

SOME THEORETICAL AND PRACTICAL ASPECTS REGARDING ACTION OF EVICTION

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Abstract

The paper is dealing with a few theoretical and practical aspects regarding eviction. This action is not legally established which in turn generated doctrinal debates and practical contradictions.

Key words: *action of eviction, action of claim, possession, new Code of Civil Procedure*

Introduction

Since present-day legislation does not regulate action of eviction and the very few legal texts related to eviction aren't able to establish its requirements, the features of this institution have taken shape in doctrine and jurisprudence. Still, there is no common point of view in terms of its scope, which led to different solutions to similar situations.

The present work is trying to present the institution of action of eviction combining theoretical and practical aspects in order to offer a broader vision of this matter. It is also concerned in revealing some problems regarding this subject, problems appearing in judiciary practice.

Even more, this work presents the special procedure of eviction regulated by the new Code of Civil Procedure, adopted by Law no.134/2010 published in the Official Gazette no.485/ 15.07.2010 whose date of entry into force has not been established.

Content

1. Definition

Action of eviction has no legal regulation although many times in practice, reference is made to the provisions of Article 1410 et seq of the Civil Code. That is why there is no unitary definition of this type of action, even more because its legal nature is controversial. Only in the new Code of Civil Procedure the action of eviction finds a legal basis, allocated with Title XI.

As stated in doctrine and jurisprudence, eviction is a specific sanction of legal tenancy, that is to say those relationships in which one party, called *the lessor*, has committed to purchase to the other party, called *the tenant*, the fixed-term use of a determined and unconsumptible individual good in exchange of an amount of money called *the rent*. So, the action of eviction is that action by which the use of an asset protection is done, the claimant wishing to force the defendant to leave the building.

2. Legal nature. Demarcation from the action of claim

By eviction a right to claim is protected, correlated to the obligation to give back the rented asset, that's why action of eviction is a personal, not real, prescriptive in general limitation period of three years action. It is also a realization of rights action, in terms of patrimonial estate.

In practice, in numerous cases, the difference between action of eviction and action of claim was questioned and also the scope of the two. If the admissibility of the action of eviction in case of

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the existence of locative relationship has been denied neither by any doctrine nor by jurisprudence, still there were different opinions in situations that were faced by courts.

Thus, when the lease has ended or the tenant uses the asset contrary to the destination it was rented for, when there are relationships arising from a residential lease, the lessor has access to action of eviction in order to free his estate. The tenant, as an owner without real legal rights over the asset, is forced to return it. Legal relationships regarding estate lease are obligation relationships, the ownership right of the claimant not being questioned. As stated in jurisprudence¹, the cause of the action of eviction is the defendant's occupying a home without title and the claimant's wish to stop it, establishing a status according to the claimed right, respectively handing over the estate and the cause of the application for summons is the claim of the creditor claimant against the debtor defendant. It is about the obligation of handing over the estate to the creditor which is not equivalent to the obligation of giving or forwarding a real right.

Thus, when the claiming owner aims to force the lease contract holder to free the estate, he has the action of eviction at hand. But it is questioned whether in this situation the claimant can also use the action of claim or whether it would be admissible since the defendant is not owner, but precarious holder.

In a case² in which a situation like that was subject to judicial review, it was said that the defendant's lack of possession of the asset makes the action of claim impossible, the claimant having only an action of eviction available. We think that the solution of The Supreme Court is too restrictive because, if we follow the theory adopted by them, after the prescription term of three years in which the action of eviction can be started has expired, the owner would not have any legal action to regain his own good. It is true that the person having the good as tenant is just a precarious holder and the action of claim is started by the not in possession owner against the non-owning possessor, but the claimed owner should still have the opportunity to choose between the action of eviction and the action of claim. Besides, in practice it is said³ that this option right exists considering that who can do more can be less.

Action of eviction can be instituted only against precarious holder and not against a holder having the asset in property.⁴

When the defendant doesn't hold the asset as a result of a lease contract, therefore he is not a precarious holder owning the estate in someone else's behalf, the claimant hasn't got the action of eviction at hand, he has the action of claim⁵. This is a real, inalienable action, by which the claimant demands legal recognition of his property right upon the asset he has been deprived of.

