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Андрій Богданович Гриняк, Надія Василівна Міловська

*Відділ проблем приватного права
Науково-дослідного інституту приватного права і
підприємництва імені академіка Ф.Г. Бурчака НАПрН України
Київ, Україна*

ОСОБЛИВОСТІ ЗАСТОСУВАННЯ СТАТТІ 392 ЦИВІЛЬНОГО КОДЕКСУ УКРАЇНИ ПРИ ВИЗНАННІ ПРАВА ВЛАСНОСТІ НА НОВОСТВОРЕНЕ НЕРУХОМЕ МАЙНО (ЗА МАТЕРІАЛАМИ СУДОВОЇ ПРАКТИКИ)

Анотація. Дослідження особливостей визнання права власності на новостворене нерухоме майно зумовлене його метою, яка полягає у визначенні підстав для застосування передбаченого статтею 392 Цивільного кодексу (ЦК) України способу захисту при визнанні права власності на новостворений об'єкт будівництва, а також виявленні прогалин і суперечностей у законодавстві України, судовій практиці, що виникають під час застосування відповідного способу захисту суб'єктивного права та виробленні пропозицій щодо їх усунення. У зв'язку з цим, основним методом даного дослідження став порівняльно-правовий, який дав змогу виявити та проаналізувати різні підходи до законодавчого закріплення та застосування такого способу захисту, як визнання права власності. У науковій статті встановлено, що, незважаючи на те, що при укладенні договору купівлі-продажу майнових прав на нерухоме майно, покупець отримує обмежене речове право, за яким він наділений певними, але не всіма правами власника майна. Обґрунтовано, що покупець, який виконав свої грошові зобов'язання за договором купівлі-продажу майнових прав на нерухоме майно, повністю сплативши вартість, установлену вказаним договором, вважається таким, що вчинив дії, спрямовані на виникнення юридичних фактів, необхідних і достатніх для отримання права вимоги переходу права власності на об'єкт будівництва. У зв'язку з цим доведено, що ефективність застосування при визнанні права власності на новостворене нерухоме майно способу захисту, передбаченого ст. 392 ЦК України, спрямована на нівелювання можливості вчинення подальших протиправних дій третіх осіб щодо такого майна, і досягається за допомогою примусового виконання рішення суду шляхом визнання права власності на конкретний об'єкт, а у випадку його знищення – шляхом отримання відповідного відшкодування. Практичне значення дослідження особливостей застосування ст. 392 ЦК України при визнанні права власності на новостворене нерухоме майно полягає у тому, що його результати покликані сприяти подальшим науковим розробкам, удосконаленню правового регулювання відносин, об'єктом яких є новостворене нерухоме майно, оптимізації реалізації права власності та правозастосування у цій сфері.

Ключові слова: спосіб захисту, майнові права, об'єкт інвестування, державна реєстрація, договір купівлі-продажу.

Andrii B. Hryniak, Nadiia V. Milovska

*Department of Private Law Issues
Academician F.H. Burchak Scientific Research Institute of Private
Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine
Kyiv, Ukraine*

FEATURES OF APPLICATION OF ARTICLE 392 OF THE CIVIL CODE OF UKRAINE UPON RECOGNISING THE RIGHT OF OWNERSHIP OF NEWLY CREATED REAL ESTATE (A CASE STUDY OF JUDICIAL PRACTICE)

