

REAL ESTATE CLAIM ACTION. COMPARISON OF OWNERSHIP TITLES. GOOD FAITH OF THE ACQUIRER.

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ABSTRACT: *A direct legal means of civil law used to defend principal real rights is the claim/recovery action. In practice, the claim action is often preceded by a request addressed to the court to annul the defendant's title of ownership. The first mechanism for resolving the dispute when there are two titles of ownership is to compare the titles and analyze the successive transfers of ownership titles. If, in the analysis of these transfers, the absolute nullity of an ownership title is found, then the principle of annulling the subsequent act as a result of annulling the initial act applies. The principle "error communis facit ius" becomes applicable when, although the circumstances of concluding the legal act would require its annulment for non-compliance with legal conditions, what prevails is the good faith of the beneficiary of that act, who was in a common and invincible error, trusting in what we designate under the term "appearance in law". An exception to the imprescriptibility of the real estate recovery action is provided by art. 860 of the Civil Procedure Code. The acquisition of the property following a public auction sale confers on the successful bidder a special situation regarding any eviction actions brought by third parties..*

KEYWORDS: *real rights; claim action; comparison of ownership titles; nullity of the subsequent act; appearance of right.*

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1. PROLEGOMENA

The recovery/claim action does not have a legal definition. It has been established in doctrine that it is a real, petitory action brought by the plaintiff-owner, who does not have possession of a good, addressing the court to recognize their ownership right and the restitution of the good. The purpose of the action is to regain possession of the good, being directed against the one who holds the good. The burden of proof falls on the one who makes an affirmation before the court. Since the civil trial is initiated by the plaintiff by

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filing the lawsuit, it is natural for them to prove the claim they have submitted to judgment. As the plaintiff presents evidence to prove their ownership right, the defendant does not remain passive, presenting to the court, in turn, other evidence that attests to his ownership right.

2. PROOF OF OWNERSHIP. OWNERSHIP TITLES.

Proving ownership by presenting the title has several valences. The judicial struggle between the plaintiff and the defendant must be understood from the perspective of what the parties pursue through the administration of evidence, as well as the complexity in interpreting the means of evidence (ownership titles). In practice, each party tries to prove the way they acquired their own ownership right or that of their author. The court is obliged to thoroughly analyze all the evidence administered in the case, applying the principles of law, the applicable legal norms, presumptions, and legal logic.

The term "title" has the meaning of a way of acquiring ownership or another principal real right. The most important and having the greatest probative force remain, in this matter, the writings.

In practice, difficulties have arisen in proving ownership or, especially, in interpreting the notion of title.

In the regulation of the Civil Code, proof of ownership is made with the land registry extract. The exigency of this legal text is justified, since, from the moment when, in the Civil Code, the constitutive or translative effect of real rights of land registry entries is consecrated, the only proof that proves the acquisition of ownership by the plaintiff is the land registry itself, respectively the land registry extract. (Bîrsan, 2013)

But there is the possibility that both parties present ownership titles, and then the following hypotheses can be outlined:

a) if both parties have ownership titles, which come from the same author, the party that first fulfilled the formalities of real estate publicity, for the opposability of its right towards third parties, will win the case; if neither party has registered their title, the party whose title has the oldest date will win;

b) if both parties present ownership titles, if they come from different authors, the court will give the case to the party that acquired from the author whose right is preferable; the burden of proof that their author had a preferable right falls on the plaintiff.

If only one party presents the ownership title, the following situations are distinguished:

a) when the plaintiff is the one who has the title, they will win if 2 conditions are met: the title emanates from a third party, and not from the plaintiff themselves; the title has a certain date prior to the defendant's possession;

b) if the defendant has a title, the plaintiff's action will be rejected, since the defendant has proven the legitimacy of their possession.

