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***THE SIGNS OF COMMON PROPERTY OF OWNERS
IN AN APARTMENT HOUSE***

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Introduction: *it is hard to overestimate the importance of common property for owners of premises in an apartment house. Comfort and safety of stay in residential and non-residential premises of a house depend on its proper use. Questions of common property maintenance and use directly affect the relevant expenditures of owners. The list of common property in an apartment house is regulated by the law. At the same time, in practice, there are disputes regarding referring particular property objects to the category of common property.* **Purpose:** *to analyze signs of common property in an apartment building and to attempt to answer the question whether the fact that common property has been financed by the third party investor appears to be a standalone ground for recognition of this investor's right of sole proprietorship.* **Methods:** *general scientific methods of cognition and methods specific to legal science have been used.* **Results:** *according to the author, it is impossible to exclude any property from common property in case it was an independent investment during the house construction.* **Conclusions:** *the author concludes that the property intended to serve for some or all premises in an apartment house and having no independent purpose refers to common property owners regardless of who (owners or third-party investors) have financed its construction or acquisition.*

Keywords: owner; Housing Code; Civil Code; apartment house; residential property; community property; investment agreement; equity participation in the construction; project declaration

Information in Russian

ПРИЗНАКИ ОБЩЕГО ИМУЩЕСТВА СОБСТВЕННИКОВ ПОМЕЩЕНИЙ В МНОГОКВАРТИРНОМ ДОМЕ

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Введение: значимость общего имущества для собственников помещений в многоквартирном доме сложно переоценить. От его надлежащей эксплуатации во многом зависят комфорт и безопасность пребывания в жилых и нежилых помещениях дома. Кроме того, содержание и эксплуатация общедомового имущества напрямую влияют на соответствующие материальные затраты собственников. Перечень общедомового имущества в многоквартирном доме нормативно регламентирован. В то же время на практике возникают споры в части отнесения того или иного имущества к числу общего. **Цель:** проанализировать признаки общедомового имущества; дать свой ответ на вопрос, является ли факт финансирования общедомового имущества сторонним инвестором самостоятельным основанием признания за этим инвестором права единоличной собственности на это имущество. **Методы:** использованы общенаучные методы познания и специально-юридические методы исследования. **Результаты:** по мнению автора, невозможно исключать имущество из числа общедомового в ситуации, когда оно хоть и предназначено для обслуживания более чем одного помещения в доме, но при этом являлось самостоятельным объектом инвестирования при строительстве дома. Видится спорной судебная практика, признающая имущество не относящимся к общедомовому по тому основанию, что его создание финансировалось за счет средств стороннего инвестора. **Выводы:** имущество, предназначенное для обслуживания нескольких или всех помещений в многоквартирном доме и не имеющее самостоятельного назначения, относится к общему имуществу собственников вне зависимости от того, кто (собственники или сторонние инвесторы) финансировал его строительство или приобретение.

Ключевые слова: собственник; Жилищный кодекс; Гражданский кодекс; многоквартирный дом; общее имущество; инвестиционный договор; долевое участие в строительстве; проектная декларация

Introduction

The importance of the common property of the owners of premises in an apartment building can hardly be overestimated. From its proper operation depends largely on the comfort and safety of stay in residential and non-residential areas of the house. In addition, the content and operation of the property directly affect the material costs of owners who are obliged by virtue of the direct instructions of the law (Article 39 of the Housing Code of the Russian Federation) contain the property in proportion to the amount owned by them on the right area of the property.

The list of property in an apartment building belonging to the number of common, standard regulated. At the same time, in practice, there are disputes regarding the designation of a property to the number of the total, in which the owners of premises have to prove that they have on the property ownership.

Often, the problem of recognition of the property in the apartment building common arises even at the design stage of an apartment building and addressing the issue of sources of funding for its construction. So during the construction of new apartment buildings developers seek to attract money by offering low prices per square meter. One practiced options to reduce the cost per square meter of housing is the “removal” of a property developer from among the general building at the expense of attraction for its funding of foreign investors means that after putting the house in operation are able to register the right to sole ownership of the said property. Legally, the introduction of a third-party investor in the process of financing the construction of the common property is made by indicating in the project declaration to the house and in the agreements with the future homeowners that some design elements of the house are not among the general building property, and are “separate objects of investment”, ownership which arises directly from the

investor fund their construction. As a result, after putting the house in operation is often a legal dispute in which the owners of premises in an apartment house prove that they have under the law of common property rights to common property, while investors are proving that they have the sole right of ownership, referring to the fact of self-financing of the property.

