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TÍTULO: A la cuestión de la protección de los derechos reales.

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RESUMEN. El artículo resume cuestiones teóricas y metodológicas del estudio de los derechos reales, así como presenta una descripción general de las leyes de propiedad, revela su naturaleza legal y las formas de ocurrencia e implementación tanto en la ley rusa como en países extranjeros. El estudio expone el mecanismo y hace conclusiones sobre la protección y defensa de los derechos de propiedad, e incluye no solo medios legales, tradicionalmente conocidos como los métodos de protección de los derechos civiles, sino también las mismas normas de propiedad. El documento lleva a cabo el análisis de las acciones reales, en primer lugar, de las reivindicativas y negativas, la comparación entre ellas y con otros medios legales para restaurar los derechos de propiedad violados.

PALABRAS CLAVES: derechos reales, mecanismo de protección legal, métodos de protección, acción reivindicativa, acción negativa.

TITLE: To the question of the protection of Real Rights.

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ABSTRACT: The article summarizes theoretical and methodological issues of the study of real rights, as well as presents a general description of property laws, reveals their legal nature and the forms of occurrence and implementation both in Russian law and in foreign countries. The study exposes the mechanism and makes conclusions on the protection and defense of property rights, and includes not only legal means, traditionally known as the methods of protection of civil rights, but also the same property norms. The document carries out the analysis of real actions, in the first place, of the vindictive and negative actions, the comparison between them and with other legal means to restore the property rights violated.

KEY WORDS: real rights, legal protection mechanism, methods of protection, vindictory action, negatory action.

INTRODUCTION.

Property relations are the basis of any economy. The task of law is to optimally and adequately regulate these relations.

Given the importance of real rights, they are protected, defended by almost all branches of law. Moreover, each industry has its own methods of influence. The forms of protection and defence of real rights are provided primarily by civil law. Thus, Article 12 of the Civil Code of the Russian Federation [Civil Code of the Russian Federation. Part One / 1994] regulates the methods of protecting civil rights, the list of which is not exhaustive, which enables to use other methods of protection provided by law.

Traditionally, these include vindictory and negatory actions, which are referred to as absolute ones because of the specifics of property-legal relations. Such actions may be brought against any person who has violated the subjective real right. However, the protection and defence of property rights are not limited to these methods. There may be the situations when an object of real right is destroyed and the above methods cannot be applied. Considering the above, it can be concluded that there is a need for an in-depth study of the mechanism for the protection of real rights.

DEVELOPMENT.

Methods.

The research uses a comparative legal method, a legal sociological method, methods of legal modeling and forecasting, and a legal interpretation method.

Results.

An analysis of the legal mechanism for the protection and defense of real rights has been carried out, and some of its elements have been disclosed and compared.

Property relations in Russia are protected and defended by almost all branches of law. At the same time, the main role belongs to civil law, the subject of which is property and personal non-property relations based on the equality of subjects, the autonomy of their will and the property independence of participants. A huge stratum of civil law regulates the grounds for the appearance and the procedure for the exercise of real rights and other property rights.

At the same time, consideration should be given to the fact that modern civil science, in particular, in Russian, as well as in Austrian, German, etc., rightly notes that the principle of an exhaustive list applies to real rights [Sukhanov E.A., 2017, p. 251-251; Wacke A., 2014 , p. 750], which means that the law exhaustively determines the types and matter of each specific real right [Sukhanov E.A., 2017, p. 62-63; Koziol H., Welser R., Kletecka, 2006, p. 237; Riemer H.M., 2000, p. 37-38].

With reference to Anglo-American law, the principle of an exhaustive list is also the case. However, we note that the owner is characterized as a person who has “the utmost right or a set of rights that may exist in relation to property” [Bell A.P., 1989, p. 66; Honore A.M., 1961, p. 108]. At the same time, the right of property and ownership are related to each other as a system of priorities [Bridge M.G. 2015, p. 29-30; Sukhanov E.A., 2012, p. 307].

Turning to Russian civil law, it should be noted that the norms on the right of ownership and other real rights perform certain tasks in relation to the protection and defense of the rights of property. Before listing them, we note that some norms directly fix certain methods of protection (Article 301-306 of the Civil Code of the Russian Federation), while other norms indirectly affect the ability to protect the rights and interests of owners of real rights (Article 8.1 of the Civil Code of the Russian Federation).

In our opinion, it is possible to single out the following tasks that fulfill the norms and the institutions of the real right:

- 1) Protection of economic property relations. Due to the fact that the economic relations of property are regulated at the legislative level, their legal protection is possible. The state, recognizing the rights of property and their diversity, recognizes their protection, authorizes it.
- 2) Ensuring certain conditions for the realization of real rights. So, for example, in accordance to Article 8.1 of the Civil Code, the right to a certain property (immovable) are subject to state registration by making an entry in the Unified State Register of Real Estate (USRE), which, we believe, can be considered not only as a condition for the realization of real rights but also as an element of protection, since making entries in the USRE is controlled and carried out by government agencies.

