Procedural Aspects Concerning the Notice of Claim in the Romanian Civil Law

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Abstract: - The notice of claim within The Romanian Civil Law registered a double regulation, this being filed by the non possessing owner according to the regulations in force both according to the common law norms, according to art. 480 of the Civil Code and according to certain special rules, as regulated by Law 1/2000 and 10/2001. Considering the double regulation, in the legal practice, we identified certain procedural aspects raising problems even at present, as we shall discuss them within this article, concerning Civil Law Institutions as res judicata, evidence aspects, the lack of locus standi.

Key-Words: - notice of claim, res judicata, locus standi, evidence aspects.

1 Introduction

The notice of claim as it is regulated by art. 480 of the Civil Code and as it is treated within the current Civil code is the action in which the owner, having lost the possession of the asset, requires the recovery of such asset from the non owner possessor [1]. Yet, in the same time, parallel to this common law regulation, the Romanian legislature stipulated special cases of revendication on the grounds of special laws: no. 1/2000 and 10/2001, laws aiming at certain classes of citizens, their goal being to order reparatory measures for the persons illegally, abusively deprived of their ownership right during the Communist era.

2 The possibility of successive notice of claim grounded on special laws and subsequently of a common law notice of claim concerning the same asset, filed by the same persons.

This article deals with procedural matters in relation to a specific case in which the same people, as heirs of the former owners who have filed a notice of claim grounded on the special laws 1 / 2000 and 10/2001 during 2000-2001 related to a building made up of several apartments, which belonged to their parents and which, during the communist times, was illegally taken over by the Romanian State. Following the above-mentioned litigation solution, the Romanian courts ruled as res judicata that the real estate that represented the object of the litigation and of the notice of claim filed by the heirs was illegally been taken by the Romanian State and they ordered the restitution of the real estate, except one apartment that had been alienated before the Romanian State lawfully filed the notice of claim to the apartment tenants according to the provisions of law 112/1995 [2].

Thus, when the Law no. 112/1995 was adopted, the legislature foresaw the legal and constitutional possibility that the tenants legally owning the residences in nationalized houses could buy those residences according to real estate assessment methods in order to establish a price, with the possibility of lagging the price payment, prohibiting the alienation of such property thus purchased for 10 years.

Although the heirs purchased as res juduicata the real estate representing the object of the notice of claim grounded on special laws during 2000- 2001, they purchased it without the apartment that had been alienated before the tenants filing the notice of claim; on the grounds of law 112/1995 and

of the final and enforceable legal decisions such tenants became the good faith owners – buyers.

Given the context and the circumstances, in 2008, about 7 years from the final and enforceable settlement of the notice of claim grounded on the special laws, the same heirs filed a common law notice of claim for the apartment representing the object of the previous dispute, this time requiring by the main petition the rectification of the Land Book, on the grounds of art. 34 section 4 of the Law 7 / 1996 and a subsidiary common law notice of claim.

2.1 The quality of the Land Book rectification followed by the common law notice of claim.

Given that in 2008 the same heir file a case suing the former tenants, considered by final and enforceable decisions as bona fide owners, legal purchasers of the apartment, referring to the same real estate that had represented the object of a similar dispute, yet grounded on special laws, the question whether this new action is inadmissible arises.

The admissibility of the new action shall be taken into account from the point of view of the plaintiffs – heirs petitions. Therefore, filing this new action, the plaintiffs-heirs request the court to initially order the rectification of the Land Book related to the apartment that was not returned in 2000 on the grounds of art. 34 section 4 of Law 7 / 1996, as the *"registration in the Land Registry is no longer consistent with the actual, current real estate situation [3]"*. Subsequently, as a natural consequence of the admission of the first petition, the same plaintiffs request the obligation of the former tenants who, on the grounds of the court decisions of 2000 and 2001, became bona fide owners, to leave the full ownership and possession of the apartment, as the Land Registry rectification has already been done and they become tabulation owners of the apartment.

The legal practice asserts that action of rectifying the land book, as it is regulated and reflected in the jurisprudence, is an ancillary action following the main action requesting the annulment of an ownership title on the grounds of which the land book registration to be rectified is required [4]. Given those ordered by the Supreme Court, the issue of the order of solving the petitions by the court vested with such case. The court will rule as the plaintiffs initially requested, concerning the petition related to the rectification of the Land Registry and subsequently on the notice of claim, or the court, under its active role, is to consider the action mainly as a notice of claim, followed by an action of correcting the Land Registry.

