Fate of Pledge (Lien) in Bankruptcy Cases

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This article discusses the features of foreclosure on the subject of a pledge. The author focuses attention on the fate of a pledge, as an encumbrance on the subject, which was a guarantee of the fulfillment of the Debtor's obligations to the creditor. The conflict between the norms of the Civil Code and the Federal Law "On Insolvency (Bankruptcy)" is considered, supported by relevant examples from judicial practice. In addition, the author draws attention to the fact that the order of foreclosure on the subject of the lien, its implementation and the distribution of funds received do not apply to the requirements on the foreclosure of the subject of a pledge, which ensures the fulfillment of debtor's liabilities to creditors under current obligations.

Keywords (tags): pledge, bankruptcy, secured creditors, subject of a pledge, repossession of pledged items, register of creditors 'claims, mortgagor, mortgagee, satisfaction of creditors' claims.

The Civil Code of the Russian Federation (hereinafter referred to as the Civil Code of the Russian Federation) defines the concept of a lien - this is a way of ensuring the fulfillment of an obligation, by virtue of which the creditor (pledgee) has the right, in case of default or improper performance by the debtor of this obligation, to get reimbursed through the value of the pledged property (pledged item) mainly before other creditors of the person who owns the mortgaged property (mortgagor). To meet their claims the secured creditor exercises their rights through the foreclosure of the subject of a lien. In the event when one of the bankruptcy procedures has been introduced in respect of the pledger, foreclosure is possible exclusively in court.

Submission by the pledgee of a claim for repayment of the debt in the insolvency procedure can be considered as an analogue of filing a claim to the court for foreclosure of the collateral, since the pledgee, being the debtor's creditor, has no right to make its claims to the debtor in a different way other than provided by the Federal Insolvency Law (bankruptcy) "(hereinafter - the Bankruptcy Law), if he is his bankruptcy creditor.

Thus, the presentation by the pledgee of a claim against the debtor in the process of bankruptcy proceedings means only the judicial procedure for enforcing the pledged property, an extrajudicial procedure in this case on the basis of an agreement or by virtue of the law are excluded.

The foreclosure of the pledged item is aimed at meeting the creditor's claims, and as a consequence it provides for a change in the ownership of the pledged item, since it is either sold at an auction in the manner prescribed by law, and the third person who agreed to pay the price announced in the notice of tender becomes the buyer , or the Pledgee himself, who, subject to the combination of the conditions stipulated by the norms of the law on insolvency, kept the subject of the pledge and thereby satisfied their claim against the debtor.

However, it is important to question the fate of the pledge, as an encumbrance, on the subject, which was guarantee of the performance of the Debtor's obligations to the creditor.

According to the general rule established by Clause 4 Part 1 of Art. 352 of the Civil Code of the Russian Federation, the Pledge is terminated if the pledged property is sold in order to satisfy the pledgee's requirements in the manner prescribed by law, including when the pledgee keeps the pledged property for himself, and in the case when he has not exercised this right (Clause 5 of Article 350.2).

Thus, the civil code provides that for the termination of a pledge in the case of the sale of its subject, two conditions must be present simultaneously:

1) the subject of pledge is realized in the manner prescribed by law;

2) the subject of pledge is realized in order to meet the requirements of the PLEDGER.

In turn, art. 18 of the Bankruptcy Law establishes: "The sale of the pledged property in accordance with this article entails the termination of the pledge in respect to the bankruptcy creditor, at whose request the foreclosure on the subject of pledge is levied".

Thus, the Bankruptcy Law does not see as a condition for the termination of a pledge the mandatory distribution of funds obtained from the sale of the pledged item in favor of the Pledgee.

The conflict between these two norms was the subject of a study in a litigation in which the court obliged the mortgagee, who did not receive reimbursement from the funds received from the sale of the pledged item, to retain the encumbrance after the transfer of the right to the object to the winner of the auction.

Thus, within the framework of consideration of case No. A53-13780 / 2015 on the recognition of a pledge (mortgage) absent, the Court of Cassation instance reversed the decision of the court of first and appeal instances to recognize the encumbrance as non-existent and refused to meet the demands of the winning bidder who had acquired an apartment based on the results of open bidding through a public offer with the preservation of the encumbrance in the form of a mortgage.

