TAX LIABILITIES. APPEAL TO FORECLOSURE

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Abstract: According to art. 622 of the Code of Civil Procedure, the obligation established by court order or by another enforceable title is carried out willingly. If the debtor does not carry out his duties willingly, it will be achieved by foreclosure.

Keywords: duty, foreclosure, appeal, admissibility.

Introduction

From the point of view of enforcement methods, foreclosure is carried out by tracking the movable and immovable property of the debtor or belonging to third parties held liable or by surrendering to the creditor all the assets specified in the enforceable title that he holds without right. By direct foreclosure the creditor tries to accomplish in kind the debt listed in the enforceable title, respectively the contractual obligations. With indirect foreclosure the creditor wished to cover his debt by selling the assets of the debtor or by garnishing the money they are to receive from third parties.

The New Civil Procedure Code states in art. 643 the participants to foreclosure, respectively the creditor, the debtor, the vouching third parties, the intervener creditor, the enforcement court, the legal executor, the Public Ministry, the agents of public forces, the assistant witnesses, experts and interpreters. Regarding their rights, the creditor and the debtor may assist in performing all acts of execution, personally or by representatives, may inspect all files in the execution file and may obtain copies and certificates thereof. In addition to the provisions of the previous Code, the creditor is bound to grant actual support to the legal executor in carrying out the foreclosure, offering the necessary means in this respect.

In the opposite sense, the creditor may track simultaneously or separately the assets of third parties that have guaranteed the payment of debtor’s debt, within the limit of debt and its accessories. In the meaning of the law, when only the fidejussor third party is pursued, all foreclosure documents will be communicated to the main debtor. Also, any creditor of the debtor may interfere in the ongoing foreclosure procedure until the deadline for the asset assessment or may participate in the distribution of amounts achieved by tracking.

The new regulation refers to the institution of assisting witnesses, as persons with full capacity not interested in the acts of execution, not in kinship relations with the participants in this procedure and that have the right to request information and make observations regarding the foreclosure documents.

Regarding the participation of legal executors, art. 652 stipulates the possibility of their recusation for similar reasons to the absolute incompatibilities of judges, the request for recusal not suspending by right the execution but only as a procedure motivatedly marshalled by the enforcement court until the resolution of the recusation request.

As possibilities for the debtor to be exempt from the foreclosure procedure, we mention the situation of prescription, the foreclosure, as well as when the appeal is accepted.

Appeal to foreclosure

According to the provisions of art.711 of the Civil Procedure Code against foreclosure, or against the conclusions given by the legal executor as well as against any enforcement act an appeal can be filed by the parties that are interested or prejudiced by the foreclosure. The appeal is filed in the enforcement court.

An appeal can be also filed when there is the need for clarification regarding the meaning, extent or enforcement of the enforceable title, or against the request for the admission of the foreclosure or regarding the division of common property or condominium.

Regarding the introduction of the objection to the foreclosure the new Code of Civil Procedure introduces admissibility conditions when the enforceable title is not issued by a court or an arbitration board, may invoke factual or legal reasons which could be opposed during the trial in the first instance or during the appeal. Also, when the foreclosure is made on the

1 Stătescu C., Birsan C., Drept civil. Teoria generală a obligațiilor, Ed.All Beck, București, 2000, pg.307
2 Stoica Camelia, Dreptul afacerilor.Contracte, Ed.ASE, București,2012, pg.82
3 Zilberstein Savelly, Ciobanu V. M., Tratat de executare silită, Ed.Lumina Lex, 2001
grounds of an enforceable title that was not issued by a court, the appeal may invoke factual or legal reasons relating to the substance of law contained in the enforceable title when there is no other legal alternative for its abolition.

As a result, the appeal will not be admissible if the applicant will hold as object of the appeal matters that cannot be subject to judicial review in this way.

Thus, failure to report the enforceable title at the basis of foreclosure, as well as the incompleteness of the summons procedure in the judgment on the merits cannot make the object of appeal to foreclosure as it is not part of the enforcement activities.

Therefore, as these procedural acts are not acts of enforcement they cannot be challenged by foreclosure, the debtor being able to use ordinary or extraordinary ways of appeal, and not to subject them to judicial review by way of appeal to foreclosure.

The above mentioned situation is found when enforceable titles that led to the foreclosure are represented by court decisions, certified and invested with enforcing powers, or civil judgments and decisions. Moreover, the bailiff is obliged to communicate these titles during the foreclosure procedure, attached to the debtor’s summons.

If, within the meaning of the law, when the party against whom foreclosure was started was unable to invoke the ordinary appeal procedure, because of a procedural error committed on the communication of a decision we can take into consideration such a procedure.

