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CASELAW REVIEW OF THE SUPREME COURT OF THE RUSSIAN FEDERATION

JUDICIAL CHAMBER ON ECONOMIC DISPUTES

I. Resolution of disputes related to the protection of ownership title and other property rights

1. Transfer of immovable property by the executive body of the municipal entity to the operational management of the entity is not in itself a ground for refusal to transfer this property into the ownership of a small or medium-sized business entity on the basis of Article 3 of the Federal Law as of July 22, 2008, No. 159-FZ if from circumstances of the case it follows that the establishment of the right of operational management is made only to prevent a small and middle-sized business entity to exercise the preemptive right to acquire leased property established by the law.

The company - a small business entity - applied to the arbitration court with a statement to the administration of the municipality to recognize as illegal the refusal to transfer the leased non-residential premises into the ownership of the plaintiff and the obligation of the administration to eliminate violations of the rights of the plaintiff by developing and sending to the company a draft contract on sale and purchase of the disputed property item.

The company has grounded its claims on the fact that it meets the conditions to be qualified as a small and middle-sized business entity, established by Article 4 of the Federal Law as of July 24, 2007, No. 209-FZ "On the Development of Small and Middle-Sized Business in the Russian Federation" (hereinafter referred to as "Federal Law No. 209-FZ"), and has fulfilled the requirements of Article 3 of the Federal Law as of July 22, 2008, No. 159-FZ "On Peculiarities of Real Estate Alienation Being the State Property of Constituent Entities of the Russian Federation or the Municipal Property and Leased by Small and Middle-Sized Business Entities, and on Amendment of Separate Legislative Enactments of the Russian Federation" (hereinafter referred to as "Federal Law No. 159-FZ") that gives it the preemptive right to acquire the title to the leased premises that previously was residential premises.

The court of first instance established that the disputed property had been transferred to the operational management of the municipal institution. In accordance with the provisions of Article 1, Part 2, Paragraph 3 of Federal Law No. 159-FZ pursuant to which the given law does not extend on the real estate belonging to the state and municipal entities on the right of operational management, the court has refused in satisfaction of the claims of the company.

The court of appeal cancelled the decision of the court of first instance, satisfied the motion of the company, having qualified the actions of the administration as violating the rights and the lawful interests of the company, interfering with the right available to it on

the repayment of the leased premises. On receiving the statement of the company on exercising the preemptive right to acquire the leased property the administration has been obliged to make the actions provided by Article 9, Part 3 of Federal Law No. 159-FZ, namely to provide for the conclusion of the contract on estimation of the market price of the leased property, to make the decision on conditions of its privatizing within the two-week term from the date of acceptance of the estimation report, to submit to the company the draft of the contract on sale and purchase of the leased property within ten days from the date of the decision regarding the conditions of its privatizing.

The district court of arbitration overturned the decision of the court of appeal and sustained the decision of the court of first instance.

The Judicial Chamber on Economic Disputes of the Supreme Court of the Russian Federation revoked the decision of the court of cassation and sustained the decision of the court of appeal on the following grounds.

Pursuant to Paragraphs 1, 5 of the Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation as of November 5, 2009, No. 134 "On Some Questions of Application of the Federal Law "On Peculiarities of Real Estate Alienation Being the State Property of Constituent Entities of the Russian Federation or the Municipal Property and Leased by Small and Middle-Sized Business Entities, and on Amendment of Separate Legislative Enactments of the Russian Federation" (hereinafter referred to as "Information Letter No. 134") the list of conditions under which the tenant has the preemptive right to acquire the leased property is defined in Federal Law No.159-FZ exhaustingly. Constituent Entities of the Russian Federation and municipal entities have no right to establish any other restrictions or additional conditions for the implementation of the right to purchase real estate by their regulatory legal acts. The court can recognize that the tenant has the right to acquire leased property and in the event that after the publication of Federal Law No. 159-FZ the constituent entity of the Russian Federation or local government body made other actions, aimed at preventing small or medium business entities to exercise their right to acquisition.

At the moment when the company submitted its statement on exercising the preemptive right to repayment of the premises, it fulfilled all conditions established by Article 3 of Federal Law No. 159-FZ.

Meanwhile, the municipal institution, which had the right of operational management over the disputed premises, was established on the basis of the resolution of the head of the municipal entity dated September 29, 2008, i.e. after Federal Law No. 159-FZ came into force.

The operational control of the municipal entity to manage the premises leased by the company was registered and, consequently, was established as a proprietary right on February 29, 2012, i.e. also after the said law came into force. At that, the property was vested in the operational management of the municipal entity without its actual removal from the possession and use of the company.