Canceling judicial acts of courts of first and appeal instances, and refusing to satisfy the stated demands, the district court noted that the list of grounds for termination of the right of pledge is given in article 352 of the Civil Code of the Russian Federation. It follows from this that two conditions are necessary - the realization and meeting the demands of the pledgee.

However, the existence of relevant circumstances has not been established by the lower instances. The funds paid by the winner of the auction for the disputed apartment were not transferred to the pledgee, the obligation, for the purpose of which the mortgage was established, was not fulfilled. In addition, the court referred to clause 1 of Article 353 of the Civil Code of the Russian Federation, according to which the peculiarity of legal relations connected to mortgaging is the existence of the right of consequence, which means that when alienating a pledged thing, the mortgage right follows the thing,

and the mortgagee's encumbrance. This legal position is reflected in the definition of the Supreme Court of the Russian Federation of 09.10.2012 No. 18-KG12-39.

In view of the fact that the bank (mortgagee) did not file a request for establishing claims in the bankruptcy case of the mortgagor and his claims were not satisfied at the expense of the pledged property, the district court concluded that the mortgage of the disputed apartment did not stop after the bankruptcy proceedings were completed in respect of the Debtor, and by virtue of paragraph 1 of Art. 353 of the Civil Code of the Russian Federation passed to the new acquirer.

Thus, the cassation court attempted to legally substantiate the creation of a situation of eternal encumbrance on the subject of pledge due to the unscrupulous conduct of the Pledge Holder.

Disagreeing with this situation, the acquirer of the pledged property filed a complaint with the Judicial Board on Economic Disputes of the Supreme Court of the Russian Federation, which canceled the Resolution of the Cassation Instance and acknowledged the encumbrance as absent (Determination from 05.26.2016 N 308-ЭС16-1368 in case N A53-13780 / 2015).

The current legislation and the established law-enforcement practice are based on the fact that during the sale of property at an auction in the framework of an organization's bankruptcy case, the rights of third parties to this property are terminated and the buyer receives a thing free from any claims. In addition, until proven otherwise, the acquisition of property at an auction implies the good faith of the acquirer.

By virtue of the clarifications of the resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of July 23, 2009 No. 58 "On some issues related to meeting the claims of the mortgagee in case of a mortgagor's bankruptcy" (clause 12), the sale of the mortgaged property in a bankruptcy case of a legal entity entails. In the event that the secured creditor did not make a claim for inclusion in the register.

The current regulatory framework for private-law relations is based on the fact that citizens and legal entities exercise their civil rights at their discretion (clause 1 of Article 9 of the Civil Code of the Russian Federation).

Developing this principle in relation to insolvency relations, the legislator established provisions in the Bankruptcy Law aimed at encouraging bankruptcy creditors to promptly declare their claims in a bankruptcy case (Articles 71 and 100 of the Bankruptcy Law). The consequence of the late application is the inclusion of such requirements "outside the register". In the event that the creditor fails to take actions to establish his claims in the bankruptcy case, these claims are recognized as canceled upon completion of the bankruptcy proceedings (paragraph 3 of clause 1 and paragraph 3 of clause 9 of article 142 of this Law). At the same time, the law does not contain exceptions to these rules for any claims against a bankrupt organization, including for those that are secured by the pledge of the debtor's property.

That is why, giving explanations about the legal consequences of the pledgee not filing a statement about the establishment of bankruptcy case related demands, the Plenum of the Supreme Arbitration Court of the Russian Federation indicated that in such a situation, the pledged property is sold at auction in accordance with the general procedure provided for by Articles 110 - 111 of the Bankruptcy Law without the need to obtain the consent of the mortgage lender for the sale of the collateral; such a sale leads to the termination of the right of pledge by virtue of the law in relation to subparagraph 4

of paragraph 1 of article 352 of the Civil Code of the Russian Federation and paragraph six of paragraph 5 of article 18.1 of the Bankruptcy Law (paragraphs 9 and 12 of Resolution N 58).