Abstract. *The study of the specific features of recognition of ownership of newly created real estate is conditioned by its purpose, which is to determine the grounds for application of remedy upon recognising ownership of newly created construction object, stipulated by Article 392 of the Civil Code of Ukraine. The purpose of the study also includes identification of gaps and discrepancies in the legislation of Ukraine and judicial practice, which arise during application of the appropriate remedy for a substantive right, and the development of proposals for their elimination. In this regard, the main method of this study was comparative law, which allowed to identify and analyse different approaches to the legislative consolidation and application of such a remedy as the recognition of property rights. Upon concluding an agreement on sale and purchase of property rights to immovable property, the buyer receives a limited real right, under which it is endowed with certain, but not all rights of the property owner. Nevertheless, in recognising the ownership of newly created real estate, the study proves the feasibility of applying the method of protection stipulated in Article 392 of the Civil Code of Ukraine. It is substantiated that the buyer, who has performed its monetary obligations under the agreement on sale and purchase of real property rights, having fully paid the contractual value, is considered to have committed actions aimed at the occurrence of legal facts necessary and sufficient to obtain the legal claim for the transfer of ownership of the construction object. In this regard, it has been proved that the effectiveness of the remedy stipulated by Article 392 of the Civil Code of Ukraine, which is applied upon recognising the ownership of newly created immovable property, is aimed at levelling the possibility of further unlawful actions of third parties in relation to such property, and is achieved through the enforcement of judgement by recognition of ownership of a specific object, and in case of its destruction – by obtaining appropriate compensation. The practical significance of the study of the application of Article 392 of the Civil Code of Ukraine upon recognising the ownership of newly created real estate is that its results are designed to promote further research, to improve the legal regulation of relations, the object of which is newly created real estate, to optimise the implementation of property rights and law enforcement in this area.*

Keywords: remedy, property rights, investment object, state registration, sale and purchase agreement.

INTRODUCTION

In accordance with Part 1 Article 16 of the Civil Code of Ukraine¹, every person shall have the right to go to court to protect their violated, unrecognised, or disputed rights, freedoms, or interests. Protection of civil rights is an action to prevent, stop the violation of rights, or restore the violated rights of individuals or legal entities. Every person shall have the right

¹ Civil Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15>

to protection of their right and interest, which do not contradict the principles of civil legislation, the requirements of justice, good faith, reasonableness. The protection of substantive civil rights and interests is carried out in accordance with the procedure stipulated by law, i.e. by means of appropriate remedies [1; 2]. The remedy for the substantive civil rights constitutes a substantive coercive means stipulated by law, which facilitate the restoration (recognition) of the violated (disputed) rights and exercise influence on the offender. Provisions of civil legislation (Article 16 of the Civil Code of Ukraine)¹ stipulate certain ways to protect civil rights and interests, the list of which is not exhaustive, because the court may remedy civil rights or interests by other means prescribed in an agreement or law. Under Article 16 of the Civil Code of Ukraine, one of the ways to remedy civil rights is the recognition of a substantive right, which is applied when a certain substantive right of a person is questioned or disputed, denied, or when there is a real threat of such actions.

In the field of property rights, recognition of property rights constitutes an effective remedy. Thus, in accordance with Article 392 of the Civil Code of Ukraine², the property owner may file a lawsuit for recognition of their property right, if this right is disputed or not recognised by another person, as well as in case of loss of a document certifying the said property right. The application of the remedy prescribed by Article 392 of the Civil Code of Ukraine should promote the real restoration of the violated right by ensuring the termination of its non-recognition or dispute, as well as be aimed at eliminating the possibility of further unlawful actions of third parties against such property. The purpose of such remedy is achieved through the enforcement of a judgement by recognising the ownership of a particular object, and in case of its destruction – by obtaining appropriate compensation. At present, however, the issue of the possibility of applying Article 392 of the Civil Code of Ukraine to legal relations concerning investment in construction objects remains debatable both at the theoretical and practical levels. Moreover, such application concerns not only the loss of title establishing documents, but also the cases of their complete absence. This situation may arise from the lack of confirmation of the existence of the substantive right of the owner by the respective documents due to other persons obstructing the registration of ownership of the newly created immovable property subsequent to its commissioning. Furthermore, the existence of the owner's substantive right to the invested construction object may be doubted, unrecognised, or disputed by other persons, in particular in case of alienation of the investment object to third parties subsequent to commissioning of the building as a result of changes in the technical specifications of the investment object introduced during the construction [3-7]. In this regard, the purpose of this study is to determine the possibility and grounds for the application of the remedy stipulated by Article 392 of the Civil Code of Ukraine upon recognising the ownership of a newly created construction object, as well as to develop proposals to eliminate contradictions in the legislation of Ukraine and judicial practice, which arise upon application of the corresponding remedy of subjective rights. The practical significance of the study of the application of Article 392 of the Civil Code of Ukraine upon recognising the ownership of newly created real estate is that its results are

¹ Civil Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15>.