Thus, when the one holding the asset has no title or he invokes the existence of a title, the property right itself is questioned, which justifies the beginning of an action of claim. In spite of all these, in practice there are solutions which deny this point of view. For instance, the action of eviction was admitted on ground that an action of claim was unnecessary in case the claimant, who has gained his ownership by a court order that substitutes an authentic act of sale purchase, has demanded that the promising vendors, who were denying their intention of selling, to free the estate, therefore, the existence of the ownership right in the vendor's patrimony⁶.

¹ Cluj Court, decision no.1381/20.06. 2002,

² The Great Court of Cassation and Justice, Civil Section, Decision no. .2646/2 .07.2002,

³ D. N. Theohari – Action of eviction, Ed. Hamangiu, București 2010, pag.29,

⁴ The Great Court of Cassation and Justice, Civil Section and Intellectual Property, Decision no.2574/31.03.2005,

⁵ The Great Court of Cassation and Justice, Civil Section and Intellectual Property – Decision no.3045/15.04.2005, The Great Court of Cassation and Justice, Civil Section and Intellectual Property – Decision no.3206/21.04.2005, The Great Court of Cassation and Justice, Civil Section and Intellectual Property – Decision no.2102/17.03.2005, The Great Court of Cassation and Justice, Civil Section and Intellectual Property – Decision no.2574/31.03.2005.

⁶ Cluj Court, decision no.1209/20.05.2010,

Also questionable is the solution of a court invested with a cause regarding the eviction of some people who had abusively entered into a space belonging to the territorial-administrative unit, by breaking the seal. In this case, the judges thought that the person occupying the building without a title was neither owner nor tenant because he was not part of a lease contract, but just a precarious holder. That's why their conclusion was: "the claimant did not try to assert his exclusive and absolute property right within an action of claim which would have forced the debtor to evacuate and hand over the house. In other words, the claimant did not ask for the defendant to be obligated to admit his ownership over the building, but merely to evacuate and to turn it in.

The motivation of the Appeal Court that admitting the action of eviction is conditioned by the existence of a valid lease contract whose effects have already ceased for various reasons and the former tenant having refused to leave the home had no legal basis. To condition the action of eviction exclusively by the existence of a lease contract and in its absence to consider all actions of eviction as being actions of claim with all their consequences is a violation of the principles of Civil Procedure Law and of a long judicial practice, too."⁷

But according to Article 1853 of the Civil Code „the acts we exert on someone else's asset, in a precarious manner, that is as tenants, depository, beneficial owner etc. or on a common thing according to its legal destination does not mean possession as owner. Likewise it's the possession we would have on someone else's asset by means of his permissiveness."

This legal text offers a definition to a state of holding an asset namely precarious holding. Or, the precarious holder is the one who holds the asset given by another person, usually the owner, based on a legal act signed with the latter. In the case shown above the defendants did not hold the building based on a contract or by the owner's permissiveness, which is also a will agreement, but by breaking the seal. Thus, in our opinion, they didn't have the status of precarious holder, but they were holders of the building in territorial-administrative unit's property. It is true that, in order to produce legal effect, possession must be useful, and in the case above, due to breaking the seal, it was based on violence. That's why, in our opinion, only an action of claim would have been admissible.

Also in another situation⁸, the action of eviction was admitted although the defendant, during the entire lawsuit, denied the claimant's status as owner of the building she was asked to leave. In this case, after a contested enforcement the acquirer of the building solicited the debtor's eviction enforced from the entire estate, consisting in building and terrain. The defendant company claimed all along the lawsuit that they owned the terrain as it had not been auctioned, but also the building, based on real estate ascent. Though the eviction of the defendant from the entire estate was ordered on ground that they owned the building without title, the action of eviction not being conditioned by the existence of locative relations. We appreciate that the situation submitted to court was much more complex and it aroused a series of problems which were not taken into account and which could have determined the inadmissibility of an action of eviction.

When the ownership itself is questioned its holder can defend it only in action of eviction. It is true that, in case the owner is also lessor, he can use action of claim too. But if there is no lease contract between the two parties the owner has only claim at hand in order to regain the asset illegally held by someone else.