In a case¹, the transfers of ownership were analyzed, the ownership titles were interpreted, and it was held that the titles came from the same author and the defendant was the one who first fulfilled the formalities of real estate publicity. The defendant's

¹ Civil sentence no. 1690/2023 pronounced by the Galați Court, unpublished.

author is a former state enterprise that was transformed, under Law no. 15/1990², into a commercial company with full state capital. The lands administered by state enterprises during the communist period were transformed into lands owned by these commercial companies with full state capital, also under Law no. 15/1990. In conclusion, the land in question became the property of the plaintiff at the moment of entry into force of Law no. 15/1990 and not at the moment of issuing the Certificate of attestation of ownership of the lands. From the very title of the act, it can be observed that it attests to an ownership right and does not constitute an ownership right. The provisions of art. 5 of HG no. 834/1991³ can only be interpreted in the sense that the certificate of attestation of ownership is only a probative instrument, without having a constitutive effect, since the ownership right over the land pre-exists in the patrimony of the commercial company from the moment of entry into force of Law no. 15/1990.

Subsequently, after the issuance of the Certificate of attestation of ownership of the lands, a handover protocol was signed, through which the ownership of the land was transferred from the defendant's author to the second owner. After this transfer of ownership, 2 other transfers of ownership took place: the adjudication act and the sale contract through which the defendant became the last owner.

In practice, in this case, there was an analysis of all transfers of ownership and ownership titles, respectively Law no. 15/1990, the Certificate of attestation of ownership, the handover protocol, the adjudication act, and the sale contract.

Ownership titles are legal documents that attest to ownership of a good. Here are some examples of ownership titles:

- a) the sale contract - the synallagmatic contract by which a person (seller) transfers ownership of a real estate to another person (buyer) in exchange for a price.
- b) the donation contract - an act by which an owner (donor) cedes their good to another person (donee), without receiving financial compensation.
- c) certificate of inheritance - a document issued by a notary, which attests to the ownership of inherited goods after the death of the deceased.
- d) nationalization act - a document issued by the state that attests to the transfer of a good from private ownership to public ownership, usually in specific historical contexts (e.g., Nationalization Decree no. 92/1950 for the nationalization of some buildings, expropriation decrees issued in the communist regime).
- e) the exchange contract - in historical order, the exchange was the first contract through which a person could acquire ownership of a good in exchange for the ownership of another good (barter).
- f) ownership acts issued by local authorities (for example: order of restitution in kind based on Law no. 10/2001⁴). These may include building certificates or other documents that confirm ownership rights over land or buildings, depending on national legislation.

² Law no. 15 of August 7, 1990, on the reorganization of state economic units as autonomous regies and commercial companies, published in the Official Gazette no. 98 of August 8, 1990, with subsequent amendments.

³ Government Decision no. 834 of December 14, 1991, regarding the establishment and evaluation of certain lands held by state-owned commercial companies, published in the Official Gazette no. 259 of December 20, 1991, with subsequent amendments and additions.

⁴ Law no. 10 of February 8, 2001, on the legal regime of some buildings abusively taken over during the period March 6, 1945 - December 22, 1989, republished in the Official Gazette no. 798 of September 2, 2005.

g) ownership titles over lands - for example, ownership titles issued by the County Commission for the Establishment of Private Ownership Rights over Lands constituted by the Prefect's Order, based on Law no. 18/1991⁵, other specific documents that prove ownership of a land, issued according to the law.

h) normative acts - e.g. Law no. 15/1990 on the reorganization of state economic units as autonomous regies and commercial companies.

i) court decisions concerning usucaption, real estate accession, inheritance debate, common goods partition.

The enumeration of ownership titles is not limitative and there is no classification of them in terms of probative force. The difficulties of proving ownership in real estate matters result from the nature of the way of acquiring this right and from the shortcomings of real estate publicity systems. The plaintiff must present evidence to prove their right and the chain of successive transmissions to remove any uncertainty regarding their ownership right. (Chelaru, et al., 2024)

3. EXCEPTION TO THE ANNULMENT OF THE OWNERSHIP TITLE. THE PRINCIPLE OF ERROR COMMUNIS FACIT IUS/GOOD FAITH.

The real estate recovery action can involve comparing two ownership titles and requesting the annulment of one of the two ownership acts.

