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## LAWSUITS FOR THE PROTECTION OF REAL GUARANTEE RIGHTS

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**ABSTRACT:** *The purpose of the obligation is the realization of the creditor's right through the execution of the obligation. To achieve this goal, when the debtor does not execute the obligation voluntarily, the obligation sanction is activated.<sup>3</sup> In practice, it often happens that from the creation of the obligation and until its execution, a relatively long time must elapse and it may happen that the debtor becomes insolvent or in conditions of mistrust does not execute the obligation he had undertaken.<sup>4</sup> Thus, it is necessary to provide mechanisms to ensure the execution of the obligation. In the entirety of the mechanisms that the Albanian legislator recognizes within the mechanisms for fulfilling the obligations, pledge and mortgage are two institutes that are regulated by the Civil Code and are a real guarantee of securing and guaranteeing the obligation.<sup>5</sup> These guarantees have erga omnes effect, are real rights over the other's belongings and have an accessory character<sup>6</sup>. The purpose of their explicit provision in the Civil Code has been realized in order to prevent the risk that the debtor will alienate his assets and that the preferential creditor will be preferred. These mechanisms in the form of real guarantees achieve the goal of avoiding risks, by means of a minimal possible burden, on the debtor's property and its turnover in the civil circulation<sup>7</sup>. Through this scientific paper, we aim to analyse in detail the lawsuits for the protection of real rights of guarantee, as aspects which receive a significant impact both from a scientific and practical point of view. Thus, in this scientific paper, we will not treat from a material point of view the characteristics of the institutes, their commonalities and peculiarities, but we will focus on the scientific and practical analysis of lawsuits, such as: claim lawsuit, denial lawsuit, report lawsuit of a new work and a possible damage, etc.*

**KEYWORDS:** pledge, mortgage, mechanisms to enforce obligations, real guarantee rights, lawsuits.

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### Claims for protection of pledge.

Civil Code, in its Article 548 has explicitly regulated the protection of the creditor in a pledge legal-civil relationship. There are authors who hold the view that this provision should not be read literally, but extensively, because according to them, even the third person who is a pledge host takes advantage of the rights of this article<sup>8</sup>. From the literal reading of the provision we

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<sup>3</sup> Doc.Andond Sallabanda: 'E Drejta e Detyrimeve' (Pjesa e Përgjithshme), Tiranë 1962, Pg.200.

<sup>4</sup> Idem.

<sup>5</sup> Prof.Dr. Mariana Tutulani-Semini: 'E Drejta e Detyrimeve dhe Kontratave' (Pjesa e Përgjithshme dhe Pjesa e Posacme), Tiranë 2016, Pg.172.

<sup>6</sup> Prof. Dr. Ardian Nuni, Prof. Dr. Ilir Mustafaj, Asim Vokshi: 'E Drejta e Detyrimeve I', Tiranë 2008, Pg.228-229.

<sup>7</sup> Idem.

<sup>8</sup> Olti Skrame: 'Komentari I Kodit Civil të R.Sh' (Vëllimi II), Tiranë 2011, Pg.28.

note that the pledge host who has lost possession of the item or because this item may still be stolen<sup>9</sup>, is legitimized to protect his interest through the investment of the Court and the establishment of: (i) the claim for possession<sup>10</sup>, (ii) the claim for action rei vindicatio<sup>11</sup> and / or (iii) the claim for cessation of the violation of possession.

The creditor may also file a denial lawsuit, but may not file a lawsuit alleging a new work and possible damage. Article 548 of the Civil Code, makes an exception to the general rule established by Article 296, according to which the claim rei vindicatio can be filed only by the owner of the item<sup>12</sup>. However, in the doctrine this exception is considered fair due to the existence of a great interest of the plaintiff to have possession of the item, interest arising from the legal-civil relationship of the pledge, created to ensure the execution of another legal relationship, that of the principal debtor<sup>13</sup>.

Also, for the protection of the right to the credit, the pledge creditor can file various personal lawsuits, such as: compensation for damage, or other personal lawsuits, always based on his real right<sup>14</sup>.

### **Claim rei vindicatio.**

In the substantive law of the civil legislation of the Republic of Albania, the claim rei vindicatio is explicitly provided in Article 296 of the Civil Code.<sup>15</sup> In the sense of this provision, a claim for rei vindicatio is a lawsuit which is filed by the owner of the item, who is stripped of possession, against the possessor or holder of his item. The lawsuit of rei vindicatio has as its form the object of the lawsuit itself the right of ownership.