By Law no.202/ 2010 regarding taking measures for speeding up solving lawsuits it was introduced Article 578 which, although referring to forced handing over of estate assets, shows indirectly the situations that can lead to person evacuation: abusive occupation, without title of a house and endangering cohabitation relations or serious disturbance of public peace. It appears that the legislator tried to solve the problem of the action's of eviction scope in the sense that it enlarged it, such actions being admissible not only in case there are lease ratios but also when the defendant

⁷ Cluj Court, decision no. 1381/20.06.2002,

⁸ The Great Court of Cassation and Justice, Civil Section and Intellectual Property – Decision no.713/4.03.2009.

abusively holds the building without title, or when he has improper conduct which affects cohabitation and seriously disturbs public peace.

Also in the new Code of Civil Procedure, adopted by Law no.134/ 2010, in Title XI, dedicated to the institution of eviction, it is detailed its scope being shown that this procedure applies in cases regarding evacuation of used buildings or illegally occupied by former tenants or other persons holding the estate with or without the owner's permission or tolerance.

3. Procedural issues

a. Locus

Active locus belongs first to the building's owner who is also locator, this being entitled to start an action of eviction to release his asset. In case the estate belongs to several people any of them can initiate such demand as action of eviction represents an act of administration. Regarding this issue, it was stated in jurisprudence⁹ that common property of an asset does not represent for its holders an impediment in performing administrative or availability acts on it, including legal actions which tend to establish in relation to third parties the free ownership on the asset prior to a possible division of it.

Under Article 18 of Law no.230/ 2007 regarding the establishment, operation and status of Owners Associations, "when in homes one of the owners or tenants knowingly prevents the normal use of the building creating harm to the other owners or tenants, the owners or their legal representative can ask the court to decide upon the measures necessary to normal use of the building, as well as upon the damage pay." Thus, this legal text gives the owners and the owner associations the possibility to demand eviction of those whose conduct makes cohabitation in multiple-home buildings impossible.

There were also admitted actions of eviction started by holders of real rights dismemberments of the ownership¹⁰ although they had confessor actions at hand, actions that protect such rights or possessory actions and not actions of claim in the absence of some legal locative relations among parties.¹¹

The Supreme Court¹² appreciated that the right to legally demand eviction of a tolerated person is also given to the tenant, this being a manifestation of the possessory action that he benefits of.

In terms of passive locus, it belongs to the precarious holder who holds the asset for someone else based on a lease contract. The defendant's quality as possessor makes the action in eviction inadmissible. However, based on the provisions of Article 18, of Law no.230/ 2007, courts have disposed eviction even of the co-owner who was knowingly preventing normal use of the building. Also, from the interpretation of Article 578, line2 of the Code of Civil Procedure concerning measures for speeding up solving lawsuits, it is understood that can be evacuated people who abusively without any title occupy a home and people who endanger cohabitation or disturb public peace.

b. The Interest in Promoting Action in Eviction

In practice it was also the question of the admissibility of an action of eviction started by the owner to whom the estate asset was given by court after a partition against his former co-owner. As

⁹ Iași Court decision no.211/R/21.05.2008,

¹⁰ Bucharest Court – decision no.528/R/9.12.2008,

¹¹ D.N. Theohari – Action of eviction, Ed. Hamangiu, București 2010, pag.123,

¹² The Great Court of Cassation and Justice, Civil Section and Intellectual Property – Decision no.109/13.02.2005,

stated in the doctrine¹³ the partition decision remained definitive or irrevocable is an executor title if invested with executor form, being capable of executing no matter if in the request of partition was asked for the asset to be turned in or not and even if the court has not decided this handing over, so starting an action of claim against the co-owner that holds the asset and refuses to turn it in is not necessary. Starting from this issue, if one of the co-owners holds the asset and refuses to hand it over to the other, to whom it was given in court, the latter has no interest in beginning an action of eviction as he can start enforcement.