² *Ibidem*, 2003.

designed to promote further research, to improve the legal regulation of relations, the object of which is newly created real estate, and to optimize the implementation of property rights and law enforcement in this subject area.

1. MATERIALS AND METHODS

The issue of recognition of ownership of newly created real estate is understudied in the legal literature. Recognition of property rights in general has been the subject of research among such scholars as O.O. Kot [8], I.M. Panchenko [9], I.O. Dzera [10], etc. At the academic level, some issues of recognition of ownership of a self-built object, inheritance in the absence of a title deed, recognition of ownership of a derelict thing, the statute of limitations, etc. have been considered, indicating that the legislator either stipulates no possibility whatsoever for the recognition of ownership in some of these cases (for example, for objects of self-built construction or recognition of ownership by the testator) or stipulates another, special procedure for acquiring ownership of such objects, which is more complicated than the procedure for recognition of ownership under Article 392 of the Civil Code of Ukraine, and therefore should be governed by other rules of civil legislation [11-13]. The comment of scholars on legal positions of the Supreme Court, "Protection of property rights", edited by I.V. Spasybo-Fatieieva, deserves special mention [14]. However, the inconsistency of judicial practice necessitates the identification of features and grounds for recognition of ownership of newly created real estate under Article 392 of the Civil Code of Ukraine. The methodology of this study is determined by its purpose and lies in identification of features and grounds for the application of such a remedy as the recognition of ownership of newly created real estate; identification of gaps and discrepancies in the legislation of Ukraine and the judicial practice, which arise during the application of the corresponding remedy of subjective rights and proposals for their elimination. The legal framework of this study includes the Civil Code of Ukraine¹, the Law of Ukraine "On Property Valuation, Property Rights, and Professional Valuation in Ukraine"², the Law of Ukraine "On Financial and Credit Mechanisms and Property Management in Housing Construction and Real Estate"³, Law of Ukraine "On Regulation of Urban Development"⁴, Law of Ukraine "On State Registration of Real Rights to Immovable Property and Their Encumbrances"⁵, Resolution of the Cabinet of Ministers of Ukraine "On the Procedure for Commissioning Completed

¹ Civil Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15>

² Law of Ukraine No. 2658-III "On Valuation of Property, Property Rights and Professional Valuation Activities in Ukraine". (2001, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2658-14#Text>.

³ Law of Ukraine No 978-IV "On Financial and Credit Mechanisms and Property Management in Housing and Real Estate Transactions". (2003, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/978-15>

⁴ Law of Ukraine No 3038-VI "On Regulation of Urban Planning Activity". (2011, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/3038-17>

⁵ Law of Ukraine No. 1952-IV "On the State Registration of Real Rights to Immovable Property and Their Encumbrances" (2004, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/1952-15#Text>.

Facilities"¹, Resolution of the Cabinet of Ministers of Ukraine "On Procedure for Registration of Proprietary Rights to Immovable Property and Their Encumbrances"², etc.

The study uses general scientific and special legal methods of scientific knowledge. The main method of research is comparative law, which allowed to identify and analyse different approaches to the legislative consolidation and application of such a remedy as the recognition of ownership. Philosophical and functional methods allowed to outline the prerequisites for the development of an effective remedy of property rights to construction sites and to identify the interrelation of its elements. The dialectical method of cognition accompanied the entire procedure of scientific research and allowed to consider the trends of development and improvement of domestic civil legislation in the context of European integration. The use of the dialectical method of cognition provided an opportunity to consider the main features of the acquisition of ownership of newly created real estate. The formal legal method is used in the analysis of legal provisions governing relations in property rights and the practice of their application. Among other methods of research of the subject matter, the method of the analysis and synthesis were used to investigate the modern condition of the legislation and judicial practice and to propose improvement of the regulatory framework. Analysis of judicial practice of Ukrainian courts and the case law of the European Court of Human Rights allowed to establish the possibility and determine the grounds for the application of remedy of recognising the right of ownership of newly created real estate stipulated by Article 392 of the Civil Code of Ukraine.