In this paper, we analyze the features of the common property of the owners of premises in an apartment house and take an attempt to answer the question whether the fact of financing common property to third-party investor recognition of an independent foundation on the property rights of the investor's sole property. To illustrate as an example of our widespread in Russia will be shown that the involvement of developers of third-party investors for the construction of apartment buildings roof modular boilers, which are specified in the terms of the project declaration transmitted to the sole ownership of investors and are excluded from the general building property.

Main content

According st. 290 Civil Code of the Russian Federation (hereinafter – the Civil Code) to owners of apartments in an apartment building owned by the right of common shared ownership of the common areas of the house, supporting structures at home, mechanical, electrical, plumbing and other equipment outside or inside the apartment, serving more than one apartment.

According to Article 36 of the Housing Code, owners of premises in an apartment building owned by the right of common shared ownership of the premises in the house that are not part of the apartment and designed to serve more than one room in the house, including landings, stairways, elevators, lifts and other shafts, corridors, technical floors, attics, basements, which are utilities, other serving more than one room in the house

equipment (technical basements), as well as a roof, protecting load-bearing and non-load-bearing structure of the house, mechanical, electrical, sanitary technical and other equipment located in the building outside or inside the premises and serving more than one space, the land on which is located the house, with elements of gardening and landscaping and other intended for the maintenance, operation and improvement of the house objects on said land plot.

As is true in connection with this point in Science [3, p. 8], the common property of the owners of premises in an apartment building are those of the house, which are auxiliary, serving value and are not subject to individual property. Also reasonably suggest that the common property in an apartment building is not subject to alienation, it does not participate in public circulation as an independent object. Not subject to alienation and parts common property [2, p. 219].

Litigation is basically also follows the path of recognition of such common house property, which in their characteristics meet the criteria laid down in Article 290 of the Civil Code and 36 of the Housing Code.

According to the position of the Plenum of the Supreme Arbitration Court of the Russian Federation to the common property of the building are, in particular, a space intended to serve more than one room in the building, as well as landings, stairways, hallways, elevators, elevator and other shafts, corridors, technical floors, attics, cellars, which are utilities, other serving more than one room in the building, equipment (technical basements), the roof, protecting load-bearing and non-load-bearing structure of the building, mechanical, electrical, plumbing and other equipment outside or inside the premises and serving more than one room. The right of common share property in the common property belongs to the owners of the premises in a building under the law, regardless of

its registration in the Unified State Register of rights to immovable property and transactions with it. This position is supported by, and in the Anglo-American legal order [3, p. 21].

In accordance with the legal position of the Constitutional Court, if indoors, not part of the apartments, located equipment designed to serve the needs of the owners of the premises, common property in an apartment building, then these very premises, also designed to serve some or all rooms in the house and have no self-purpose, belong to the common property of the owners.

Thus, the legislation of the Russian Federation and down on its base jurisprudence define common property through its main feature – a special purpose, using more than one service for the premises in an apartment building.

In this connection one cannot but agree with the view expressed in the legal literature that “in deciding whether to classify a particular element to the common property should be guided by the signs of the destination of these elements: the first sign of a predestination element to serve more than one room, the second a sign of predestination element acts to serve the whole apartment block” [1].

As a result, it seems to us impossible to the exclusion of the property among the general building in a situation where it is though intended to serve more than one room in the house, but it was an independent object of investment in the construction of the house. In this connection it is seen controversial judicial practice, recognizing, for example, roof modular boilers in apartment buildings not related to the common property of the owners of the premises only on the grounds that their creation was financed at the expense of investors, but not at the expense of owners of premises.

Results

In support of the declared argument, specify the following:

Firstly, we believe investors insolvent links to various investment agreements on the construction of a property based on its exclusion from the general building. We believe that these investment treaties should be classified as contracts for the sale of real estate to be established or acquired in the future. Thus, according to the legal position of the Plenum of the Supreme Arbitration Court, in disputes arising out of contracts related to the investment activity in the sphere of financing the construction or renovation of real estate, the courts should establish the legal nature of the relevant contracts and resolve the dispute over the rules of Chapter 30 (“Sale”) 37 (“Contract”), 55 (“Simple partnership”) of the Civil Code, etc.