In the application of the provisions of article 105, paragraph 2 of the Code of Civil Procedure, Chapter IV - The nullity of pleadings - on the enforceable title which would require its cancellation, we note that in this case the application is inadmissible because an appeal to foreclosure cannot result in the annulment of the enforceable title itself.

Appeal to foreclosure being an open appeal procedure against illegal enforcement, the parties will only be able to rely on the vices and unlawful acts of enforcement titles subsequent to the enforced court ruling and not on merits which could be invoked in the court of first instance.

In terms of the debtor’s insolvency, this legal fact is not object to appeal as the legal executor has the right to both start and continue foreclosure in spite of it.

Appeal on clarifying the meaning, scope or application of the enforceable title is lodged with the court whose decision is inadmissible because an appeal to foreclosure cannot result in the annulment of the enforceable title itself.

Appeal to foreclosure being an open appeal procedure against illegal enforcement, the parties will only be able to rely on the vices and unlawful acts of enforcement titles subsequent to the enforced court ruling and not on merits which could be invoked in the court of first instance.

In this case, if the debtor claims he/she could not be compelled to pay the creditor's entitlements because he/she has not recorded any profit, and property owned by the debtor has mortgage inscriptions in favour of the BCR secured creditor to obtain mortgage, these reasons make no object whatsoever to sustain an appeal to foreclosure.

Neither are the provisions of art.492 paragraph 2 of the old Code of Civil Procedure applicable in this case because they cover an estranged mortgaged property, in which case the acquirer may request the enforcement court to prosecute other mortgaged property in possession of the main debtor.

In addition, under the principle of procedural availability the creditor tracker has the right to choose the debtor's assets that they want to track, which determines the tracking method. The creditor may thus within the limit of its claim to pursue any active part of his debtor's assets respectively movable, immovable or money that is owed. According to art.622 of the Code of Civil Procedure foreclosure takes place simultaneously or successively to the realization of the right recognized by enforcement, the interest, penalties, other amounts or costs.

The provisions of the foreclosure tax procedure cannot be extended in other cases, there being no similarity between tax debts of the debtors declared insolvent who have no traceable income or assets and debtors subject to enforcement reports where the creditor is a natural person and the debtor is a legal entity of private law. Also the legal tax procedures are customized due to the reference to the collection of state revenues.

As a consequence, for the enforcement relations where the creditor is an individual person and the debtor is a legal entity of private law, the regulation is mostly subject to the Code of Civil Procedure. On the contrary, for the enforcement relations where the creditor is the state or a legal entity of public law, when the debt is money recovered from taxes, the regulation is the subject of special provisions, imposed by tax procedural rules and foreclosure.

We note, however, that the provisions of the Code of Civil Procedure are common law also for the fiscal enforcement relations, thereby helping to complete the special procedure.

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4 Idem, pg.255
9 Tăbărcă Mihaela, Drept procesual civil, Ed.Universul Juridic, 2005, pg.6
10 Postolache Rada, Drept financiar, Ed.CH Beck, București, pg.113-130
Hence, following the submission by the debtor to the provisions of tax procedures and the request for the removal of the debt from the current tracking record of the enforcement body, moving it into a separate record, and stopping the foreclosure on the grounds of the debtor’s declared bankruptcy may not be applicable on the path of appeal to foreclosure.

Conclusions

General aspects aiming foreclosure proceedings have been maintained in the new Code of Civil Procedure as well. As a result, foreclosure will start only on the basis of an enforceable title such as final judgments and court decisions and other documents that can be enforced. The enforcement can only occur for an outstanding debt, liquid and payable and shall be communicated only after the debtor is notified to that effect.

The New Code detailed certain legal aspects relating to the active role of the executor, enforceable obligations, enforcement grounds, the participants in the proceedings, enforcement costs, and the appeal to the foreclosure.

This article tries to highlight some cases of inadmissibility of the appeal to foreclosure cases that were debated in the judicial practice. The novelty is the express provision in the Code for the admissibility of the cases of appeal to foreclosure, which was not mentioned in the previous regulation.

Regarding court proceedings the new code brings provisions such as the appeal to foreclosure being judged with the procedure provided for in the first instance; the decision may be appealed, except on the division of joint property or where a third party claims the right of ownership over the tracked asset; the decision may be appealed under the common law.

Regarding the suspension, the resolution of the appeal pending, the court may suspend the enforcement, after submission by the parties of a security in an amount determined by the value of the claim, value that is specified by the provisions of the new code.

Foreclosure stops in principle when the foreclosed obligation was achieved in full, and the foreclosure expenses and other amounts due under the law have been paid; in the case of the appeal to foreclosure it stops when the enforceable title was dissolved or the enforcement was annulled. In all cases where the enforceable title is dissolved or the enforcement is annulled, the party concerned has the right to return the enforcement by restoring to the previous situation.

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