The presented scientific ideas of the authors in the modern development of civil relations include target, methodological, substantive, legal, and effective components.

2. RESULTS AND DISCUSSION

Nowadays, investment and financing of housing construction with the use of funds raised from individuals and legal entities, including management, can be carried out exclusively through construction financing funds, real estate funds, mutual investment institutions, as well as by issuing targeted bonds of enterprises, the obligations under which are performed by transferring the object (part of the object) of housing construction. Legal relations arising between persons who alienate property rights to immovable property at the construction stage and persons who acquire such rights are formalised by agreements of sale and purchase of property rights to immovable property, according to which the buyer receives the right to own, dispose of, and use property rights, but the ownership of a particular apartment arises only in the future [15-16]. Thus, according to Article 656 of the Civil Code of Ukraine³, property rights may be the subject of a sale and purchase agreement. Therewith, the general provisions on sale and purchase of property rights shall apply to the sale and purchase agreement, unless the content or nature of these rights

¹ Cabinet of Ministers of Ukraine Decree No. 461 "On the Procedure for the commissioning of completed construction projects". (2011, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/461-2011-%D0%BF>.

² Decree of the Cabinet of Ministers of Ukraine No. 1127 "On the Procedure for State Registration of Real Rights to Immovable Property and Their Encumbrances". (2015, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/1127-2015-%D0%BF>.

³ Civil Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15>

specify otherwise. Admittedly, property rights can act as the subject of a wide array of other civil agreements [17].

As noted in the legal literature, the property right to immovable property at the construction stage is a limited real right [18]. Analysis of the legislative definition of property rights, which is stipulated by Article 3 of the Law of Ukraine "On Valuation of Property, Property Rights and Professional Valuation in Ukraine"¹ also testifies to its understanding as different from the ownership of *jus in re*, as well as other specific rights and rights of claim. That is, the property right to immovable property at the construction stage constitutes the right of its holder to claim ownership of such immovable property in the future. However, at the construction stage, the holder of the property right is endowed with certain, but not all rights of the property owner. The latter receives only the right to acquire ownership of a particular property only subsequent to an occurrence of an array of investitive facts (completion of construction, commissioning, address assignment, etc.), and not the ownership of real estate *per se*.

Thus, under the agreement on sale and purchase of property rights, the buyer receives not ownership of individually determined real estate with all its inherent properties, but ownership of property that is non-existent at the construction stage, which may come into existence provided the occurrence of all the circumstances prescribed by the construction documentation. Therewith, the legislator does not restrict the holder of ownership to immovable property in performing any operations on these rights that are not prohibited by law, including the assignment of the right of claim (cession) under such agreements. However, in the context of the issue of property rights, the case law of the European Court of Human Rights should be noted. In one of its judgments, it pointed out that the concept of property in the meaning of Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms² covers both available property and assets, including requirements concerning which the applicant may claim that it has at least a "legitimate expectation" of effective acquisition of property rights (Pine Valley Development Ltd. and others v. Ireland) [19]. That is, the property right as a "right of expectation" is a limited real right, which certifies the competence to acquire ownership of real estate in the future and forms an integral part of the property [18; 20]. Such a legal conclusion is stipulated in the judgement of the Supreme Court of Ukraine in case 6-265цc16 [21].

Acquisition of property rights is a certain legal structure with which the law connects the emergence of a person's substantive right of ownership of certain objects [22]. Part 1 Article 328 of the Civil Code of Ukraine prescribes that the property right is acquired on the grounds that are not forbidden by the law, in particular from transactions. As for the moment of occurrence of ownership of the newly created real estate, there are certain features stipulated by Part 2 Article 331 of the Civil Code of Ukraine, according to which the right of ownership of newly created real estate arises from the completion of construction. In this case, if the agreement or law prescribe the commissioning of real estate, the right of ownership shall also arise from the moment of such commissioning

¹ Law of Ukraine No. 2658-III "On Valuation of Property, Property Rights and Professional Valuation Activities in Ukraine". (2001, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2658-14#Text>.

