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Some Aspects of the Refusal to Open the Proceedings under the Civil Procedural Legislation of Ukraine

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Abstract — The analysis of court practice in Ukraine shows the lack of a common approach to the use of the grounds for refusal to open proceedings. In addition, under the same conditions the civil procedural legislation of Ukraine envisages adoption of various decisions, not always specifying their procedural legal nature. The article aims to identify issues of grounds for refusal to open proceedings application depending on the type of trial in civil proceedings of Ukraine, and to develop the solutions for such issues. Despite the exhaustive list of grounds for refusal to open proceedings, in practice judges should also consider the provisions of substantive law.

Index Terms — the refusal to open the proceedings, court ruling, civil litigation, action proceedings, clerks proceedings, separate proceedings, civil jurisdiction.

1. Introduction

T The issue of the court proceedings opening has always attracted the attention of procedural scholars and remains relevant in the context of changes to current civil procedural legislation of Ukraine.

First of all, it should be noted that the Civil Procedural Code (hereinafter - CPC) of Ukraine [1] provides the uniform procedural document, since the adoption of which terms of consideration of civil case start - a court ruling. However, if there are grounds for refusal in action proceedings judge decides to deliver a ruling on refusal in opening the proceedings, and in clerks procedure – a ruling on refusal to accept the application for a court order issuance. At first glance this legal structure is justified because it does not deprive the person of the right to appeal to the same requirement in action proceedings. However, a detailed analysis of p. 3 Art. 100 CPC of Ukraine allows to conclude that there are two groups of grounds for refusal to accept the application for a court order:

1) those that do not deprive a person the right to bring proceedings in action trial (§ 1-2 p. 3, Art. 100 CPC of Ukraine);
2) Those that deprive persons of possibility to protect their rights in civil proceedings regardless of the type of trial (§ .2-5 p. 2, Art. 122 CPC of Ukraine).

The second group of reasons is inherently unconditional grounds for refusal to open proceedings in the civil case. Thus, in case of death of a person who stands the creditor (in procedural relations - recipient) or debtor in alimony obligations are not legal succession and, consequently, the judge has no grounds for the opening of the proceedings irrespective of the type of trial. In my opinion, the notion of "refusal to accept the application for a court order" should be abandoned and only the ruling on refusal to initiate the proceedings should be left in the CPC of Ukraine. Instead, the first group of reasons should be defined as additional grounds for the return of the application for a court order similar to the results of the detection of the dispute during the court trial in separate proceedings when the court delivers a ruling on leaving the application without consideration. In such a way there will be ensured a unified approach not only to the opening proceedings but also to refusal to commence proceedings and to returning the claim (application) as well.

Terms of the CPC of Ukraine on separate proceedings do not contain specific grounds for refusal to open the proceedings, however, Art. 271 and 276 CPC of Ukraine provide for the possibility of enacting a court ruling on refusal to accept applications in separate proceedings. This is a situation where the applicant appeals to the court before the expiration of statutory one-year deadline for the transfer of ownerless immovable property into municipal ownership or on acknowledgment of the heritage abandoned. Unlike the decision on refusal to accept the application for a court order, the decision to refuse to accept the application in separate proceedings allows for re-treatment by the applicant in the same type of trial in civil proceedings.

I consider that in case of compliance with the terms of appeal with the appropriate application in separate proceedings circumstances justifying the request of the applicant are being changed, so that the person can apply again in separate proceedings, despite the presence of decision on refusal to initiate the proceedings. Under these conditions, the use of refusal to accept the application structure in clerks and separate proceedings is unjustified. If the person appeals before the end of the statutory term the court should in all cases, regardless of the type of trial enact a ruling on refusal to initiate the proceedings. It goes about the cases of restoration of parental rights (p. 7, Art. 169 of the Family Code of Ukraine [2]), declaring a person dead (Art. 46 of the Civil Code (hereinafter - CC) of Ukraine [3]) or recognition missing (Art. CC of Ukraine) on acknowledgment heritage abandoned (p. 2, Art. 1277 CC of Ukraine), the transfer of ownerless immovable property into municipal ownership (p. 2, Art. 335 CC of Ukraine).