However, The Supreme Court¹⁴, as a result of admitting an appeal for annulment shows that action of eviction for former co-owners is admissible. Motivating their solution the court showed that, resulting from the partition's declaratory effect, the exclusive ownership goes to the former co-owner to whom the entire estate has been given, the rights of all other co-owners having ceased. Therefore, the action of eviction of these was appreciated as admissible, due to lack of title.

Also the same court appreciated in another case¹⁵, that the partition decision is a title giving the person to whom the estate was given the right to get use of the asset by means of action of eviction.

As we can see, there is no view unit upon this issue. But the new Code of Civil Procedure, adopted by Law no.134/ 2010 - which did not enter into force – solves the problem, we think, because in Article 980 it's stated that "once remained definitive and invested with executor form, the partition decision constitutes executor title and it can be applied even though the effective hand over of the asset was not requested or the court did not specifically ask for it." Thus, from the interpretation of this legal text it is understood that executing the partition decision can require also the eviction of the former co-owner.

As stated in the provisions of Article 981 of the same law, in case the parties specifically declare they do not demand handing over the assets, the partition decision is not susceptible of enforcement. Not even in such situation can the co-owner to whom the estate was given start an action of eviction, as he only has at hand an action of claim in order to take possession of the property whose handing over has been denied by the other co-owners.

For these reasons, it is believed¹⁶ as being uninteresting the beginning of an action of eviction by the person who is entitled by a court order pronounced in an action of claim by which the owner has been forced to give him the estate in full property and peacefully, as this obligation involves the obligation to evacuate the estate too.

c) The Competent Court

In terms of the material competence, it varies depending on the issue type . thus, in civil cases competence belongs to the courthouse, based on the provisions of Art.1 of the Code of Civil Procedure and in commercial cases the competence belongs to the court, based on Art.2, line 1 of the same document.

Territorial competence is determined according to Art.5 and 10 point2 of the Code of Civil Procedure, being alternative competence. This justifies by the fact that action of eviction is specific to lease relationships and according to Article 10, point 2, beside the defendant's domicile court the court where the estate is can also be competent in demands derived from a lease relation. The provisions of Article 13, line1 of the Code of Civil Procedure according to which demands regarding estate assets can be made only to the court where the estate is are not incident. Though not obviously

¹³ V.M.Ciobanu, G. Boroi, Civil Procedure, Ed. C. H. Beck, București, 2009, pag.444,

¹⁴ The Great Court of Cassation and Justice, Civil Section and Intellectual Property – Decision no..4083/18.05. 2005,

¹⁵ The Great Court of Cassation and Justice, Civil Section and Intellectual Property – Decision no..6604/25.11 2004,

¹⁶ D.N. Theohari – Action of eviction, Ed. Hamangiu, București 2010, pag.272,

specified, this law text regards real estate actions and not personal estate actions because for them the Article 10, line 1 and 2 establish alternative territorial competence. As stated in the doctrine, the real demands go for the recovery of a real right or the protection of possession or, by action of eviction the protection of an asset's use is made, this being a personal, not real action.

d. Stamps

Action of eviction is taxed under the provisions of Article 3, letter b of the Law no.146/ 1997, modified by Law no.202/ 2010 regarding some measures for speeding up solving lawsuits, with 10 RON stamp tax and, under Article 3 line 1 of the Law no.32/ 1995 with judiciary stamp valued 0.3 RON.

e. Court Order. Means of Attack and Its Enforcement

The court decides the evacuation of the defendant from the building, a verdict which can be subject to the ordinary and extraordinary means of attack. The right to demand enforcement of a court order of tenants eviction is prescribed in 3 years, starting the day it remained irrevocable, an argument in the matter being the provision of Article 25, line 1 of the Law no.114/ 1996. According to this law, eviction of the tenant can only be done upon irrevocable decision. Since exceptions are caused strictly by interpretation and application the result is that in the other cases appeared in practice the prescription term starts in the day when the decision is final.

Under provisions of Article 578 of the Code of Civil Procedure "no eviction from the home destined buildings can be done since December 1st till March 1st next year unless the creditor proves that he and his family don't have a home or that the debtor and his family have another home where they can move immediately.