² Convention for the Protection of Human Rights and Fundamental Freedoms. (1950). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004#Text.

(commissioning of completed facilities is governed by the relevant Procedure approved by the Resolution of the Cabinet of Ministers of Ukraine No. 461 of April 13, 2011¹). If the right of ownership of immovable property is subject to state registration in accordance with the law, the right of ownership shall also arise from the moment of state registration. Notably, in accordance with the Letter of the Ministry of Justice of Ukraine No. 19-50-2309 of June 22, 2007², until the completion of the construction of the invested real estate and its commissioning, the investor shall hold not the ownership of this object, but the property rights to it. The investor cannot alienate the apartment as a real estate object prior to the acceptance of the construction object into operation and registration of ownership of the specified apartment, but can alienate its property rights to the apartment. Thus, the analysis of the provisions of Article 331 of the Civil Code of Ukraine³ in systematic connection with the provisions of Articles 177-179, 182 of the Civil Code of Ukraine, gives grounds to conclude that the ownership of newly created real estate as an object of civil rights arises from the moment of its state registration.

The procedure for state registration of real rights to immovable property and the list of documents required for its implementation is determined by the Procedure for State Registration of Real Rights to Immovable Property and Their Encumbrances, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1127 of December 25, 2015⁴. Thus, paragraph 78 of the above Procedure prescribes that for state registration of ownership of certain individually identified immovable property (apartment, residential, non-residential premises, etc.) located in the object of immovable property, the construction of which was performed with the involvement of funds of individuals and legal entities, the owner of such property shall submit, in particular, a document confirming the acquisition of ownership of the investment object, which is stipulated by law (investment agreement, equity agreement, agreement on sale and purchase of property rights, etc.). That is, in case of acquisition of property rights to real estate, the document confirming the ownership of the construction object is the agreement on sale and purchase of property rights. In this case, the buyer who has performed its monetary obligations under the agreement on sale and purchase of property rights to real estate, having paid in full the contractual value, shall be considered as such that has committed actions aimed at the occurrence of legal facts necessary and sufficient to obtain the right of claim to transfer ownership of the construction object. As noted in the legal literature, the State Register of Real Rights to Immovable Property is an information system that ensures processing, storage, and provision of information on registered real rights to immovable property and their encumbrances, the objects and subjects of such rights, and the state registration itself lies in the entry of information according to a special procedure, which involves data accuracy verification [23]. Considering the above, it is important to point out that the

¹ Cabinet of Ministers of Ukraine Decree No. 461 “On the Procedure for the commissioning of completed construction projects”. (2011, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/461-2011-%D0%BF>.

² Letter of the Ministry of Justice of Ukraine No. 19-50-2309. (2007, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/v2309323-07>.

³ Civil Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15>

⁴ Decree of the Cabinet of Ministers of Ukraine No. 1127 “On the Procedure for State Registration of Real Rights to Immovable Property and Their Encumbrances”. (2015, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/1127-2015-%D0%BF>.

essence of state registration of rights is reflected in the official recognition and state confirmation of the acquisition, change, or termination of real rights to immovable property that have already taken place based on decisions of relevant bodies, agreements, or other title establishing documents by means of relevant entries into the State Register of Rights, and not the direct creation of such facts by the specified entries. In this regard, the certificate of ownership is only a document that formalises the respective right, but is not a transaction based on which this right arises, changes, or terminates, i.e. the certificate of ownership does not give rise to the defendant's right, but only records the fact of its presence. The relevant legal position is set out by the Commercial Court of Cassation of the Supreme Court of Ukraine in decisions No. 925/797/17 of 27.06.2018 [24], No. 927/849/17 of 10.04.2018 [25], No. 917/927/17 from 03.04.2018 [26] and is confirmed by the provision of paragraph 78 of the Procedure for State Registration of Real Rights to Immovable Property and Their Encumbrances¹, which states that in case of acquisition of property rights to real estate, the agreement on sale and purchase of property rights constitutes the document confirming the acquisition of ownership of an object of construction registered with the person.