The possessor can be sued in the lawsuit for the return of the item, only if he possesses the item without a title (without a contract)<sup>16</sup>. Otherwise, the owner can recover the item only if he terminates the relevant contract and further requests the return of the parties to the previous situation, i.e. the return of the item to the owner.<sup>17</sup> In this regard, it should be noted that the claim for the return of the item can be filed only if the possessor does not possess the item according to a title. Referring to the jurisprudence of the Supreme Court of the Republic of Albania<sup>18</sup>, (i) the claim of the return of the item is the claim of the owner illegally stripped of

<sup>9</sup> Idem.

<sup>10</sup> Article 312-313, of Civil Code.

<sup>11</sup> Article 296, of Civil Code.

<sup>12</sup> Olti Skrame: 'Komentari i Kodit Civil të R.Sh' (Vëllimi II), Tiranë 2011, Pg.29.

<sup>13</sup> Idem.

<sup>14</sup> Zeta Tërpollari: Paditë për Mbrojtjen e të Drejtave Reale', Tiranë 2014, Pg.606.

<sup>15</sup> The owner has the right to sue to claim his property from any possessor or holder. This right also belongs to each co-owner of the joint property, so that it is handed over to all co-owners

<sup>16</sup> Olti Skrame: 'Komentari i Kodit Civil të R.Sh' (Vëllimi I), Tiranë 2011, Pg.384.

<sup>17</sup> Idem.

<sup>18</sup> Unified Decision, Supreme Court: Nr. 31, dt. 30.05.2002.

possession of the item against the illegal possessor and, (ii) the person is not the owner if he possesses a stolen item.

The legislature has also recognized this legal instrument to the creditor who has lost possession of the pledged item, who may also file a claim for restitution against the possession lawsuit, if this belongs to the pledge host.<sup>19</sup>

Since the pledge can only be placed on movable, individually defined items, the claim for *rei vindicatio* is limited to these items only. However, since the provision of Article 548 is an exception to the general rule, according to which this right is exercised only by the owner of the item, since this right is explicitly recognized to the pledge creditor, it is worth stopping at some differences, whether the owner of the item or the pledge host is legitimate<sup>20</sup>.

In the case where the legitimate party is the pledge host creditor, the purpose of this lawsuit is to protect the creditor's credit and not to protect the right to property, because the latter is a derivative of the process<sup>21</sup>.

The way the provision is formulated, Article 545 of the Civil Code, leaves us space for interpretation. The expression: '*if this belongs to the pledgee*', implies that the pledgee creditor will act in the claim for restitution only in the capacity of the owner's replacement.<sup>22</sup> In order for a pledge creditor to be legitimized in the return of the item through a claim for restitution, he must prove his quality as a pledge creditor and in this respect his credit right.<sup>23</sup> But, not only that, the creditor must prove all other requirements and subjective conditions provided in the petition of the claim of *rei vindicatio*<sup>24</sup>. Thus, the creditor must prove not only the fact that he has his right of pledge on the object subject to reclaim, but also the fact that he has been illegally deprived of this possession by the respondent.<sup>25</sup>

### **Claim negatoria**

The denial lawsuit is the lawsuit through which the owner requests from the court that the latter (i) recognize the plaintiff as the owner of the item, (ii) not recognize the person who infringes the possession of the plaintiff as the owner of the item, (iii) of prohibit the infringement of property rights by the respondent and, (iv) prohibit this infringement from being repeated in the future.<sup>26</sup> This legal-civil defence tool of the owner for the protection of the right to property, is one of the oldest lawsuits for the protection of the right to property and many

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<sup>19</sup> Article 548, Kodi Civil.

<sup>20</sup> Zeta Tërpollari: Paditë për Mbrojtjen e të Drejtave Reale', Tiranë 2014, Pg.607.

<sup>21</sup> Idem.

<sup>22</sup> Idem, Pg. 608.

<sup>23</sup> Idem.

<sup>24</sup> Idem.

<sup>25</sup> Idem.

<sup>26</sup> Olti Skrame: 'Komentari I Kodit Civil të R.Sh' (Vëllimi I), Tiranë 2011, Pg.389.

elements of this lawsuit, especially those related to active and passive legitimacy, with the proof of this lawsuit, as well as its nature, are almost the same as the claim *rei vindicatio* and thus, the same rules apply as for the claim for *rei vindicatio*.<sup>27</sup>

In court practice, there are cases when the pledgee creditor is positioned as a plaintiff in the negative claim under Article 302 of the Civil Code, however, the doctrine circulates that in the interpretation of Article 302, this way of protection also belongs to the pledgee creditor.<sup>28</sup>

The reasons why this group of authors thinks that this legal-civil tool can be used by the pledge creditor, are opinions embraced in the Italian literature<sup>29</sup> and by the Spanish Civil Code<sup>30</sup>. *Inter alia*, one of the reasons is that, since the pledgee creditor has the right to use the claim for restitution, the right to use the negative claim should not be denied, while the pledgee creditor has an interest in the item.