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2. Some Grounds for Refusing to Open Proceedings in a Civil Case

2.1. The Case is Subject to Be Reviewed According to Different Type of Trial

Common reasons for refusal to open the proceedings are defined in p. 2 Art. 122 of CPC of Ukraine.

The first ground for refusing to open the proceedings is that the application cannot be considered in civil proceedings. This legal formulation, particularly the notion "application" refers to the versatility of the reasons for the refusal to open the proceedings for all types of trial in civil cases. However p. 3 Art. 100 of CPC of Ukraine does not contain proper reference to § 1, p. 2, Art. 122 of the same Code. Instead, the Supreme Specialized Court of Ukraine for Civil and Criminal Cases notes that cases to be considered in the economic or administrative proceedings cannot be considered in clerks proceedings (paragraph 3 of Resolution of the Plenum of the Supreme Specialized Court of Ukraine for Civil and Criminal Cases "On the practice of considering applications by the courts in the order of clerk proceedings "of 23 December 2011 [4]).

Overall, the procedural scholars note that stated reason for refusal to open proceedings covers the following conditions [5, p. 219]:

- the case is to be considered in the order of another type of trial;
- the claim has no legal character;
- the lack of civil procedural legal capacity of the subject of appeal;
- the lack of interest of the subject of appeal.

When deciding on whether or not considering of the application is subject to the civil jurisdiction, the following points are to be examined. First, despite the exhaustive list of cases to be considered in order of economic or administrative proceedings, the most of controversial issues are resolved at the level of Supreme specialized courts plenum resolutions. Second, chosen by the plaintiff method of protection impacts on the jurisdiction determination. For example, if the individual without the status of entrepreneur will appeal to the economic court for protection of the preferential right to purchase shares of a private company by recognizing the contract null and void, the judge of Economic Court refuse to accept a claim under § 1 p. 1 Art. 62 of Economic Procedure Code of Ukraine [6]. Thus, changes in statutory method of protection (in this case – the transfer of rights and obligations of the buyer to person, whose pre-emptive right has been violated (p. 5, Art. 7 of the Law of Ukraine "On Joint Stock Companies" [7])), leads to the change in the jurisdiction of the case.

In the practice of courts often occur cases of individual appeal to the court in which the method of protection is not prescribed by law. According to Art. 4 of CPC of Ukraine court protects the rights, freedoms and lawful interests of individuals, the rights and interests of legal entities, state and public interests in the manner determined by the laws of Ukraine. However, this legal wording is incorrect. In p. 2, Art. 16 of CC of Ukraine there is established that the rights and interests can be protected otherwise established by law or agreement of the parties. In addition, p. 2, Art. 275 of CC of Ukraine provides for the application of methods of protection of moral rights, which are not mentioned in the law, but which provide full elimination of the negative consequences of the violation of this right. The position of the Supreme Court of Ukraine, who, referring to the European Court of Human Rights said that ultimately efficient way should provide redress and in case of failure of such redress - to guarantee the person to get his or her appropriate compensation, is favorable [8].

Only the fact the use of chosen method of protection can violate the disposition of legal regulation of relationships covered by civil jurisdiction can indicate its illegality. However, in most cases such a fact can be investigated only during consideration of the merits of the case. All in all, refusal to commence proceedings due to the fact that the case is not subject to review in civil proceedings, because of choosing by a person method of protection, not under Art. 16 of CC of Ukraine or other law is inadmissible. Thus, the absence of specific method of protection in the law does not mean that the requirement has illegal nature.