Remedy of property rights is carried out in accordance with the procedure stipulated by the legislation, and if such a special procedure is not established, the property rights are remedied on the general grounds enshrined in civil legislation. Article 392 of the Civil Code of Ukraine stipulates that the owner of property may file a lawsuit for recognition of their property right, if this right is disputed or not recognised by another person, as well as in case of loss of a document certifying their property right [27]. Accordingly, the plaintiff here will be an entity that considers itself the owner of certain property, but cannot properly exercise its powers due to the existence of doubts concerning this right from third parties or the need to procure title establishing documents. The defendant in this claim may be any person who does not recognise, denies, or disputes the right of the plaintiff to exercise the powers of possession, use, and disposal of the disputed property, or has their interest in this property.

Prerequisite for the application of Article 392 of the Civil Code of Ukraine² is the absence of other ways to recognise the relevant right of ownership of property except the judicial. It is obvious that a special recognition of the right of ownership of property by the court can take place even when the plaintiff does not have the necessary title establishing documents regarding its affiliation. Thus, the Supreme Specialised Court of Ukraine for Civil and Criminal Cases in its decision of February 7, 2014 "On judicial practice in cases of protection of ownership and other real rights"³ outlined legal positions on the application of Article 392 of the Civil Code of Ukraine and noted that the need for such a method of protection of property rights arises, in particular, when the existence of the subjective right of the owner is not confirmed by relevant documents, doubtful, not recognised by other

¹ Decree of the Cabinet of Ministers of Ukraine No. 1127 "On the Procedure for State Registration of Real Rights to Immovable Property and Their Encumbrances". (2015, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/1127-2015-%D0%BF>.

² Civil Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15>

³ Resolution of the Plenum of the High Specialized Court of Ukraine for the Consideration of Civil and Criminal Cases No. 5 "On Judicial Practice in Cases of Protection of Ownership and Other Property Rights". (2014, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/v0005740-14>.

persons, or is disputed. That is, the possibility of consideration of cases on the recognition of property rights stipulated by Article 392 of the Civil Code of Ukraine in courts can be justified not only by the loss, but also by the complete absence of title establishing documents. Therefore, if a person who considers themselves the owner of the newly created real estate, after the completion of construction and commissioning of the object, cannot properly exercise their powers in connection with other persons obstructing the registration of ownership of the newly created immovable property, the rights of such a person shall be subject to remedy by means of filing a claim for recognition of ownership of property belonging to this person, which is a proper and effective way to protect substantive rights.

As noted in the legal literature, any civil agreement must meet certain requirements, compliance with which is necessary [28]. Thus, the content of the agreement on sale and purchase of property rights to real estate must contain a technical description of the apartment as an investment object in the building with the specification of the address of the building, its number, floor, size of the total project and residential area, number of rooms. It is important to attach a plan (scheme) to the agreement, which outlines the corresponding investment object. After all, the agreement is a way of legal regulation of the behaviour of the parties in civil obligations, as the will of the parties is consolidated in the contractual terms, which shall be consistent with provisions of relevant legislation [27]. Pursuant to Article 2 of the Law of Ukraine "On Financial and Credit Mechanisms and Property Management in Housing Construction and Real Estate Transactions"¹ the construction object is a building, structure, or complex of buildings, the construction of which is organised by the developer and carried out by the manager at the expense of funds received for management, and the investment object is an apartment or premises for social and domestic purposes (built into residential buildings or separately located non-residential premises, garage, parking space, etc.) in the construction object, which after completion of construction becomes a separate property.