3) Negative consequences for offenders. The classic variant of the protection of real rights: when the person whose right is violated uses special means to restore his violated right and to bring the offender to civil liability.

Given the above, we can conclude that the protection of real rights is carried out thanks to the whole institute of property rights. After all, “the mechanism for the protection of property rights is a systemic phenomenon directly connected with the mechanism for exercising subjective civil rights and with the mechanism of legal regulation in general. Such mechanism can be defined as a system of legal means and their relations aimed at the effective exercise and protection of property rights” [Akhmetyanova Z.A., 2011, p. 333-334].

With regard to the above, it should be added, that along with civil law, the institute for the protection of property rights also encompasses the norms of family, land, environmental and other branches of law. Thus, it is rightly noted by Russian civil lawyers that in order to protect the proprietary interest of minor children, family law consolidates the principle of separation of goods of parents and their children. According to this principle, the child does not have the right to own the property of its parents, and the parents do not have the right to own the property of their child [Akhmetyanova Z.A., Makarov T.G., Nizamieva O.N., 2018, p. 2349].

Concerning the protection of real rights, this paper considers certain means, stipulated by the law for the protection of violated subjective real rights. Protection implies the possibility of applying of civil law measures to violators, which include both special property law (vindictory actions, negatory actions), and general civil law remedies (self-defence, recognition of the right, non-use by the court of an act that is contrary to the law, etc.).

The choice of a specific method of defense depends directly on the nature of the violation. Given the above, we can conclude that the observance and ensuring the legitimate interests of the subjects of real rights depends on the nature of the violation of real rights, as well as on the content of the

appropriate method of protection.

As a special proprietary method of protection in the science of civil law, two main proprietary law actions are traditionally distinguished: vindictory (about reclamation a thing by a holder of right from the actual (illegal) owner) and negatory (about removal of property law violations that prevent the legal owner from using it but not depriving him of possession of the thing). The peculiarities of the application of such special methods of protection of property rights are due to the absolute nature of the property rights to be protected. This is due to the fact that these methods are aimed at protecting the interests of the owners of real rights against unlawful actions on the part of any third parties. Accordingly, the defense of property rights is absolute; therefore, the corresponding actions are also called “absolute claims”.

These claims are brought against any persons who have violated the real right. The objects for the protection of the rights to which these claims are directed may be individually-defined things that are preserved specifically. In case of their destruction, with considerable damage or processing, when the original object of property rights is no longer present, both the real right to it and the proprietary legal relationship cease, the sufferer may resort to other ways of protecting his property interests.

As it has already been established, to defend their violated real rights, the subjects can take legal action. It should be noted that both the Civil Procedure Code of the Russian Federation and the Arbitration Procedure Code of the Russian Federation provide equal access to the mechanism of legal remedy for both residents of our country and foreign participants [Valeev D.Kh., Zagidullin M.R., Situdikov R.B., 2018, p. 2440].

Judicial practice has elaborated other ways of proprietary legal protection; in particular, the Resolution of the Plenum of the Supreme Court of the Russian Federation and the Plenum of the Supreme Arbitration Court of the Russian Federation “On some issues arising in court practice in

resolving disputes related to the protection of property rights and other real rights” [The Resolution of the Plenum of the Supreme Court of the Russian Federation and the Plenum of the Supreme Arbitration Court of the Russian Federation of April 29, 2010], claims for recognizing the real right as absent, for establishing servitude, delineating ground areas; for releasing impounded property (things); for rectification of state register of rights to real property, which according to E. A. Sukhanov, are a variety of such civil method of protection of rights, such as the recognition of the right [Sukhanov E.A., 2017, p.253]. The mentioned claims are united by the fact that the subjects are not connected by contractual relations, and the subject of the dispute is individually-defined things.

Note that there may be the cases where the real right becomes to be violated as a result of the actions to be not justified or abusive acts on the part of public authorities; for example, as a result of incorrect data entry into the USRE, erroneous seizure of property, etc.

Law books advance an opinion that the mentioned measures refer to a negatory claim [Usacheva K.A., 2013, p. 90]. However, in most cases such claims can be used when the authorized subject is deprived of actual possession of the thing; for example, when it is demanded to impugn an entry into the registry for the vindication of a real thing, the arrested property is turned in for storage to a third party, it is contested to delineate ground area by a person who is not in possession of it, and so on. Given the legal nature of the negatory action, it can be concluded that such requirements do not correspond to the nature of the negative claim. According to a negatory action, it is possible to demand the removal of various obstacles in the exercise of the right in rem when the right in rem is not the subject of dispute. In this regard, K.I. Sklovsky’s statement seems to be right that when claiming to eliminate obstacles, if even the claimant’s right to property is subject to be proven but only on the threshold of a dispute, and it does not constitute its content [Sklovsky K.I. 2011, p. 99-100].