If there are two valid ownership titles and all transfers of ownership are analyzed, good faith can be invoked in relation to the request to annul the ownership act. Therefore, one of the effects of the recovery action is the retroactive annulment of an ownership right. Of course, the action should include two claims: recovery action and annulment of the defendant's ownership title. If, in the analysis of the successive chain of ownership titles, the absolute nullity of a title is found, then the principle of annulling the subsequent act as a result of annulling the initial act applies. This principle appears as a natural consequence of the principle of the retroactive effects of the nullity of the civil legal act and the principle of restoring the previous situation. There are exceptional cases to the principle "resolutio iure dantis resolvitur ius accipientis," those situations that require the maintenance of the subsequent act, although the initial act was annulled. The legal basis of these exceptions is either the idea of protecting the good faith of the sub-acquirer for consideration or the need to protect the stability of the civil circuit. (Kuglay, et al., 2020)

Even if the principle of annulling the subsequent act as a result of annulling the main act - "resolutio iure dantis resolvitur ius accipientis" - is applied, we can be in exceptional cases to this principle.

An exception to the annulment of subsequent acts is the rule "error communis facit ius" or the principle of the validity of the appearance of law.

The notion of apparent ownership is closely related to the issue of selling another's good. To the extent that apparent ownership operates, the third-party acquirer, although they have concluded the legal act transferring ownership with a non-owner, respectively with a person who has alienated another's good, will no longer be able to be evicted by the initial owner.

⁵ Law no. 18 of February 19, 1991, of the land fund, republished in the Official Gazette no. 1 of 05.01.1998, with subsequent amendments and additions.

The principle "error communis facit ius" becomes applicable when, although the circumstances of concluding the legal act would require its annulment for non-compliance with legal conditions, what prevails is the good faith of the beneficiary of that act, who was in a common and invincible error, trusting in what we designate under the term "appearance in law."

The belief of the apparent possessor owner that they are the sole owner is doubled by the consciousness of an entire community, not just a determined person. In other words, the error must be common. Good faith is legally presumed, while common and invincible error must be proven by the one who invokes the benefit of apparent ownership. In this sense, the state of fact is proven, i.e., all the elements of the material side of the appearance that are reflected in the consciousness of the community in the form of a common and invincible error. The interpretation of the evidence is assessed by the judge and cannot be arbitrary. The common and invincible error must exist at the time of signing the ownership title, but it must also have a certain persistence in time. (Matefi, 2018)

Therefore, to be able to conclude that there was a common and invincible error, we must analyze the factual elements prior to this moment.

The acquisitive effect of apparent ownership is based not only on the existence of common and invincible error, but also on the good faith of the acquirer.

According to art. 14 of the Civil Code "Good faith. (1) Any natural person or legal entity must exercise their rights and perform their civil obligations in good faith, in accordance with public order and good morals. (2) Good faith is presumed until proven otherwise."

The presumption of good faith can be overturned by any means of evidence by the plaintiff in a recovery action brought against the acquirer. A distinction must be made between the apparent owner and the acquirer. The apparent owner can be in good or bad faith, these aspects being important in the context of the tort civil liability action. The apparent owner in good faith may be obliged to return the price paid by the acquirer and may retain the fruits. In contrast, the apparent owner in bad faith will have to fully cover the damage of the true owner, which may consist of the updated value of the sold good, the fruits, plus the unrealized benefit. (Stegărescu, 2006)

In jurisprudence⁶, the good faith of the buyer was upheld when they concluded a sale contract for an apartment on which a criminal seizure measure was instituted, without them having knowledge of this measure. At the time of perfecting the sale contract, the seizure measure had been removed from the land registry at the seller's request based on a court decision subsequently proven to be falsified. At the end of the criminal trial, by criminal decision⁷, the property entered the state's patrimony, being confiscated from the defendant seller.

Also, based on the evidentiary material, but also on the res judicata resulting from the considerations of the court decisions⁸, it was held that the defendant buyer was in good faith when concluding the contract whose annulment/nullity the plaintiff (the State through the Ministry of Finance) requests to be established.

⁶ Civil decision no. 213/2023 pronounced by the Galați Court of Appeal, unpublished.

⁷ Criminal decision no. 2255/23.06.2008 of the High Court of Cassation and Justice.