### **Mortgage protection lawsuits.**

Mortgage is one of the safest tools that guarantees the fulfilment of obligations. Its definition is explicitly provided for in Article 560 of the Civil Code, according to which: '*The mortgage is a real right placed on the debtor's or a third party's property, for the benefit of the creditor, to ensure the fulfilment of an obligation*'.

The provisions of the Civil Code<sup>31</sup> which regulate the Mortgage Institute as a means of guaranteeing the execution of obligations do not explicitly provide for the protection of the mortgage, but this real right benefits protection by referring to the concrete provisions on the mortgage if the latter is registered<sup>32</sup>. To protect his credit right, the mortgage creditor may file: (i) a lawsuit alleging a new work and a possible damage and / or (ii) various personal lawsuits, e.g. compensation for damage, etc.

### **Claim for reporting a new work and possible damage.**

This is another means of protecting the right of ownership that is recognized to the owner of the item<sup>33</sup>. This lawsuit is filed to prevent any damage that may be caused to the owner or the person who owns a real right over this item<sup>34</sup>.

As it results from the content of the provision, this lawsuit is filed only in cases when there is a new work, which can harm the owner of the item and / or the person who enjoys a real right over the item, precisely for him. avoiding this damage that may be caused to his property by

<sup>27</sup> Prof.Dr. Ardian Nuni, Luan Hasneziri: 'E Drejta Civile II' (Pronësia), Tiranë 2010, Pg.475.

<sup>28</sup> Zeta Tërpollari: Paditë për Mbrojtjen e të Drejtave Reale', Tiranë 2014, Pg.609.

<sup>29</sup> P.Rescigano: 'Codoce civile- le fonti del diritto italiano', A.Giuffre Editore-Milano 1994, Pg. 1017

<sup>30</sup> Article 544-4/2, Spanish Civil Code.

<sup>31</sup> Article 560-584, Civil Code.

<sup>32</sup> Zeta Tërpollari: Paditë për Mbrojtjen e të Drejtave Reale', Tiranë 2014, Pg.611.

<sup>33</sup> Article 303/1, Civil Code.

<sup>34</sup> Prof.Dr. Ardian Nuni, Luan Hasneziri: 'E Drejta Civile II' (Pronësia), Tiranë 2010, Pg.492.

this new work started, he is legitimized to file this lawsuit, which by its nature is a fast and conditional lawsuit in time and with other conditions.<sup>35</sup>.

According to this lawsuit, in the case of a mortgage, the mortgage creditor has the right to ask the court to terminate those actions and acts, which can cause significant damage to the mortgaged object as a result, his right is endangered and loan.

In addition to the lawsuit alleging a new work and a possible damage, the doctrine holds that nothing prevents the mortgage creditor from defending his credit right through the lawsuits provided for in Article 607 of the Civil Code. to challenge the debtor's legal actions by means of a Paulina lawsuit, but only if the value of the loan is not covered by the value of the mortgaged item<sup>36</sup>.

## CONCLUSIONS

At the end of this scientific paper, we highlight some conclusions regarding the lawsuits for the protection of real rights of guarantee.

*First*, we have identified the real means of securing the execution of obligations, such as pledge and mortgage, explicitly provided by civil legislation, the latter treated in the Civil Code.

*Second*, we have addressed, for each guarantee, lawsuits for the protection of real warranty rights, which take on special importance for law scholars and its practitioners, in order to have a clearer background of the legal instruments that the penitentiary creditor and the mortgage lender has the option to protect his credit against the debtor.

*Third*, we have analysed by applying the methodology of legislative analysis, the comparative methodology and that of jurisprudence analysis, legal mechanisms such as: (i) the claim for rei vindicatio, (ii) the negative claim, (iii) the claim for reporting a news work of item and possible damage, as well as other personal lawsuits that the creditor may use in practice.

*Fourth*, we have focused on the characteristics of these lawsuits with a focus on ensuring the enforcement of obligations so that practitioners of law and its researchers have the opportunity to choose the right legal instrument in case of filing a lawsuit. claim before the competent Court.

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<sup>35</sup> Idem, Pg. 493.

<sup>36</sup> Zeta Tërpollari: Paditë për Mbrojtjen e të Drejtave Reale', Tiranë 2014, Pg.613.

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