Thus, both the legislation and the established law-enforcement practice proceed from the fact that when property is sold at auction in the framework of an organization's bankruptcy case, the rights of third parties to this property are terminated, and the buyer receives the item free from any claims.

With regard to the pledge applicable relations, this regulation means that the pledgee, without using his right to include claims secured by the pledge in the register, actually refuses the advantages provided by the encumbrance established in his favor.

At the same time, the presence in the civil law of competing rules on the right of succession (clause 1 of Article 353 of the Civil Code of the Russian Federation) cannot be taken into account, since a special law that takes precedence over general rules of private law contains a different rule establishing the termination of a pledge.

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Regulated by the Federal Law "On Insolvency (Bankruptcy)", the procedure for foreclosure on a pledged item, its sale and distribution of received funds does not apply to claims for foreclosure on a pledged item, which ensures the debtor's obligations to creditors under his current obligations.

Since current creditors are not persons involved in a bankruptcy case, repossession in this case occurs by filing a claim, outside the insolvency proceedings.

By virtue of parts 1 and 4 of Article 96 of the Federal Law of 02.10.2007 N 229-ФЗ "On Enforcement Proceedings" (hereinafter referred to as the Law on Enforcement Proceedings), enforcement proceedings for collection of arrears on current payments during the procedures of monitoring, financial rehabilitation and external management are not suspended , and during the bankruptcy proceedings does not end (paragraph 19 of the Resolution of the Plenum of the Supreme Court of Arbitration of the Russian Federation No. 58).

This means that if the creditor's current claims are secured by the pledge of the debtor's property, repossession upon the creditor's request for the pledge and its implementation in the execution of the relevant court decision is carried out independently of the bankruptcy procedure held against the debtor. When distributing the proceeds from the sale of the pledged property, the priority established by paragraph 2 of Article 134 of the Bankruptcy Law is not applied.

Thus, the creditor of the current obligation, the requirement of which is secured by the pledge of the property of the debtor, calls for the subject of the pledge regardless of the bankruptcy procedure conducted in relation to the latter. A similar conclusion was made by the court of the Udmurt Republic in the decision of 02/10/2016 in the case of A71-613 / 2015 and supported by Resolution No. 17 of the Arbitration Court of Appeal of 05.30.2016.

When making the decision, the court of first instance considered that the creditor's claims for current obligations were secured by the debtor's property; recovery upon the creditor's request for collateral and its implementation in the execution of the relevant court decision is carried out independently of the bankruptcy procedure conducted against the debtor.

Further, after receiving a judicial act on foreclosure of the pledged property, there is no need for the Lender to apply for the sale of the property to the debtors' bankruptcy trustee , the bailiff must perform these actions in accordance with the authority granted to him by the Enforcement Act.

Based on paragraph 4 of Art. 78 of the aforementioned law, the requirements of the pledgee are satisfied from the proceeds from the sale of the pledged property after the repayment of the cost of bidding without complying with the priority of meeting the requirements established by article 111 of this Federal Law.

Thus, the funds from the sale of the collateral can join the insolvency estate only if the proceeds from its sale amount to more than the amount of the obligation secured by this pledge and the costs of its implementation. This means that even the court costs of a bankruptcy case cannot be reimbursed from the proceeds.

In view of this, a certain paradox arises when the debtor has property in the insolvency estate, sometimes very expensive, and, perhaps, its cost is enough to satisfy the requirements of creditors included in the registry, but the Bankruptcy Manager has no right to dispose of them. The case becomes clear when in such a situation the mortgagee appeared - the creditor for the current obligation and began to foreclose on the subject of pledge, but what to do in a situation when the mortgagee did not appear?

I believe that under the circumstances of bankruptcy procedures time restraints and the duties of the manager for the formation and sale of the bankruptcy estate in order to settle with the creditors, the manager has no choice but to take an inventory of the collateral and implement it in the prescribed manner.