In accordance with claim 1 st. 549 Civil Code of the Russian Federation under a contract of sale of real estate the seller undertakes to transfer immovable property in the ownership of the buyer. In this case the seller shall have the right to alienate the property, and the buyer – the right to acquire it.

Under such conditions, concluded between the developer and the investor contract in respect of the common property of an apartment building is in force Article 168 of the Civil Code invalid transaction as violating the requirements st.290 Civil Code of the Russian Federation and Article 36 of the Housing Code. Given the fact that the transaction infringes on the legally protected interests of third parties (owners of premises in an apartment building), it can be qualified as insignificant on the basis of paragraph 2 of Art. 168 of the Civil Code.

Therefore, even if an investor to carry out independent common finance the construction of property, he had to understand (business risk presumption) that the registration of sole ownership of the property will not be possible due to the di-

rect instructions of the law. Refers in this case to the principle of freedom of contract to the investor is not allowed because this principle has its limits, due not only to the protection of third party interests, but also the concept of maintaining the fairness of the legal regulation, which has repeatedly been pointed out not only in domestic but also in foreign literature [4, p. 31].

In addition, according to the legal position of the Presidium of the SAC fact finance creation of general property of a third party does not give the latter the right to sole ownership of the property. Presidency pointed out the need to take into account the peculiarities of the legal regime established by the legislation in force in respect of the common property in an apartment building. The criterion for the designation of a house equipment to the common property is its functional purpose, suggesting its use to serve more than one room in the apartment building. It is unacceptable for the recognition of third-party investor in the sole ownership of the property with reference to claim 1 st. 218 Civil Code, according to which the ownership of the new thing made or created by a person for himself in compliance with the law and other legal acts, acquired by this person. Since its inception common property becomes a structural element of engineering equipment at home, losing the properties independent of the object of property rights and by virtue of its functional purpose, at the end of construction of the house be transferred to the developer (investor) to owners of premises in the house together with other engineering equipment, regardless of any conditions. Therefore, the actual performance of third-party investors at their own expense of installation common property itself has no legal value to third parties (owners of premises in the house) and cannot change the legal regime common property directly determined by the law.

Second, it is unacceptable to specify in the project declaration of an apartment building in the exclusion of general building of the property, which

by its technical features is designed to serve more than one room in the house.

According to Article 19 of the Federal Law “On Participation in the shared construction of apartment buildings and other real estate and on amendments to some legislative acts of the Russian Federation” project declaration includes information about the builder and construction project information.

Project declaration published by the developer in the media and (or) placed in the information and telecommunications networks (including the network “Internet”) no later than fourteen days before the date of conclusion of the builder of the contract with the first participant of shared construction, and seems the body carrying out state registration of rights to immovable property and transactions with them, and to the supervisory authority.

The developer is obliged to make a declaration to the project changes regarding the information about the builder and construction project, as well as the facts of changes in project documentation, from the date of change in the relevant information within three working days.

Thus, the project declaration is filled on the basis of documentation on the developer and on the construction site. In particular, on the construction site information is entered in the project declaration based on the documents referred to in Article 21 of the Federal Law “On Participation in the shared construction of apartment buildings and other real estate and on amendments to some legislative acts of the Russian Federation”, namely:

- permission to build;
- feasibility study for the construction of apartment buildings and (or) other property;
- the conclusion of examination of project documentation, if such expertise is established by federal law;
- the design documentation, including all changes made to it;
- documents confirming the developer of the land.

Consequently, the project declaration must conform to the documentation about the builder and

construction of the object and cannot distort the information contained in the building permit and project documentation.

Given the fact that the building permit and project documentation for apartment house the same roof modular boiler described as common property, the subsequent distortion of their status in the project declaration should be recognized violation of the developer norms of the Federal Law “On Participation in joint construction...”

Conclusions

As a result, we conclude that the property designated to serve some or all of the premises in an apartment building, and has no independent purpose, refers to the common house property, regardless of who funded the construction or purchase of the property. Requirements to the order of reference of the property in the apartment building to the total number specified in article 290 of the Civil Code and 36 of the Housing Code, which do not contain such an aggravating circumstance as the “funding source”. Otherwise it would be possible assignment to the sole ownership of third parties wishing to incur the relevant investment, staircases, lift equipment, sewer riser block of flats, etc.

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