These circumstances indicate that the administration and the committee have taken steps to prevent the company from exercising its preemptive right to acquire the premises it

leases. At the same time, the application for state registration of the operational control right of the municipal entity to the disputed premises was a consequence of the said illegal actions of the administration and the committee, the implementation of which made it possible to refer to the presence of an obstacle for the company - a small business entity - in the exercise of the right to acquire the leased property.

As before coming into legal force of Federal Law No. 159-FZ the premises leased by the company did not belong to any other municipal entities subject to the operational control right, other restrictions for exercising by the company of the right to acquire of the real estate were absent, the administration had no legal basis to refuse the company in granting the demanded property by right of ownership.

According to Article 10, Paragraph 1 of the Civil Code of the Russian Federation, the actions of citizens and legal entities performed solely with an intention to inflict harm to another person, as well as other forms of abuse of rights, shall not be allowed.

Taking into account the circumstances established on the case, confirming commitment by the administration of the actions aimed to prevent the company to exercise the right to acquire ownership of the nonresidential premises, the conclusions of courts of the first and cassation instances about the presence of the grounds for refusal in the repayment of the leased premises in connection with its transfer in operational control of the municipal entity are recognized as unreasonable.

Ruling No. 305-ES14-101

II. Resolution of disputes related to corporate relations

2. When determining the circumstances testifying to abuse of the right by the person at contestation of the major transaction (Article 79, Paragraph 6 of the Federal Law as of December 26, 1995, No. 208-FZ "On Joint-Stock Companies"), in particular, use of corporate rules on approval exclusively for the purpose of causing harm to the counterparty on this transaction, the arbitration court on the basis of Article 10, Paragraphs 1 and 2, and Article 1, Paragraph 4 of the Civil Code of the Russian Federation shall refuse to satisfy the claim for invalidation of such a transaction.

The shareholder of the company has applied to the arbitration court with the action for invalidation of the guarantee agreement concluded between the company (the guarantor) and the firm (the creditor) in ensuring performance of obligations of the company (the buyer) to the firm (the seller) on payment of the delivered goods as at the conclusion of the challenged transaction the order of approval of major transactions established by the Federal Law as of December 26, 1995, No. 208-FZ "On Joint-Stock Companies" was not observed.

As established by the courts, the ruling of the arbitration court in another case with respect to the principal debtor - the company - the insolvency proceedings were initiated upon its application under a simplified bankruptcy procedure for the debtor being liquidated.

When refusing to satisfy the claims, the court of first instance proceeded from the fact that the disputed contract was concluded in the ordinary course of business of the company, it

did not require approval, and the recognition of this transaction as invalid would lead to an unjustified violation of the rights and legitimate interests of the firm that supplied the expensive goods and did not receive for it a consideration.

When cancelling the decision of the court of first instance and recognizing the guarantee contract as null and void, the court of appeal pointed that the fact of conclusion of a security transaction in the ordinary course of business of the company had not been proved, stated that this transaction had signs of a major transaction and the absence of evidence of its approval.

The district court of arbitration agreed with the conclusions of the court of appeal.

The Judicial Chamber on Economic Disputes of the Supreme Court of the Russian Federation revoked the rulings of the court of appeal and court of cassation and sustained the decision of the court of first instance on the following grounds.

Within the meaning of Article 10 of the Civil Code of the Russian Federation, in order to protect the violated rights of the victim from abuse, the arbitration court may not accept the arguments of the person who abused the right, referring to the compliance of his/her actions on the implementation of his/her right to the formal requirements of the legislation.

In the considered case, the debtor and the guarantor located at the same address had common shareholders (participants) - the plaintiff and another individual, each of which owned 50 percent of the total number of votes attributable to shares, interests of these legal entities. The said organizations pursued a common economic goal to sell products using a single combined trademark.

At the same time, the plaintiff, based on the amount of its participation in the authorized capital of the company, could not but be aware of the large supplies of goods by the firm for significant amounts. The plaintiff did not dispute the deliveries themselves, did not question their expediency, and did not notify the supplier on the violation of its rights and legitimate interests when agreeing to the acceptance of the goods.

The plaintiff, being interested in receiving goods on the terms of a commercial loan from the firm, had a real economic interest in the very issuance of a guarantee by the company, the availability of which depended on the very possibility of the actual acquisition of products, which, in its turn, determined the entrepreneurial activity of legal entities controlled by the plaintiff and the second participant of these organizations, the general essence of which was to retail sale of goods received.

Previously, the company, as well as the plaintiff itself, had already issued guarantees to the firm in the event of non-performance or improper performance by the company of the secured obligation to pay for similar goods.

In the course of consideration of this case, the plaintiff did not refer to the occurrence of a corporate conflict between it and the second shareholder, who was, among other things, the head of the company. The plaintiff, the company and the company-buyer took a consolidated position on the dispute.