2.2 Illegal Nature of the Dispute

Regarding to the unlawful nature of the requirements it should be noted that under the legislation of Ukraine there is no list of requirements that are not subject to review in the courts. At the same time, everyone understands that the appeal to the court to enforce the human purchase contract is illegal, because it is contrary to all the possible principles of law and under the Criminal Code of Ukraine is punishable deed. Investigating in the actions of a person of a crime is the responsibility of the police. That is why courts, as a rule, open proceedings, decide the case on the merits, deny the claim, and, where appropriate, decide to separate rulings. However, judges are guided by art. 124 of the Constitution of Ukraine [9] (as amended on June 28, 1996): jurisdiction of the courts extends to all legal relations arising in the country. However, it is necessary to consider the following:

1) courts decide cases arising from the relationships that directly regulated by the law;
2) the subject of a civil case in court is a relationships, settled by applying the statute analogy or analogy of law (Art. 8 of the CC of Ukraine);
3) while solving the cases courts cannot decide matters within the exclusive competence of other public authorities, local governments and others. These bodies include: the local councils for disposal of communal land ownership, medical and social expert commission on disability, commissions on the rights of rehabilitated rehabilitated status, general assembly as the supreme body of the company, etc.

However, it should be emphasized that at September 30, 2016 the amendments to the Constitution of Ukraine (on justice) of 2 June 2016 will come into force [10]. According to these changes in court jurisdiction extends to any legal dispute and any criminal prosecution in certain cases courts can hear

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other cases as well. The new version of Art. 124 of the Constitution of Ukraine is considered to be controversial. First, not every dispute arising between the parties can be called legal. Moreover, it is not known who will determine the legal nature of the dispute and by which criteria? This in turn will result in inconsistency of judicial practice. Second, how to interpret the concept of "other matters that in certain cases the courts consider"? It seems that these are cases, which are not legal. Perhaps the practice of this constitutional provision applying will cause a lot of questions, fom scientists as well, as from practitioners.

All of the above mentioned conditions can be set only during the consideration and resolution of the case, since before the removal to the retiring room the court has no right to evaluate the evidence, and therefore to give legal qualification to the relationships which are the subject of proceedings.

2.3 The Lack of Procedural Capacity

The issue of the lack of procedural capacity, in my opinion, should be seen in the following aspects:

1) lack of procedural capacity regardless of the type of the case;
2) lack of procedural capacity in a particular case.

The creation of a public association by a notification of formation can be an example of the first situation. This association does not acquire legal personality (Art. 16 of the Law of Ukraine "On public associations" [11]), and therefore has no civil personality and as a result of procedural capacity.

Sometimes the appropriate authority of the legal entity or structural subdivision, not a legal entity are mentioned in the statement of claim as the plaintiff or defendant, in these cases the judge should refuse to open proceedings under § 1 p. 1 Art. 122 of CPC of Ukraine.

The lack of procedural capacity in a particular case is related to the orders of the substantive or procedural norms to subjects that can apply with the claim (application) in a particular case. As a rule, the legislator clearly indicates the persons who may be applicants in separate proceedings (Art. 237, 279 of CPC of Ukraine). However, in exceptional cases the similar legal structure can be used for action proceedings. In particular, Art. 110, 128, 165 of the Family Code of Ukraine provide an exhaustive list of persons who may be plaintiffs in cases arising out of family relationships.

In cases where the rule of substantive or procedural law defines the scope of persons who have the right of appeal to the court, it goes about that others have is no legal standing in this particular case. Nevertheless, this person has procedural legal capacity in other categories of cases.

In these circumstances, we cannot talk about the lack of appeal subject's legal interest in the case. A person may be interested in the claim, but he or she has no right to go to court with the claim.

The lack of interest can not be ground for refusal to open the proceedings, since only during the proceedings the court may establish unjustified treatment of persons' claim to protect their legitimate interests. The only time the law deprives the subject of interest is the appeal under § 3 p. 3 Art. 23 of the Law of Ukraine "On Prosecution" [12]. Therefore, if a prosecutor pointing himself as a plaintiff drawn to represent the state's interests in the face of public companies during the elections, the referendum and the creation of the media, political parties, religious organizations, engaged in professional self-government, other NGOs and in the legal relations connected with the activity of the Verkhovna Rada of Ukraine, President of Ukraine, the judge should refuse to open the proceedings.