According to Article 13 of the Law of Ukraine "On Financial and Credit Mechanisms and Property Management in Housing Construction and Real Estate Transactions"², the system of operation of construction financing funds provides, in particular, determination of the specifications of construction objects and investment objects, the transfer of the list of investment objects in the construction objects by the developer to the manager of the construction financing fund, the assignment of the chosen investment object by the manager to the principal, which confirms the order for construction of this investment object as a part of the construction object, transfer of the ownership rights to the investment objects by the manager to the principals who have fully invested these objects under the sale and purchase agreement, as well as state registration of principals' ownership of the investment objects, compliance with the deadlines for construction, compliance with the technical specifications of construction project and investment objects, the use of measures to eliminate the identified shortcomings, commissioning of the construction object by the developer, written notice of the manager, ordering technical documentation for the construction object and for each investment object, transfer of data on the actual area of

¹ Law of Ukraine No 978-IV "On Financial and Credit Mechanisms and Property Management in Housing and Real Estate Transactions". (2003, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/978-15>

² *Ibidem*, 2003.

investment objects to the manager of the construction financing fund, the performance of final settlements by the principal with the manager according to the actual area of investment objects, etc.

The commissioning of completed construction objects is preceded by a technical inventory of the property. Thus, in accordance with Part 1 Article 393 of the Law of Ukraine "On regulation of urban planning activities"¹, technical inventory of real estate is a set of works to determine the composition, actual area, volume, technical condition and/or determine changes in these specifications for a certain period of time with the preparation of corresponding documents (materials of technical inventory, technical passport) with the use of the Register of construction activities. Furthermore, construction objects, houses, buildings, structures, apartments, other residential and non-residential premises, which constitute independent real estate, are assigned the appropriate address (Part 3 Article 263 of the Law of Ukraine "On Regulation of Urban Development"²). In case when subsequent to the assignment of the address there was an adjustment of the design documentation, which may affect the determination of the address of the construction object (change of location of the object, main entrance, etc.), the customer shall specify the need for the adjustment (change, assignment) of address in the respective notice of such changes.

That is, subsequent to the completion of construction and commissioning of the building, certain parameters of both the construction object and the investment object (apartment), for which the agreement on sale and purchase of property rights was concluded, may change, which should be specified in the said agreement. Therewith, if all available documents, schemes, plans, examinations, technical data sheets attest to the fact that it is the same investment object (the apartment which is a subject of the agreement, and the apartment which is created in the course of construction), there are no obstacles to the application of the provisions of Article 392 of the Civil Code of Ukraine³ y in case of alienation of such an investment object to third parties under the guise of another object subsequent to the commissioning of the building. Moreover, the application of Article 392 of the Civil Code of Ukraine in cases of alienation of the investment object to third parties under the guise of another object after putting the house into operation, should be considered a proper and effective remedy for the investor.

Notably, the reasoning of the possibility of applying Article 392 of the Civil Code of Ukraine with regard to newly created real estate, despite the contradictory nature of the judicial practice on this issue, is provided, in particular, in the decision of the Supreme Court of Ukraine of 13 April 2016 in case No. 6-160ц16 [29], which states that protection of property rights to newly created property that was commissioned and issued (registered) to another person, in case this person does not recognise the plaintiff's rights to the disputed property shall be performed in accordance with the procedure prescribed by the legislation, and if such a special procedure is not defined, the protection of property rights is performed

¹ Law of Ukraine No 3038-VI "On Regulation of Urban Planning Activity". (2011, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/3038-17>

² *Ibidem*, 2011.

³ Civil Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15>.

on the general principles of civil legislation (in particular, based on Article 392 of the Civil Code of Ukraine¹).

Furthermore, Article 387 of the Civil Code of Ukraine stipulates the right of the owner to claim their property from a person who illegally, without appropriate legal basis, took possession of it. Therewith, considering the provisions of Article 396 of the Civil Code of Ukraine, which extends the application of real right remedies inherent in the owner to the acquirers of other real rights to another's property, one can conclude that vindication as a separate remedy is available not only to the owner [30-31]. In turn, the defendant in the vindication claim is the illegal holder of the owner's property, who may not be aware of the illegality of possession and maintenance of such property. In this case, illegal owners are considered to be both persons who directly illegally seized someone else's property, and persons who acquired property not from the owner, i.e. from a person who did not have the right to dispose of it. The basis for the vindication claim is circumstances confirming the legitimacy of the plaintiff's claim for return of property from someone else's illegal possession (these are facts confirming the ownership of the claimed property, its disposal from the plaintiff's possession, its being in kind with the defendant, etc.). That is, vindication and other property rights may be available to the owner of rights to immovable property. However, their application must consider the condition of property creation, because it is impossible to vindicate property that does not exist. In other words, as a general rule, vindication, as well as a negative claim against real estate, is possible subsequent the completion of construction and commissioning of the respective objects.

