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Notary's executive inscription

In the article, the authors consider the work of a notary as an activity aimed not only at preventing legal conflicts, but also at assisting in resolving conflicts during the notary's execution of an executive inscription. In this regard, the authors analyze the structure of the legal conflict, as well as the functional and procedural role of the notary in the process of resolving it. Executive inscription, according to the authors, is at the peak of its popularity, acting as an extrajudicial form, it (executive inscription) seeks to help in the restoration of those civil rights that have been subjected to violations, and for this purpose the mechanism is used to recover from debtors in favor of creditors money or property, and the main advantage is that the protection is carried out without mandatory recourse to the court. The theoretical elaboration of the notary's executive inscription is little represented by the works of modern authors. The authors note that although a notary has the right to make an executive inscription according to the indisputable requirements of the creditor, nevertheless notaries practice this notarial action, but not without consequences for themselves.

Keywords: notary; executive inscription; indisputability; proceedings for the execution of an executive inscription.

Introduction

The notary, as a special institution of the legal system of society, realizes public interest by creating favorable conditions for the economic activities of subjects of legal relations. It carries out the tasks of ensuring the stability of civil circulation and economic development [1; 174].

The state has always referred the notary to the sphere of protection of property rights of individuals and legal entities. Notarial acts certifying property rights have always been a means of protecting real and binding rights [2; 10].

In the conditions of dynamic development of civil turnover, the need for prompt and effective means of confirmation and protection of rights and legitimate interests of its participants is becoming more and more apparent. In Kazakhstan, judicial form of rights protection is most often preferred. This situation is conditioned, first of all, by the fact that it is judicial acts, created within the framework of a special procedural form, is provided with the power of state coercion, which makes them the most effective means of protection of rights.

However, such a load on the judiciary and enforcement bodies causes a number of problems related to the quality of justice, unreasonably long court proceedings, insufficient awareness of citizens about the activities of the judicial system, ineffective execution of judicial acts, lack of necessary conditions for the implementation of justice and other problems. In addition, the lack of an effective system for the enforcement of enforcement documents also contributes to the formation in society of legal nihilism, disrespect for the law and the court, disregard for one's civil and other obligations established by law, the development of corruption, and the encouragement of unlawful behavior.

Jurisdictional bodies other than courts have great potential in ensuring the protection of the rights and legitimate interests of participants in civil turnover. In particular, the notary, which is an effective means of confirmation and protection of civil rights in the framework of undisputed jurisdiction, but the shortcomings of normative-legal regulation do not allow it to realize its full potential.

Currently, it can be said that state policy is aimed at solving existing problems in this area. This is evidenced by the presence of a number of special programs, as well as the measures provided for by them to reform the judicial system, notary systems and executive proceedings, improve the legal regulation of their activities.

One of the directions of development of the notary and notarial activity is the expansion of the range of notarial acts that have the force of executive documents.

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Materials and methods

The methodological basis of the study was formed by general scientific methods (analysis, synthesis, deduction, induction, generalization, analogy, transition from abstract to concrete), methods of theoretical analysis (system approach, combination of historical and logical), methods of empirical research (comparison, grouping, statistical analysis) and others.

While adhering to a generally systematic approach, such private-scientific methods as historical-legal, formal-legal, and comparative-legal were applied.

The system approach, allowing analyzing and synthesizing data obtained as a result of various studies, made it possible to form a holistic view of the subject of study, to identify a variety of links of its components and to bring them together in a single theoretical picture.

Results and Discussion

In the Republic of Kazakhstan for more than fifteen years there was no public procedure for the execution of notarial acts, and the notary's executive inscription was excluded from the types of notarial acts back in 2000.

Since January 1, 2016, amendments to the Law of the Republic of Kazakhstan dated July 14, 1997 "On Notary" have been enacted, the innovations consist in giving notaries the right to perform two new actions: conducting conciliation procedures, expressed in the notarial certification of the agreement on dispute resolution, as well as the execution of executive inscriptions [3].

