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APPENDICES TO THE STATEMENT OF CLAIM: BETWEEN DEMANDING AND EXCESSIVE CONDENCY

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Subject of the research. The article deals with the problems of access to court and violation of the adversarial principle in case of unreasonable decision by the court to leave the claim without movement. The purpose of the research: to determine the nature of possible violations of the principles of access to justice and competitiveness at the time of filing a claim and to identify a way to eliminate violations. Research methods: formal-legal method, analysis, synthesis, formal-logical method.

The main results. The procedural and legal consequences of non-compliance with the requirements for a statement of claim is the issuance by the court of a decision to leave the statement without movement, in which it indicates the grounds for this procedural action and the period during which the plaintiff must eliminate the circumstances that served as the basis for leaving the statement of claim statements without movement (part 1 of article 136 of the Civil Procedure Code of the Russian Federation). The problem is that an appeal against this ruling is not provided. In cases where the shortcoming of the submitted application is the absence of evidence in the annex to it, which is impossible for the applicant to obtain, the applicant will not be able to comply with the court order or appeal against the ruling issued by the court. In fact, the applicant is deprived of access to the court. In this situation, the plaintiff cannot count on any court assistance in obtaining (reclaiming) the necessary evidence: the court provides assistance in collecting evidence only at the stage of preparing the case for trial, i.e. after the case has been opened. The Constitutional Court of the Russian Federation did not see any problems in this situation, because it is impossible to independently appeal the ruling of a court of general jurisdiction on leaving the statement of claim without movement, however, failure to comply with the requirements specified in it is the basis for issuing a ruling on the return of the statement of claim, against which a private complaint can be filed. The paradoxical nature of such a statement that leaving the statement of claim without movement does not prevent the further movement of the case.

In our opinion, the problem under discussion would be solved much easier if Article 136 of the Civil Procedure Code of the Russian Federation had provided for the obligation of the court to accept the statement of claim, that is, to initiate a civil case after the deadline set by the court for the presentation of evidence, provided that the applicant justifies the impossibility of obtaining requested documents for reasons beyond his control. Then it would be possible for him to receive the assistance provided by law from the side of the court. Otherwise, the person may lose access to the court.

Conclusions. The court has the right to point out the shortcomings of the statement of claim, which is carried out by issuing a ruling on leaving the statement of claim without movement, indicating the deadlines for execution. If the plaintiff fails to submit the requested evidence within the time limit set by the court, the court returns the claim to the plaintiff. In this moment the balance in the implementation of the principles of competitiveness and judicial activity is violated. Therefore, it is proposed in this situation to accept the statement of claim after the expiration of the period appointed by the court for the provision of evidence, and to assist the plaintiff in obtaining it.

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1. Introduction

Justice in civil cases is carried out on the basis of competition and equality of the parties. The obligation to prove the circumstances on which the interested parties base their claims and objections rests with them. I.V. Reshetnikova rightly points out that the one who is responsible for the result of the procedural action must have the authority to perform the relevant actions. The procedural risk when considering issues of proof is almost entirely borne by the parties. Each party has the duty of proof, failure to comply with which may lead to a negative consequence for it [1, 100-101].

The very question of proving as a duty is debatable in the judicial literature [2, 177-186; 3, 58; 4, 106; 5, 154-155; 6, 65]. M.K. Treushnikov believes that the specificity of procedural relations is such that one can speak of proving both as a right and as an obligation of the persons participating in the case. At the same time, it is extremely difficult for the party itself, without the help of the court, to determine the legal significance of all the facts and their full volume [6, 60, 64, 67]. The presence of two components: the competitiveness of the parties and assistance to the parties in exercising their rights, in their relationship contributes to the establishment of the truth [7, 127-142]. The issues of the importance of the stages of evidentiary activity and the responsibilities of parties at each stage are also given considerable attention in the judicial literature [8, 123; 9, 25; 10, 14-18; 11, 73; 12, 33].

Part 1 of Article 57 of the Code of Civil Procedure stipulates the possibility of assisting the court in collecting and demanding evidence if it is difficult for the persons, participating in the case, to present the necessary evidence. However, the opportunity to apply to the court with a request for assistance in presenting evidence arises for the applicant only after his application is accepted by the court. But the documents confirming the circumstances on which the plaintiff bases his claims must not only be indicated, but also attached to the statement of claim, and if the specified requirements are not met by the applicant, the court has the right to leave the statement without movement, and subsequently return the statement, unless evidence is presented.

2. Deprivation of the possibility of appeal

The mutual influence of the civil and arbitration procedural codes affected Article 136 of the Code of Civil Procedure, which in the new edition is practically rewritten from Article 128 of the Arbitration Procedural Code [13, 14-18]. The procedural and legal consequences of non-compliance with the requirements established by Articles 131 and 132 of the Code of Civil Procedure entail the abandonment of the application without movement, which indicates the basis for this procedural action and the period during which the plaintiff must eliminate the shortcomings (part 1 of Article 136 of the Code of Civil Procedure). An appeal against this ruling, in contrast to the previous wording of the article, is not provided. If the shortcomings indicated in the ruling are not eliminated within the prescribed period, the court returns the statement of claim (clause 7, part 1, article 135 of the Code of Civil Procedure). The applicant in this situation cannot count on any assistance of the court in obtaining (reclaiming) the necessary evidence, because case has not been filed.