CONCLUSIONS

Therefore, considering the ambiguity of judicial practice on the application of the remedy of substantive rights under Article 392 of the Civil Code of Ukraine in legal relations, the object of which is the newly created real estate, it was established that to properly remedy the violated rights to the newly created object of construction by terminating non-recognition or contesting ownership, it is advisable to apply the remedy prescribed by Article 392 of the Civil Code of Ukraine, namely the recognition of ownership of newly created real estate. This conclusion was drawn in spite of the fact that, upon conclusion of an agreement on sale and purchase of property rights to real estate, the buyer receives a limited real right, under which it is endowed with certain but not all rights of the property owner, and which certifies the right of its owner to acquire ownership of real estate in the future. After all, a buyer who has performed its monetary obligations under the said agreement, having fully paid the contractual value, shall be considered as such that committed actions aimed at the occurrence of legal facts necessary and sufficient to obtain the right to transfer ownership of the construction object.

Ownership of newly created real estate arises from the moment of completion of construction, commissioning of real estate, and from the moment of state registration of ownership. Thus the state registration does not constitute a way of acquisition of the property right and merely confirms the fact of acquisition, change, or the termination of the real rights to immovable property. Furthermore, the issuance of a certificate of ownership does not give rise to the ownership, but only registers the fact of presence of

¹ Civil Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15>.

such a right. Applying to the court to recognise the buyer's ownership of the property invested by them, in accordance with the provisions of Article 392 of the Civil Code of Ukraine, may take place in cases where the property is already built and commissioned, but for which no title establishing documents were procured due to the seller or other persons obstructing the registration of ownership of the investment object under the agreement on sale and purchase of property rights to immovable property, the value of which is paid by the buyer in full, and in case the seller does not recognise the buyer's right to investment object or alienates it to third parties under the guise of another object. In this regard, when recognising the ownership of newly created real estate, the effectiveness of the remedy stipulated in Article 392 of the Civil Code of Ukraine is aimed at eliminating the possibility of further illegal actions of third parties in respect of such property. This is achieved through the enforcement of a judgement by recognising the ownership of a particular object, and in case of its destruction – by obtaining appropriate compensation. Therewith, in cases when the construction of real estate object has not yet been completed and it has not been commissioned, but has been fully invested, an effective way to remedy the violated rights is the recognition of property rights to the investment object in the object of unfinished construction.

Thus, to harmonise the judicial practice and develop common approaches in choosing an effective way to protect the rights of subjects of legal relations, the object of which is newly created real estate, it is necessary to expand the scope of grounds for judicial recognition of property rights under Article 392 of the Civil Code. Such grounds should include not only the loss, but also the absence of title establishing documents in connection with other persons obstructing the registration of ownership of the relevant investment object subsequent to the commissioning of the construction object; non-recognition of the investor's rights to the relevant investment object, or its alienation to other persons.

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Andrii B. Hryniak

Doctor of Law, Professor

Head of the Department of Private Law Issues

Academician F.H. Burchak Scientific Research Institute of Private Law

and Entrepreneurship of the National Academy of Legal Sciences of Ukraine

01042, 23-a Rayevskyy Str., Kyiv, Ukraine

Nadiia V. Milovska

Doctor of Law, Associate Professor

Senior researcher of the Department of Private Law Issues

Academician F.H. Burchak Scientific Research Institute of Private Law

and Entrepreneurship of the National Academy of Legal Sciences of Ukraine

01042, 23-a Rayevskyy Str., Kyiv, Ukraine

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