According to V.V. Argunov executive inscription officially certifies the emergence and existence of borrowing legal relations of the parties to the obligation [4]. According to A.V. Artamonova and Yu.O. Milinova, an executive inscription represents an exceptional additional opportunity for debt collection, or vindication of the debtor's belongings against the creditor, through a simpler procedure [5; 89].

As D. Kenshimova notes, the executive inscription is an alternative to writ proceedings, proceeding from the significant simplification of the recovery of property from the debtor for indisputable claims, which is due to the need to reduce the burden on judicial authorities, to release from the burden of indisputable cases in the field of both private and public legal relations. The notary's executive inscription has the force of an executive document and is the most important legal instrument capable of providing a quick and effective resolution of claims of an indisputable nature [6].

It should be noted that modern legislation does not provide a legal definition of the concept of "executive inscription". And in this regard, in order to ensure the unity of judicial practice of application by the courts of the legislation governing the issues of notaries making an executive inscription, the Supreme Court of the Republic of Kazakhstan issued a Normative Decision "On the application of legislation by the courts when considering cases on contesting an executive inscription" [7].

Paragraph 2 of this resolution provides that the executive inscription is a notary's order to collect a certain sum of money due to the debtor from the debtor or to recover other movable property.

At the same time, the procedure for its commission is regulated by a special law — "On the Notary" and the Rules for notarial actions by notaries [8].

The purpose of the notary's executive inscription is that on its basis money can be recovered or property from the debtor can be claimed out of court.

An executive inscription is made on documents that establish a debt.

On the basis of the executive inscription, debt collection is carried out for the following indisputable requirements:

1) on the fulfillment of an obligation based on a notarized transaction, including the fulfillment of dispute settlement agreements certified by a notary as a pre-trial settlement in cases established by this Law or stipulated by a contract;

2) on the fulfillment of an obligation based on a written transaction, the deadline for the fulfillment of which has come and non-fulfillment of the obligation is recognized by the debtor, including in response to a claim sent to the claimant as part of the pre-trial dispute settlement procedure;

3) on the fulfillment of the obligation based on the protest of a bill of exchange in non-payment, non-acceptance and updating of the acceptance made by a notary;

4) on the reclamation of the leased item in accordance with the leasing agreement or the laws of the Republic of Kazakhstan;

5) on foreclosure on the subject of collateral after the expiration of the loan repayment period presented by the pawnshop to the pledging debtor;

6) on debt collection from owners of premises (apartments) who evade participation in mandatory expenses for the maintenance of the common property of the condominium object, approved by the Law of the Republic of Kazakhstan “On Housing Relations”, with the exception of claims for the recovery of additional expenses;

7) on debt collection on the basis of public contracts for services actually consumed (electricity, gas, heat, water, etc.), as well as other contracts for services according to established tariffs, the payment term for which has come;

8) on the recovery of lease payments due to their non-payment within the terms established by the lease agreement;

9) on the collection of wages accrued but not paid to the employee and other payments, including the collection of mandatory pension contributions to the Unified Funded Pension Fund;

10) on the execution of agreements on the settlement of disputes concluded as a participatory procedure.

The collection of penalties (fines), interest, if any, is carried out on the basis of an executive inscription, with the exception of bank loans, with the written recognition of the debtor of an unfulfilled obligation.

The execution inscription shall be made when the debtor recognizes guilt in the unfulfilled obligation; the notary confirms the fact of recognition of guilt in the unfulfilled obligation, unless the contract provides for a different mechanism for the recovery of penalties (fines), interest.

The notary's executive inscription is an executive document that is subject to enforcement (paragraphs 11-1) of paragraph 1 of Article 9 of the Law of the Republic of Kazakhstan “On Enforcement Proceedings and the status of bailiffs”) [9].