⁸ Civil decision no. 66/01.02.2012 of the Prahova Tribunal and criminal decision no. 392/A/29.12.2020 of the High Court of Cassation and Justice.

Thus, the courts held that in this case the legal act whose nullity the plaintiff invokes was concluded in a situation of common, general, invincible error, not only the defendant buyer but also the other institutions involved in concluding the authentic contract, the notary, the land registry and real estate publicity office, the fiscal administration, being misled regarding the ownership status of the defendant seller and the fact that the good is free of encumbrances.

In the case brought to trial, the chronological sequence of the applications registered in the land registry was presented, and it could be observed that at the time of the purchase of the property by the defendants, it appeared as free of encumbrances, there was no more precautionary seizure.

The sale was made through the public notary under legal conditions. The authenticated sale contract at the notary includes the fact that the property is not removed from the civil circuit based on any normative act of transfer to state ownership, it is not encumbered according to the land registry extract, it is not unavailable or seized, according to the certificate issued by the city hall.

Also, the seller gave a statement on their own responsibility in the sale contract that there is no litigation pending before any court regarding the sold apartment, assuming responsibility for the encumbrances that would encumber the apartment and which they did not declare at the time of authenticating the contract.

The defendant buyer took all diligence to conclude a valid act: the sale contract was made by a public notary, land registry extracts and a fiscal certificate were issued, a certificate was requested from the National Register of Evidence of Revocation of Powers of Attorney to certify whether the power of attorney given for signing the sale contract was valid. All these steps demonstrate that the defendant is a good faith buyer and that the ownership act is valid. The defendant acted with righteous intention, i.e., without any hidden thought, without fraudulent maneuvers and without having any suspicion regarding the legality of the act they concluded.

The defendant was in good faith at the time of purchasing the property. Good faith results from the loyal conviction combined with the absence of any fault and must be complete. Good faith implies the firm conviction of the acquirer that all the conditions of validity of the legal act were met at the time of its conclusion.

In the invoked case, the criminal sentence by which the confiscation of the property was ordered was pronounced against the defendant seller who, at the time of confiscation, no longer had any right over the property in question.

Even if the sentence on the basis of which the removal of the seizure was ordered was fraudulent and consequently null, in relation to the sale contract concluded by the defendant seller with the good faith defendant buyer, the exception to the principle "*quod nullum est nullum producit effectum*" applies, respectively the principle "*error communis facit jus*". It was held that the conditions of this exception were met, respectively: the acquisition of the property through a legal act for consideration; the good is singular; the acquirer is in good faith; there is a common error regarding the absence of any encumbrance on the property; the common error is invincible, in the sense that it was impossible for the acquirer of the good not to be mistaken about the factual situation under the given conditions. The defendant took all diligence to conclude a valid act on a good free of encumbrances.

Thus, in this case, the legal efficacy of the sale-purchase contract authenticated at the public notary's office was correctly recognized, even if it is not fully compliant with strict legal conditions and which, for this reason, should be null, but having been concluded in good faith and with increased prudence on the part of the acquirer for consideration, it became valid.

The appearance in law can be defined as the rule according to which those who have relied in good faith on a legal appearance considered publicly as representing reality itself must be legally protected, not being harmed by the invalid removal of the act they concluded in this way.

There is also judicial practice⁹ regarding the incidence of the principle of good faith in the case of properties registered in the land registry, the proof of ownership being made with the land registry extract: "Sub-acquirers are protected by the principle of good faith, a principle that has as its source art. 563 para. (3) of the Civil Code, an article that states that the right of ownership acquired in good faith, under the conditions of the law, is fully recognized. In the new regulation, good faith acquires substance also in the matter of recovery, a provision that is to be corroborated with the text of art. 901 of the Civil Code, which regulates the acquisition in good faith of a tabular right.

In these conditions, if the court finds the good faith of the sub-acquirers, it must be investigated whether the plaintiff has overturned the presumption of good faith established by art. 14 para. (2) of the Civil Code.

