21, 2022, in case No. A09–9475/2019, the North Caucasus District Arbitration Court of July 26, 2022, in case No. A32–45401/2019, and the Northwest District Arbitration Court of April 14, 2022, in case No. A66–7173/2020).

In 2022, this position was supported by the Supreme Court of the Russian Federation in determination No. 305- ES 22–7163 of August 22, 2022, in case No. A41–34210/2020. The court agreed with the conclusions of the appellate and cassation courts, which found that the claims of citizen investors who entered into relations with the developer with the aim of further profit from the resale of residential premises should not be satisfied as part of the first sub-order of the third order, clarifying that the significant number of acquired apartments itself does not indicate the investment nature of the claims. Later, the lower courts began to actively apply the legal position of the Supreme Court of the Russian Federation (resolution of the Moscow District Arbitration Court of September 20, 2022 in case № A41–34148/2020).

The opinion on the need to differentiate the status of “professional” and “non-professional” participants in construction requirements has been critically assessed in the academic community. According to a legal expert opinion from February 4, 2022 by A.V. Egorov, R.T. Miftakhutdinov, and O.R. Zaitsev, the legislature and the judiciary (at the time of the opinion’s preparation) deliberately reject this differentiation (Egorov, Miftakhutdinov, Zaitsev, 2022).

The position of the Supreme Court of the Russian Federation significantly deviates from the legal definition of a construction participant enshrined in Article 201.1 of the Bankruptcy Law, thereby undermining the principle of legal certainty and making the legal position of investors in the construction sector ambiguous.

Firstly, difficulties may arise in determining the nature of a citizen’s claims. Cur-

rently, the only criterion that courts rely on is the number of acquired apartments. However, in judicial practice, possible presumptions of “investment” relationships with the developer are already emerging: an investor’s conclusion of agreements for the assignment of claims to third parties, investor owning their own housing (see, for example, the resolution of the Arbitration Court of the Moscow District of May 25, 2022, in case No. A41–34138/2020), the acquisition of housing by an investor’s close relatives from the same developer (the resolution of the Arbitration Court of the Moscow District of September 26, 2022, in case No. A41–65911/2019). However, these presumptions do not solve the problem since they do not take into account the individuality of a citizen’s housing needs and those of their close relatives.

Secondly, the criterion of the purpose of acquisition raises questions of uncertainty. It is not entirely clear which ways of making a profit can be considered: only the assignment of claims to third parties and the resale of finished housing or also the rental of acquired apartments? It is unclear at what point the purpose should be “consumer”: when concluding a contract with the developer or when filing for bankruptcy? Finally, if a citizen did indeed intend to meet their housing needs, how can we determine which specific apartment should be included in the register of claims? Should the investor be given the right to choose or should the court decide?

Thirdly, it is necessary to take into account the limitations established in Article 13 of the Federal Law of July 29, 2017, Federal Law No. 218-FZ of July 29, 2017 “On the public law company “Territorial Development Fund” and on amendments to Certain Legislative Acts of the Russian Federation” regarding the amount of payments made by the Fund..

According to article 13, part 2 of the Law on Compensation Payments to citizens recognized as participants in construction and entitled to demand the transfer of residential, non-residential premises, and parking spaces are limited within the market value of 120 square meters but not less than the contract price paid. In accordance with part 2.1. of article 13, com-

pensation is paid to the citizen for one parking space and one non-residential premises. The size of payments is determined by the Rules for payment of the public law company "Territory Development Fund" on compensation to citizens – participants in construction entitled to demand the transfer of residential, non-residential premises and parking spaces, approved by the Government of the Russian Federation on October 7, 2017, No. 1233.

It should be noted that the Territory Development Fund has the right to decide to replace the decision on financing activities to complete construction with a decision to pay compensation of a monetary nature to participants in construction. In this case, the participants in construction have the right to transform their claims into non-residential premises provided that the method for satisfying their claims is chosen by the meeting of participants in construction.

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Conclusion

In conclusion, in bankruptcy proceedings of a developer, in addition to legal and contractual subordination, the court may apply subordination of claims of participants in construction if it is established that the satisfaction of this claim does not aim to meet the housing needs of the citizen.

It seems necessary for the Supreme Court of the Russian Federation to develop an increased standard of proof for separate disputes of the discussed category. In the absence of clear criteria for the "investment" nature of the creditor's relationship with the developer, the further development of judicial practice in this direction may have a certain negative impact on economic relations: investments in construction will inevitably become more risky for citizens, including those who entered into legal relations with the developer to satisfy their own housing needs.

prav punktom 2 stat'i 3, punktom 2 stat'i 4, punktom 2 stat'i 7 i punktom 2 stat'i 33 Federal'nogo zakona "O nesostoiatel'nosti (bankrotstve)"». [Definition of the Constitutional Court of the Russian Federation No. № 529-O of March 29, 2016 "On refusal to accept for consideration the complaint of citizen Emelyanov Alexey Vyacheslavovich on violation of his constitutional rights by paragraph 2 of Article 3, paragraph 2 of Article 4, paragraph 2 of Article 7 and paragraph 2 of Article 33 of the Federal Law "On Insolvency (bankruptcy)"]. Available at: <https://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=ARB&n=458236#P-3fneXTIT0Ves4gG1> (accessed 10 February 2023).

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