The notary's executive inscription is regarded as a means of combating an unscrupulous debtor, a way of protecting the creditor's interests.

Despite the positive aspects of this institute, we believe that it has not yet fully worked in Kazakhstan. In practice, there are still problems.

For example, the issue of documents for which debt collection is carried out in an indisputable manner on the basis of executive inscriptions is debatable. The list of requirements for which debt collection is carried out in an indisputable manner on the basis of inscriptions is legislatively fixed, however, there is no list of documents for which it is possible to collect debt by means of an executive inscription. For example, an executive inscription can be issued for any property obligation based on a notarial transaction; what specific written transactions allow for a notary to apply to a notary for an inscription if their terms are violated; what requirements apply to the latter transactions? These issues are not fully regulated by law.

The problem of determining the indisputability of the requirement as the conditions for the implementation of the executive inscription. An executive inscription shall be executed if: the submitted documents confirm the indisputability of the debt or other liability of the debtor to the recovered; no more than three years have passed since the date when the right to claim (application) arose. The greatest complexity of interpretation is the condition of indisputability. The notary shall ascertain from the collector the absence of a dispute between the parties regarding both the fact of existence of the debt and its amount, in connection with which the collector shall submit relevant documents on this account — correspondence between the parties, an act signed by the parties on the amount of the debt as of a certain date, a claim, a response to it, etc. The scope of these documents is not established by law. In each case, the notary shall make sure, at his own risk and responsibility, that there is no dispute about the right. In this direction, there are no requirements for written transactions that guarantee that claims arising from transactions are undisputed [10].

Unfortunately, it should be noted that the execution of the executive inscription can be easily canceled. The debtor shall have the right, within ten working days from the date of receipt of a copy of the executive inscription, to send objections to the declared claim to the notary who made the executive inscription in writing with notice. The law does not require the objection to be motivated. Upon receipt of such an objection, the notary issues a resolution on the cancellation of the executive inscription.

If an objection is not received by the notary after the above period, as well as upon receipt of a notification of the delivery of a copy of the executive inscription to the debtor, the notary issues an executive inscription to the recovered for its execution. If, by the notary's resolution, the perfect executive inscription on the debtor's objection is not canceled, the executive inscription is challenged in court.

And in this case, the court most often cancels the notary's executive inscription. Accordingly, when making an executive inscription for a notary, the risk of being involved in a lawsuit is great with all the prospects that follow from it.

Conclusion

The notary in Kazakhstan is intended to ensure in accordance with the legislation of the Republic of Kazakhstan the protection of the rights and legitimate interests of citizens and legal entities by notaries of notarial actions provided for by legislative acts on behalf of the Republic of Kazakhstan.

When performing notarial acts, the notary shall be guided by general rules, characteristic for the performance of all notarial acts, and special rules, characteristic for the performance of individual notarial acts.

On the territory of the Republic of Kazakhstan, the fundamental law in the field of notarization is the Law "On Notary" and the Rules for notarial actions.

Since January 1, 2016, notaries in Kazakhstan have been granted the right to issue an executive inscription.

The notary's executive inscription ensures a faster and more effective implementation of the protection of the violated right, especially according to such criteria of cases as collection of rent arrears from the tenant under rental agreements, collection of collateral relations, where delaying the process, unnecessary red tape lead to negative consequences.

Its action consists in the operational and real restoration of violated subjective rights. The use of a simplified procedure for extrajudicial protection of the law, in particular the execution of an executive inscription by a notary, the constitutional principle of guaranteeing the protection of the rights and interests of citizens increases the effectiveness and effectiveness of their use in practice.

However, with all the obvious simplicity of using the executive inscription, there is some stagnation in their implementation. The absence of a legally enshrined procedure for its commission and, importantly, the procedure for the execution by bailiffs of the executive inscription is to blame.

The Institute of executive inscriptions refers to non-judicial forms of protection of creditors' interests and provides it by formalizing debt collection from unscrupulous debtors in a simplified manner without calling them to the notary office.