The Tribunal held, thus, that such proof was not made. The sub-acquirers, natural persons, have abundantly proven that at the time of purchasing the property they took all steps and made all efforts to know the legal status of the property, proof of this being the land registry extract from 2012, respectively from April 20, 2010, and the fiscal attestation certificate from 2010."

The following exceptional situations can also be noted:

- the situation provided by art. 36 item 1 and art. 38 of Law no. 7/1996¹⁰, i.e., the hypothesis of the one who, relying on the registration in the land registry, acquired a real estate right in good faith and through an act for consideration, but only after a period of 3 years from the date on which their application for registration of the respective real estate right in the land registry was registered;
- the situation provided by art. 36 item 1 and art. 37 para. 2 of Law no. 7/1996, i.e., the hypothesis of the sub-acquirer in good faith and for free of a real estate right, but only if 10 years have passed from the date on which their application for registration of that right in the land registry was registered.

4. EXCEPTIONS TO THE RULE OF THE IMPRESCRIPTIBILITY OF THE RECOVERY ACTION

The real estate recovery action is imprescriptible in terms of extinction; its imprescriptibility stems from the perpetual nature of the ownership right, a right that does not extinguish by non-use, no matter how long the inactivity of its holder may be.

⁹ Decision no. 396/2017 pronounced by the High Court of Cassation and Justice - Civil Section I.

¹⁰ Law no. 7 of March 13, 1996, on cadastre and real estate publicity, republished in the Official Gazette no. 720 of September 24, 2015.

However, it can be paralyzed by the defendant invoking the exception that they acquired the recovered good through usucaption. There are two exceptions to the principle of imprescriptibility of real estate recovery actions, namely:

a) in the case of a public auction sale of a property subject to forced execution, the adjudicated property, registered in the land registry, cannot be recovered if at least 3 years have passed from the date of registration of the registration request made by the previous acquirer of the right registered in favor of the third-party adjudicator, as well as properties registered for the first time in the land registry, based on the adjudication act, if 3 years have passed from the date of registration of the adjudication act in the land registry;

b) in the case of avulsion, the law provides a 1-year term for recovering the portion of land torn away by the force of the waters from the land of one owner and attached to the land belonging to another owner. If the owner's action is admitted, the defendant possessor (whether in good faith or in bad faith) will be obliged to return the good in question, free of any encumbrance; the restitution must be made in kind, and if this is no longer possible (either because the thing has perished due to a force majeure event, or because it was expropriated during possession, for reasons of public utility), the restitution will be made by equivalent; if the perished good is insured, the defendant possessor will return the received insurance indemnity, and if the good was expropriated, they will return the expropriation indemnity they received. The good faith possessor is entitled to keep the fruits received or collected until the date of their legal action by the true owner. (Dobrev, 2014)

The adjudication of the property at a public auction in the context of forced execution produces two main effects: the transfer of ownership from the debtor to the adjudicator and the cleansing of the property of encumbrances.

The acquisition of the property following a public auction sale confers on the adjudicator a special situation regarding any eviction actions brought by third parties.

From the provisions of art. 860 of the Civil Procedure Code, it results that, regarding these actions, a distinction must be made between the situation of the adjudicator of a property that was registered in the land registry prior to forced execution and that of the adjudicator of a property for which the judicial executor requested the opening of the land registry under the conditions of art. 829 para. 2 of the Civil Procedure Code.

In jurisprudence¹¹, it was held that in a real estate recovery action that was brought on a property adjudicated in a real estate forced execution process through the public auction procedure, the provisions of art. 860 of the Civil Procedure Code are applicable. The defendant invoked the exception of the prescription of the right to action brought by the plaintiff, considering the provisions of art. 860 of the Civil Procedure Code¹².

The court considered that the entire action, as formulated, falls within the notion of eviction, in the sense of loss of ownership of the thing (in whole or in part) or disturbance of the buyer in the exercise of ownership prerogatives. Even if the substantive law norm, in relation to which the merits of the case are resolved, is that provided by art. 563 of the

¹¹ Civil sentence no. 1690/2023 pronounced by the Galați Court, unpublished.