The recognition of a right is a special kind of method of protecting proprietary interests. When it comes to the claim for recognizing the absence of the right (the satisfaction of which confirms the existence of the right of another person to the disputed thing), we agree with E. A. Sukhanov's opinion that such claim, "contrary to the position expressed in judicial practice (Paragraph 12 of the Judicial Practice Review on some issues of protecting the rights of the owner from violations not related to dispossession [The Judicial Review on Some Issues of Defence of the Rights of an Owner against the Violations Not Related to the Dispossession Confirmed by the Informational Letter of the Presidium of the Supreme Arbitrage Court of the Russian Federation of January 15, 2013], should also be considered not a negatory action but the action for declaration (confirmation) of the right" [Sukhanov E.A., 2017, p. 254].

In practice, there are the cases when the real right is violated in a different way, which does not allow to protect it with the help of traditional proprietary actions; for example, in case of improper performance or non-performance of an obligation, the real right may be violated indirectly (non-return of the thing to an authorized person, return of the damaged thing, etc.). In these cases, between the offender and the owner (other owner) of things there are binding (contractual) relations, respectively, and the protection will be carried out using other legal-obligation methods of protection. Here, one can talk about the protection of proprietary interest, most often by entering a compensatory action, or using a different legal obligation method of protection.

In contrast to proprietary actions, personal actions have a relative character. In this case, both individually-defined and generic things (similar things as compensation) can be as an object. As an example, one can mention the claims from contractual and other obligations, as well as ensuing from the declaring a transaction invalid, sometimes referred to as the restitution of ownership (Subclause 2, Clause 3, Article 307.1 of the Civil Code of the Russian Federation). Note that the direct implementation of such claims occurs beyond the bounds of the real right.

Returning to the classic proprietary methods of protection, it should be noted, that under current Russian legislation, such claims can be brought not only by owners and holders of other real rights but also by some subjects of obligation relations (a tenant, a keeper), since in accordance with Article 305 of the Civil Code of the Russian Federation, every owner of an item has the absolute protection of his/her legal rights and interests. But it can be applied only in relation to third parties, not the owner of the thing that is the counterparty to the contract. So, for example, the tenant in relation to the landlord is protected by liability-legal methods (Article 620 of the Civil Code): if the renter does not transfer the leased property on time, the tenant is filed an obligatory claim because of the contractual relationship with the owner of the thing. Accordingly, the renter can defend against violations on the part of the tenant with the help of obligation-legal methods, require to use the leased thing by the tenant in strict accordance with the terms of the contract (Article 619 of the Civil Code of the Russian Federation). This position is also supported by judicial practice (Paragraph 2 of the previously mentioned Review of Judicial Practice [The Judicial Review on Some Issues of Defence of the Rights of an Owner against the Violations Not Related to the Dispossession Confirmed by the Informational Letter of the Presidium of the Supreme Arbitrage Court of the Russian Federation of January 15, 2013]). In relation to the third parties, the tenant may use proprietary methods (Article 305 of the Civil Code of the Russian Federation) to protect his rights to property, including in case of theft of a thing.

Note that the Russian legislator provides for the cases when the owner of a thing can bring proprietary actions against the owner; for example, such a possibility exists for a unitary enterprise as a subject of the law of economic management, or for a legatee of a testamentary gift.

It should be concluded that possessory protection is meant to protect the actual possession of a thing and does not require the title of ownership to be proven (unlike in the cases of bringing a vindictory or negatory action). Under the current legislation of the Russian Federation, such

protection is available only to the prescriptive owner, in order to apply the rules on acquisitive prescription (Clause 2 of Article 234 of the Civil Code of the Russian Federation). Such a person, although not the owner of the thing, is protected, but only in relation to the third parties who do not have any titles (statuses) to the thing.

In summary, the analysis allows to summarize that in relation to real rights in domestic law and in foreign law, the tendency of the exhaustive list of real rights prevails. Protection of property rights is provided by the entire set of norms of the institute of property rights.

Compliance with and ensuring the legitimate interests of the subjects of real rights depend on the nature of the violation of interests and the content of the appropriate method of protection. Possessory protection under the laws of the Russian Federation is possible only in relation to the third parties who do not have a title (status) to the relevant thing.

CONCLUSIONS.

The imperfection of the mechanism for protection and defense of real rights has a negative effect on the stability of civilian circulation. Economic property relations need a well-constructed and well-established legal protection mechanism.

Considering the fact that public relations constantly develop, the legal measures constituting the protection mechanism must be constantly improved in order to adequately meet the needs of the subjects of property rights.

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