In the first case when the court will consider such action as it was filed, in the absence of new documents (issued after 2001 when the ruling of the notice of claim of the plaintiffs - heirs of the same apartment was rejected) proving that the factual condition of apartment actually changed, it will reject the first petition of correcting the Land Registry, and, consequently, the second on the common law claim, as it is filed by people who are not tabular owners and who can not justify their quality of non possessing owners.

In the second hypothesis, when the court is to mainly settle the notice of claim and depending on the solution passed for this petition, the court is to rule on the subsidiary petition of correcting the Land Registry, the court shall consider the plaintiffs' title on the apartment to the extent that it exists. We believe that to justify their quality of owners, the plaintiffs – heirs can not rely on the court decisions from 2000 - 2001 in their favor, as long as the same final and enforceable decisions rule them as heirs, owners on claimed real estate (excepting the apartment bought by the former tenants) and consider the former tenants as bona fide owners - buyers of the apartment that was excluded from the restitution in kind, on the grounds of the notice of claim from 2000-2001, grounded on the special laws.

2.2. The admissibility of passing the common law notice of claim

If the court vested with the solution of the plaintiffs' action of 2008 analyzes the petitions of the case and has in the case file the court judgments of 2000 and 2001 above, we believe that the court must consider the admissibility of such actions taking into account the prior dispute, given that parties are the same (plaintiffs – heirs versus the former tenants - bona fide owners), the object of the dispute is the same (the apartment excepted from the restitution in kind and for which cash compensation was received), the only different thing being the legal grounds of the two actions (the first action is grounded on the special laws and the one of 2008 on the common law).

2.3. The lack of active capacity in a law suit of the plaintiffs – heirs in filing a notice of claim against the tabular owners.

The issues concerning the lack of locus standi of the plaintiffs raise other issues that require the analysis of the case under study. In terms of notice of claim, whether it is based on special laws, or that is based on common law, both the legislature and the current doctrine and jurisprudence state that the plaintiff is required to prove his/her claims in court according to art. 1169 Civil Code.

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Thus, the plaintiffs are required to positively prove, namely that they have the ownership right on the claimed real estate according to the principle *actori incumbit probatio* [5]. The defendants - former tenants, current tabular owners are in purely passive waiting circumstances, in their favor operating an ownership presumption deduced from the simple fact of possession, doubled in this case by the ownership title residing in the purchase agreement validated by the courts by the rulings in 2000 and 2001. Moreover, the doctrine correctly asserts that if both plaintiffs and defendants claim ownership titles that emanate from the same author, the party that registered the ownership title in the Land Registry shall win.

In light of these theoretical issues, as stated in the jurisprudence, the plaintiffs' intention in this case representing the object of the case study is obvious, namely, that of cancellation of registration of ownership right of de defendants by the petition of correcting the Land Registry and then to proceed to comparing the titles within the notice of claim.

However, referring to the petition of Land Registry correction, we consider that this petition must be proved by acts subsequent to the land registration that is required to be erased, in the absence of such documents that would prove that the current condition of the real estate is no longer consistent with that registered in the land book and ascertained by the land book registration, the action will be rejected.

These discussions refer to the merits of the case, while an important aspect to consider is that of the justification of the plaintiffs' quality in the suit. We believe that, regardless the order in which the court vested with the action solution is to decide on the two petitions, the plaintiffs are required to submit to court records unequivocally showing their capacity of owners.

In the case of action of correcting the Land Registry, the plaintiffs asked the court to order the rectification of the registration related to the ownership right of the defendants, on the grounds that the plaintiffs are owners of the apartment representing the lawsuit object. In such circumstances, our opinion is that, related to this petition, the plaintiffs vested the court with a declaratory action, requesting the court that after it ascertains their quality of apartment owners, to order the correction of the land book, that is to erase the ownership registrations of the defendants and to register their own ownership right.

Thus, to consider that the plaintiffs have active locus standi to file their petition to correct the land book, they must submit documents of which to come out the non equivoque quality of owners of the apartment representing the object of the dispute.