¹² Civil Procedure Code, article 860: (1) Any eviction request, total or partial, regarding the adjudicated property is definitively extinguished. (2) In the case of properties registered for the first time in the land registry, under the conditions of art. 829 para. (2), the eviction request will prescribe within 3 years from the date of registration of the adjudication act in the land registry. This prescription also runs against minors and persons under judicial interdiction.

Civil Code, the special provision of art. 860 of the Civil Procedure Code, derogating from the imprescriptible regime of the real estate recovery action, becomes applicable. This provision, intended to create a situation of greater security for the ownership right acquired as a result of adjudication, has limited in time the possibility of formulating any eviction requests, establishing a 3-year term for any type of action aimed at evicting the adjudicator. Therefore, art. 860 of the Civil Procedure Code does not represent another legal basis, but is a condition for exercising the substantive right to action itself, brought to trial, which expires if it was not exercised within the term provided by law.

The acquisition of the property following a public auction sale confers on the adjudicator a special situation regarding any eviction actions brought by third parties.

In the case of properties registered for the first time in the land registry by the judicial executor, after the date of the beginning of forced execution, the eviction request will prescribe within 3 years from the date of registration of the adjudication act in the land registry. By derogation from common law, this prescription also runs against minors and persons under judicial interdiction.

Therefore, if the adjudicated property is registered in the land registry for the first time under the conditions of art. 829 para. 2 of the Civil Procedure Code, it is protected from third-party eviction actions after the expiry of a 3-year prescription period from the date of registration of the adjudication act in the land registry. *De lege lata*, only in this case, the third party who claims to have an ownership right or another real right over the prosecuted good can exercise it also by separate action, if they do not file an objection to execution no later than 15 days from the date of sale. In the case of properties registered in the land registry prior to prosecution, such an option is excluded.

The legal solution, even if it may seem drastic for the third party who claims an ownership right or another real right over the prosecuted property, is natural in the context of the current real estate publicity system achieved through land registries.

In principle, the adjudication act can no longer be attacked by a separate annulment action, under the same conditions as any sale, because the elements of the forced sale are formed during the execution procedure and can be subject to court control through the objection to execution exercised against the auction minutes that record the adjudication. To the extent that the interested party or injured by the execution does not use the objection to execution to exercise such control, they forfeit this right. If it were admitted that the adjudication act can be attacked separately by the common law annulment action, the provisions governing the term for exercising the objection to execution would be circumvented.

In the case brought to trial, the plaintiff questioned the registration of the ownership right in the land registry after the registration of the ownership right of the adjudicator and of the defendant who had bought from the adjudicator. The adjudicator's ownership right over the land cannot be removed or rectified. Also, the plaintiff invoked registration irregularities starting with the first owner, without requesting the removal from the land registry of the first owner. This approach is inadmissible. If the registration in the land registry is done incorrectly, then the removal from the land registry should have been requested starting with the first owner and not with the last one.

If the eviction request prescribes within 3 years from the date of registration of the adjudication act in the land registry, this does not mean that we can directly invoke the rectification of the land registry entry of the subsequent ownership title. The court admitted

the exception of the prescription of the right to action for the claim regarding recovery and rejected the claim regarding the rectification of the land registry as unfounded.

In conclusion, real estate ownership is guaranteed and protected by a set of legal means that aim to prevent or remove violations of these rights.

A civil law means used to defend principal real rights is the recovery action, which can be admitted if the existence of the right in the plaintiff's patrimony is established or can be rejected if this finding is not made, which implies that the ownership right in the defendant's or another person's ownership is protected.

5. CONCLUSION

Good faith is a fundamental principle of civil law, acting to ensure the stability of the legal system. In the context of voidable sales, it protects the interests of third parties who have acted with diligence, maintaining the validity of their legal acts, even if the initial act is annulled.

In a real estate revendication action, comparing the ownership titles is the first procedure performed. We might have the mistaken tendency to consider that original titles (acquired by law) have priority over derivative titles (acquired through translative acts). In reality, the prevalence of one title over another depends on several factors, which are analyzed by the court of law. It cannot be stated that a title acquired by law, in principle, has greater power than a translative act of ownership. Each case is analyzed individually, based on several principles, one of which is good faith.

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