An executive inscription is made at the place of registration or the place of residence of the debtor (individual), if another address is not indicated in the contract, if the debtor is a legal entity, then at the place of its registration or the location of its permanent body.

For a number of material and legal requirements, their formal indisputability is quite obvious, that is, the claims of the plaintiff (applicant) are firmly substantiated and documented, and the defendant cannot raise any objections on the merits.

Some scholars conclude that as the general conditions for the execution of the executive inscription, it is necessary to introduce a rule according to which the creditor, in all cases without exception, must document the fact of notifying the debtor of the need to pay off the debt.

In the opinion of other scientists, the best option to ensure confirmation of the indisputability of the debt would be for the notary to obtain the debtor's consent to the execution inscription, which is sent immediately before the performance of this notarial act. According to other scientists, the best way to ensure the confirmation of the indisputability of the debt could be to obtain the consent of the debtor by a notary to make an executive inscription, which is sent immediately before the commission of this notarial action.

At present, there are still many questions concerning the executive inscription, both in theory and in practice, which gives grounds for formulating proposals for amendments to the legislation on notary.

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Нотариустың атқарушылық жазбасы

Мақалада нотариаттың жұмысын тек даулардың алдын алуға ғана емес, сонымен қатар нотариустың атқарушылық жазба жасау барысында дауларды шешуге жәрдемдесуге бағытталған қызмет ретінде қарастырған. Осыған байланысты авторлар құқықтық даудың құрылымын, сондай-ақ оны шешу процесінде нотариустың функционалдық және іс жүргізу ролін талдаған. Атқарушылық жазба, авторлардың пікірінше, қазіргі жағдайда үлкен сұранысқа ие, соттан тыс форма ретінде әрекет етеді, ол (атқарушылық жазба) бұзылған азаматтық құқықтарды қалпына келтіруге көмектесуге тырысады және бұл үшін борышкерлерден ақша қаражатын несие берушілердің пайдасына өндіріп алу немесе мүлікті талап ету механизмі қолданылады, ал басты артықшылығы — бұндай қорғау міндетті түрде сотқа жүгінбей жүзеге асырылады. Нотариустың атқарушы жазбасының теориялық дамуы қазіргі авторлардың еңбектерінде аз кездеседі. Авторлар нотариус несие берушінің даусыз талаптары бойынша атқарушы жазба жасауға құқылы болғанымен, нотариустар бұл нотариаттық әрекетті өздері үшін салдарсыз емес, тәжірибеде қолданатынын атап өтеді.

Кілт сөздер: нотариат, нотариус, атқарушылық жазба, даусыздық, атқарушылық жазба жасау жөніндегі іс жүргізу.

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Исполнительная надпись нотариуса

В статье рассмотрена работа нотариата как деятельность, направленная не только на предотвращение юридических конфликтов, но и на содействие в разрешении конфликтов в ходе совершения нотариусом исполнительной надписи. В связи с этим авторы подвергают анализу структуру юридического конфликта, а также функциональную и процессуальную роль нотариуса в процессе его разрешения. Исполнительная надпись, по мнению авторов, находится на пике своей популярности, выступая внесудебной формой, она (исполнительная надпись) стремится к тому, чтобы помочь в восстановлении тех гражданских прав, что подверглись нарушениям, а для этого используется механизм взыскания с должников в пользу кредиторов денежных средств или истребования имущества, а главное преимущество в том, что защита осуществляется без обязательного обращения в суд. Теоретическая разработанность исполнительной надписи нотариуса мало представлена работами современных авторов. Авторы отмечают, что, хотя нотариус вправе совершить исполнительную надпись по бесспорным требованиям кредитора, тем не менее нотариусы практикуют данное нотариальное действие, но не без последствий для себя.

Ключевые слова: нотариат, нотариус, исполнительная надпись, бесспорность, производство по совершению исполнительной надписи.

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