But what about the encumbrance in the form of collateral in favor of the creditor for current obligations? It seems that in relation to this situation the answer can be found in paragraph 12 of the Resolution of the Plenum of the Supreme Court of Arbitration of the Russian Federation No. 58, according to which the sale of the pledged property in the manner provided for by the Bankruptcy Law, if the pledge creditor did not use his right to foreclosure, to the termination of the right of pledge by virtue of the law as applied to subparagraph 4 of paragraph 1 of Article 352 of the Civil Code of the Russian Federation, paragraph six of paragraph 5 of Article 18.1.

However, in this case, the termination of the Pledge should be associated not only with the sale of the pledged property, but also with the fact of completion of the bankruptcy proceedings against the debtor, the consequence of which is the recognition of all claims made to the debtor, and therefore the pledge is also terminated due to the termination of the principal obligation it had covered as set forth in subparagraph 1 paragraph 1 of article 352 of the Civil Code.

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The current legislation provides for another atypical case of the fate of encumbrance in the form of a pledge when selling the property of a debtor-bankrupt.

This is the realization of the property of the debtor - an individual entrepreneur, which is a security for the obligations of that individual entrepreneur not associated with his business activities.

This question is governed by the explanation set forth in paragraph 18 of the Resolution of the Plenum of the Supreme Court of Arbitration of the Russian Federation No. 58. If the pledge of the property of the debtor - an individual entrepreneur had secured obligations not related to the business, and the

pledgee does not make claims in a bankruptcy case, these claims remain in force after completion of bankruptcy proceedings. Since the collateral is included in the insolvency estate, the bankruptcy trustee has the right to sell it in the manner prescribed by law. However, when the pledged item is sold, as a result of the retention of the principal obligation, the right of pledge is preserved, which is indicated in the terms of the open bidding in order to inform the potential buyers of this property.

The consequence of the preservation of collateral in the sale of property of bankrupt - entrepreneurs that had not participated in entrepreneurial activity, in practice, results in disputes:

- on the termination of the encumbrance in the form of a pledge and recognition of its absence;

- about recognition of the auction as invalid;

- on termination of the contract of sale in connection with the fatal deficiency of the object of sale in the form of encumbrance with the rights of third parties.

However, if there is evidence of a proper description of the object of rights and of encumbrances on the object in the notice of tendering proceedings, the courts refuse to satisfy such requirements. On the contrary, in the case when there are violations in informing the bidders about the preservation of the pledge after the sale, the courts can satisfy the demand to invalidate the bidding and invalidate the contract of sale concluded on its basis.

Thus, the decision of the Eighth Arbitration Court of Appeal of 07.07.2016 N 08АП-6156/2016 in case No. A46-8079 / 2011 canceled the definition of the Arbitration Court of Omsk Region of 04.05.16 in case No. A46-8079 / 2011. Within the framework of the dispute, it was established that when publishing a notice on tendering procedures, the organizer of tenders disclosed only the information about the object itself and the presence of an encumbrance in the form of a mortgage, without disclosing information about the amount of the obligation secured by the pledge, about preservation of the pledge after the sale, that the amount received at the auction, is not subject to offset on the bid bond, that the buyer, in connection with the sale of the pledged item, takes the debtor's place (becomes his assignee) in relation to the pledgee. The winner of the bidding filed an application, based on the information specified in the notice, but later the bidding organizer published a message informing that the applicable encumbrance is not removed on the lot, the amount of the mortgage, which must also be repaid to the Bank - 7,876,405 rubles. 91 cop. Thus, the court took into account the fact that in the absence of comprehensive information on the lot, the applicant, not being a professional bidder, could be misled about the properties of the subject of the auction and declared the transaction invalid as having been committed under a delusion.

There are cases in which when registering the transfer of ownership of objects acquired at auction in the framework of the bankruptcy procedure of an entrepreneur, the Federal Register of State Registration and Registration Service makes a record of the redemption of a mortgage in the Register.

In this case, the courts, if there are sufficient grounds, recognize the action of the Registrar to make a record of the repayment of the pledge as invalid, but refuse to satisfy the demand to reinstate the mortgage registration record in respect to the object in the USRN, assuming that this demand is actually aimed at recognizing an unregistered right of the pledge, and it is a question of the right to be settled by way of legal proceedings. (Resolution of the Federal Antimonopoly Service of the Volga district from 09.07.2014 in case N A12-26937 / 2013).

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