2.4 Court Practice on Implementation of the Grounds for Refusal to Open Proceedings in the Civil Case

It is worth mentioning that the resolution of Plenum of the Supreme Specialized Court of Ukraine for Civil and Criminal Cases and the Supreme Court of Ukraine also indicate the reasons for refusing to initiate proceedings in a particular case covered by § 1, p. 2, Art. 122 of CPC of Ukraine. According to paragraph 17 of the Resolution of the Supreme Court of Ukraine "On judicial practice in cases of inheritance" [13] entitled to claim the invalidity of the covenant occurs only after the death of the testator. This means that during the lifetime of the testator the judge should refuse to open the proceedings. Such a finding should be made from the content of the Art. 1254 of CC of Ukraine, according to which the testator during his life can change and cancel the will. Similarly, a under article 24 of the same Regulation courts refuse to commence proceedings to determine additional term for the inheritance, if the consent of heirs who accepted the inheritance, and if the person has not appealed to them to provide such consent.

Moreover, in paragraph 17 of the Resolution of the Supreme Court of Ukraine "On judicial practice in cases for protection of honor and dignity of the individual and business reputation of physical and legal persons" [14] courts did not consider, and therefore, when applying such a claim must to decree the decision to refuse the opening of proceedings, claims refute the information contained in particular in sentences and other judicial decisions in resolutions of the investigation, forensic examinations, decisions of the authorities, local authorities and other relevant bodies, certifying commissions the decision to impose disciplinary action on the person for whom the law set different procedure for appeal; scientific dispute that the request for retraction of a scientific nature.

In accordance with paragraph 5 of Resolution of the Supreme Court of Ukraine Plenum "On judicial practice in civil cases on disclosure by banks of information containing bank secrecy regarding legal and natural persons" [15] courts should refuse to commence proceedings at the request of law enforcement agencies in the implementation of operational activities on the disclosure of information containing bank secrecy.

Grounds for refusal to open the proceedings provided in §.2-4 chp. 2, Art. 122 of CPC of Ukraine have repeatedly been the subject of research in textbooks, articles and scientific comments, so we will not dwell on this. I will only note that the existence of a court order, which came into force and which is kind of a judgment of the court of the refusal to open the proceedings, which entered into force should also be grounds for refusal to open the proceedings provided for in § .2. p. 2, Art. 122 of CPC of Ukraine.

The death of an individual in a contentious relationship that does not allow the succession as a general rule shall result in the adoption of resolution on refusal to initiate the proceedings. Relationships that do not allow the succession listed in Art. 1219 of CC of Ukraine.

Exceptions to this rule concerning disputing of the parenthood are set in p. 1, 3 Art. 137 of Family Code of Ukraine.

Termination of legal entity through liquidation entails the refusal to initiate the proceedings. While analyzing § 5 p. 2, Art. 122 of CPC of Ukraine it should be noted that succession to the rights and obligations of legal entities takes place not only in case of itstermination by merger, acquisition, separation, transformation, and in the case of a legal person creation by separation. However, while the legal entity creation by entity separation, an entity which made separation, does not stop, despite the fact that some of the rights and responsibilities transferred to the newly created entity. So claims, which are the subject of those rights, adequately plaintiff is a legal entity created by the separation.

It should also be noted that when the case came before the judge to decide on the proceedings, the judge must first establish the absence of grounds for refusal to open the proceedings, which will provide savings of procedural formalities.

3. Conclusions

Thus, despite the exhaustive list of grounds for refusal to commence proceedings under Part. 2, Art. 122 of CPC of Ukraine, in practice there are many problems that are ambiguously decided by the courts. Under these conditions, the role of Supreme specialized courts and the Supreme Court of Ukraine in the development of unified court practice heightens in this area. Trends of procedural law unification must provide the a common approach of judges to refuse to commence proceedings if for this reason.

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