In the above circumstances, shareholder's challenging of the guarantee in the situation where, in fact, the insolvent principal debtor, largely controlled by the plaintiff, has already

received goods without payment, is aimed at releasing the guarantor company, controlled by the plaintiff and possessing the actual assets of the company, from the performance of contractual obligations under the security transaction, which is the use of corporate rules on the approval of major transactions solely for the purpose of causing damage to the firm.

Such interests are not subject to judicial protection by virtue of Article 1, Paragraph 4 of the Civil Code of the Russian Federation, which does not allow the possibility of deriving benefits from unfair behavior.

Ruling No. 305-ES14-68

3. The court refuses to satisfy the claim for expulsion of the participant from the limited liability company (Article 10 of the Federal Law as of February 8, 1998, No. 14-FZ "On Limited Liability Companies"), when the regular business activities of the company are hindered by equivalent mutual claims of both the plaintiff and the defendant, and thus no gross violation of obligations associated with participation in the company, one of them is proved.

One of the participants of the company, consisting of two participants, each of whom owned a share of 50 percent of the authorized capital, appealed to the arbitration court with a claim to another to be expelled from the company on the basis of Article 10 of the Federal Law as of February 8, 1998, No. 14-FZ "On Limited Liability Companies" (hereinafter referred to as the Limited Liability Company Act), referring to the fact that the defendant, as a participant and director general of the company, has never held regular meetings of the company, acting to the detriment of the interests of the company, thus causing damages.

The defendant on the initial claim has addressed to the plaintiff with the counterclaim with the similar demand, referring to repeated evasion of the latter from participation in general meetings of the company and also the actions directed on the impediment of the company's functioning.

In satisfying the initial claim and refusing to satisfy the counterclaim, the court of first instance considered that the defendant had committed acts (omissions) contrary to the interests of the company, which caused adverse consequences for the company and significantly impeded its functioning. Nothing of these was discovered in the plaintiff's actions.

In cancelling the decision of the court of first instance regarding satisfaction of the initial claim and refusing in its satisfaction, the court of appeal has come to a conclusion on the absence of sufficient grounds for expulsion of the defendant from structure of participants of the company as its actions (omissions) do not indicate to the gross negligence of the duties, which have entailed causing considerable damage to the company and impeding its functioning; the current situation is caused by the presence of a corporate conflict between participants of the company.

In cancelling the ruling of the court of appeal and sustaining the decision of the court of first instance, the district court of arbitration agreed with the conclusions set forth in the decision that the defendant's actions (omissions) had such adverse consequences for the company as to be sufficient to expel it from the participants of the company.

The Judicial Chamber on Economic Disputes of the Supreme Court of the Russian Federation revoked the decision of the court of cassation and sustained the decision of the court of appeal on the following grounds.

Pursuant to Article 10 of the Limited Liability Companies Act, participants of the company whose shares in aggregate amount to not less than ten per cent of the authorized capital of the company, shall be entitled to demand in a legal proceeding to expel from the company the participant, who materially violates his/her/its obligations or by its/his/her actions (omissions) makes the company's functioning impossible or significantly impedes it.

A distinctive feature of this corporate dispute is the presence of an equal number of shares of the company's shareholders, which increases the risk of the situation when it is impossible to make a decision on the issues related to the company's functioning.

Expulsion of a participant is a special corporate method of protection of rights, the purpose of which is in eliminating the obstacles caused by the behavior of one of the participants in the regular functioning of the company.

At the same time, at the said proportion of shares, the mentioned mechanism of protection can be applied only in exceptional cases when it was proved either material violation of obligations by a shareholder of the company or behavior of a shareholder making impossible or impeding the functioning of the company.

However, in this case, the regular economic activity of the company is impeded by equal mutual claims of its participants indicating to a pronounced conflict of interests in the management of the company. The actual reason for filing a lawsuit with the court with mutual demands for the expulsion from the company is the loss of a common purpose by the participants in the course of business and the desire to resolve an internal corporate conflict at the expense of the interests of another participant, rather than the actions (omissions) of the participants in connection with the infliction of harm to the company.

The Judicial Chamber on Economic Disputes has indicated that in the situation where the level of distrust between the participants of the company owning its equal shares reaches a critical, from their point of view, level, and the position of none of them is obviously illegal, it is advisable to consider the issue of the possibility of continuing corporate relations, which may result in the adoption by the participants of a decision on the liquidation of the company or the adoption of a decision by one of the participants to withdraw from it with appropriate legal consequences as provided for in the Limited Liability Companies Act and statutory documents of the company. Claims to expel another participant from the company in such a situation shall not be satisfied.