The assertion of the plaintiffs that they agree to prove their claims by the court judgments of 2000 and 2001 declaring them heirs of the former owners and on the grounds of which they obtain the revendication of the real estate, except the apartment whose revendication they currently ask for cannot be admitted. In this action filed in 2008, their capacity of heirs of the former owners is no longer important as they base their claims on the common law. Moreover, the same documents that had declared them heirs of former owners and upon which they were obtained the partial revendication of the real estate also declare the former tenants as bona fide owners, legal buyers of the apartment under law 112/1995.

Thus, the plaintiffs prevailing on these two judgments cannot lead to explicit evidence that they are the owners of the apartment subject to action, on the contrary, these court decisions support the point of view of the defendants and prove the defendants' quality of bona fide owners.

Furthermore, by filing the action to rectify the land register, the plaintiffs want to acquire an ownership right on their property, so that proof of ownership quality is especially required for this petition and then for the common law revendication.

In considering the above mentioned, the first court ruled on the plaintiffs' summons, admitting the exception of the lack of locus standi of the plaintiffs, supported by the absence of documents proving the ownership of the plaintiffs. We believe that, legally, the first court found that the plaintiffs lack the locus standi to file such a case [6].

Against civil decision passed by the first court, the plaintiffs appealed, arguing that referring to the main petition correcting the land book, according to art 34 section 4 of the Law 7 / 1996 any person interested may apply for rectification of land register. However, the issue of the ancillary character of the petition to correct the Land book compared to the property claim grounded on the common law is still valid, as well as the serious confusion between the "interest" in filing the action to rectify the land book and the "quality" of a person to file such a petition.

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Making a serious confusion between the interest raised by the plaintiffs and the unproven plaintiffs' locus standi, the Court of Appeal admitted the appeal, noting however that the two court decisions of 2000 and 2001 declaring the plaintiffs heirs of former owners, they have justified "their entitlement" to file an action to rectify the land book, followed by real estate revendication [7].

Or, in this case brought before the Court, the entitlement to file an action of to correct the land book and of revendication has no importance from the legal and procedural point of view, given that the Court of Appeal must rule on the legality of admitting the exception of the plaintiffs' lack of locus standi. The locus standi and therefore the quality of owner of the claimed real estate is not the same as the entitlement of the plaintiffs to file such a law suit, their entitlement being similar to the "interest" of the plaintiffs to file the case.

Considering the attack way of the appeal, the court was obligated to rule on the lack of locus standi, it annulled the judgment of the first court of law, finding that plaintiffs are "entitled" to file the action but did not rule in any way on their locus standi.

However, to the extent that the Court of Appeal, groundless we think, would have ruled on the plaintiffs' locus standi, seeing that they have the locus standi, the question would be: what would be the legal implications of the court findings that the plaintiffs have locus standi?

The locus standi to file an action to rectify the land register and to claim that real estate exclusively belongs to the property owner. Finding that plaintiffs have locus standing is it equivalent from the procedural point of view to the recognition of their quality of apartment - real estate owners that represents the object of the case? And if so, this recognition of their status as owners, by way of exception, may have influence the merits?

If the appeal court will determine in a final and enforceable manner that the plaintiffs have the locus standi to file a notice of claim, this shall be considered as res judicata, and if the merits are re-ruled, we consider that they shall not be obliged to prove their ownership right given that a final and irrevocable court decision passed on an exception and not on the merits declares the plaintiffs as having declared as having locus standi and therefore as owners.

We consider that these issues have not been clarified by the courts of appeal, that they raise numberless controversies and that a correct and grounded solution would be that during the second appeal, the court cancels the appeal decision and ascertains that the plaintiffs, lack of an express title on the claimed apartment, have no locus standi to file a new common law notice of claim.

3 Possible solutions

In light of the above, we believe that legally the first court admitted the lack of locus standi of the plaintiffs. It is possible to join these exceptions with the merits because the character of the notice of claim where the proof of ownership is equivalent to proving the claims on the merits.

In deciding on the exception, the first court legally and fairly ruled, as there was no express provision asserting that the lack of locus standi will always be ruled together with the merits of the notice of claim. To maintain the solution of the first court, we must also take into consideration the legal effects of admitting that a locus of the plaintiffs could have on the merits, this even leading to a prior passing on the merits.

4 Conclusions

We believe that these procedural matters should be regulated by the legislature, or even the Supreme Court by a decision of law, because without the express regulation the practice of the courts is non-unified and confused, causing severe damages to the litigants.

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