Provisions of line 1 are not applied in case of evacuating persons who abusively occupy, with no title, a home nor to those who have been evicted because they endanger cohabitation or disturb public peace."

Thus, by introducing this law, the legislator wished to limit the possibility of eviction of the tenants in winter.

4. Eviction of the people occupying an estate illegally by means of presidential order

In doctrine¹⁷ it is appreciated that once fulfilled the three conditions of admissibility, presidential order can be used in order to evacuate the tenant from the building he holds illegally. This point of view is also found in jurisprudence, some courts¹⁸ appreciating that on ground of Article 581 of the Code of Civil Procedure it is admissible the owner's demand to evacuate by presidential order the person who occupies the building without title. But the principle solution offered by jurisprudence is that this measure cannot be disposed by means of presidential order because it regards the essence of the problem and not a temporary action.¹⁹

5. The special procedure of eviction regulated by the new Code of Civil Procedure

As shown before the new Code of Civil Procedure has dedicated Title XI to the procedure of evicting former tenants or other people occupying estates illegally. The one initiating the action has a choice between this special procedure and the action of common law.

¹⁷ V.M.Ciobanu, G. Boroi, Civil Procedure, Ed. C.H. Beck, București 2009, pag. 406,

¹⁸ The Great Court of Cassation and Justice, Civil Section and Intellectual Property – Decision no.2426 din 25 martie 2004.,

¹⁹ Pitești Court, decision no.462/1998, Suceava Court, decision no. 526 din 12.09.2002,

Regardless of the action's nature competence belongs to the court of justice whom district the illegally occupied estate is in and the defendant will be summoned at this address.

In order to refer his matter to a court the claimant must previously notify the tenant or the occupier of the estate, in the conditions established by the law, the absence of this being a reason to refuse his petition. But according to Article 1026 the tenant can give up his right of being notified which leads to the conclusion that the preliminary procedure is not imperative and the exception of its absence is relative and can be invoked only by the party interested in a certain term.

If the tenant or the occupier previously notified refuses to evacuate or if he has given up his right of being notified and has lost the right to use the estate, the lessor or the owner will ask for his eviction to a court of law.

The petition is judged in emergency procedure in the council chamber with summoning the parties. Exceptionally, if the claimant asks for the eviction due to not paying the rent or tenancy and the contract is executor title for their pay, the petition is solved without summon of the parties. And if the pay of the rent has been also requested the court will solve the eviction demand with summon and will pronounce over the request of pay.

Since it's a special procedure, characterized by emergency, the new code dictates the rule that the summoned defendant cannot formulate counterclaim or a claim of drawing trial on third parties, as he can only invoke substance defence regarding the claimant's petition solidity.

Eviction verdict is enforceable and can be attacked only by appeal within five days since it's been pronounced if it's been given summoning the parties or 5 days since its communication if it's been given without the summon. Also, against its enforcement one can formulate litigation to enforcement by which procedural aspects can be subject to judiciary control if the eviction decision was made summoning the parties or even substance issues can be under control if it was made without summoning.

Usually, enforcement of the eviction verdict cannot be suspended. There is one exception of this rule in case the evacuation has been ordered due to not paying rent. In the litigation to enforcement or the appeal made by the defendant the court can order suspending the verdict's enforcement if he records in cash to the creditor's disposal the established amount of money necessary to pay the rent due until the date of the suspending petition as well as for those due all along the trial. But if, before the expiry of the term until the rent or tenancy has thus been covered, the debtor doesn't deposit the amount further requested by court to cover new rates, the suspending is automatically ceased.

The new Code of Civil Procedure regulates a special procedure for the eviction of those illegally holding estates, an optional procedure but which gives the possibility of solving these litigations in much shorter time.

Conclusions

Being a controversial institution due to its scope the action of eviction needed a legal regulation able to stop the contradictory solutions given in practice. Law no.202/ 2010 regarding some measures for speeding up solving lawsuits the scope has relatively outlined its scope, however without giving this institution legal regulation.

Eventually, the new Code of Civil Procedure allocates a title to regulating the procedure of eviction but it aims at a special optional procedure so people who choose common law to evacuate those illegally occupying their estates will still face contradictory solutions to relatively similar situations.

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