It is reasonably noted in the judicial literature that the burden of proof on the parties and the powers of the court to collect evidence appear at the next stage of the process. At the stage of initiating a civil case, the judge does not have the right to demand additional evidence. The new version of Article 136 of the Code of Civil Procedure regarding the withdrawal of the right to appeal against the decision to leave the application without movement raises the question of the implementation of the principle of access to justice [14, 34-35]. The question of the accessibility of justice also arises in connection with the expansion of the list of information that the applicant must indicate in the application, and the documents that must be attached to it, given that the applicant may not always have this information or the possibility of obtaining it independently [15]. Thus, the literature describes the problems of the implemented electronic document management system on the example of labor disputes [16, 241-256]. The issues of leaving the statement of claim without

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movement, as well as its return (including on the grounds of failure to present evidence) are "dangerously close" to the possibility of exercising the right to access to court, the right to justice.

Of course, no one directly says that the plaintiff has no right to sue. Compliance by the plaintiff with the requirements for the form and content of the statement of claim is one of the conditions for exercising the right to bring a claim. Failure to comply with the conditions entails other consequences compared to those due to the absence of prerequisites for the right to bring a claim, if they are identified before the initiation of a case, the judge leaves the application without movement [17, 538-539]. The problem is that the conditions for the applicant can become an insurmountable obstacle.

The legitimacy of this approach is assessed in the judgments of the European Court of Human Rights, and in the rulings of the Constitutional Court of the Russian Federation, and in the rulings (determinations) of the Supreme Court of the Russian Federation, and in the procedural literature.

The assessment of the European Court is of a general, advisory nature. The ECtHR recalls that an overly narrow interpretation of procedural rules may violate the right of access to justice. When applying procedural rules, courts must avoid both erroneous formalism, which may violate the fairness of the process, and excessive leniency, which may lead to the leveling of procedural rules established by law. The right to access to justice will be violated if the law ceases to serve the purposes of legal certainty and the proper administration of justice and becomes a barrier preventing the dispute on the merits from being considered by a competent court. In the Judgment of 13.03.2018,[1] the ECtHR notes that the right to justice, of which the right of access to a court is a part, is not absolute and there are implied limitations to this right. These restrictions are compatible with Article 6(1) of the Convention only if there is a reasonable balance of proportionality between the means used and the aim pursued.[2]

The Constitutional Court of the Russian Federation has also repeatedly dealt with the issue of whether the requirements of Article 136 of the Code of Civil Procedure violate the constitutional right to judicial protection (the constitutionality of Article 136 of the Code of Civil Procedure was checked both in the version before 01.10.2019 and in the current version).

Thus, in the case on the complaint of Mr. Makhmutov, the Constitutional Court came to the conclusion that the provisions of Articles 131, 132, 136 of the Code of Civil Procedure do not violate the constitutional norms guaranteeing the right to a court. According to the Constitutional Court, these articles of the Code of Civil Procedure are aimed at implementing the constitutional requirement for the administration of justice on the basis of adversarial and equal rights of the parties, as well as the requirement to create conditions for a comprehensive and complete examination of evidence by the court, the establishment of factual circumstances and the correct application of legislation.[3] In the case on the complaint of Mrs. Yakovleva, the Constitutional Court of the Russian Federation pointed out that the absence in Article 136 of the Civil Procedure Code of an indication of the possibility of appealing against the ruling on leaving the statement of claim without motion cannot be regarded as violating constitutional rights,

[1] Judgment of the ECtHR dated March 13, 2018 in the case of Adikanko and Basov-Grinev v. the Russian Federation, complaints No. 2872/09 and 20454/12. Bulletin of the European Court of Human Rights. Russian edition. 2019. No. 5.

[2] Judgment of the Grand Chamber of the ECtHR dated 29.11.2016 in the case of the Parish of the Greek Catholic Church in Lupeni and others v. Romania, complaint No. 76943/11, § 89. Precedents of the European Court of Human Rights. Special issue. 2017. No. 9.

[3] Determination of the Constitutional Court of the Russian Federation of September 29, 2016 No. 2105-O "On the refusal to accept for consideration the complaint of Mr. Makhmutov F.R. on the violation of his constitutional rights by Articles 131, 132 and 136 of the Code of Civil Procedure of the Russian Federation". Consultant Plus.

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including the right to judicial protection, such a court decision does not prevent the further progress of the case, while the possibility of its verification during an appeal against the ruling on the return of the statement of claim is not excluded.[4]

3. Movement without movement

It should be noted that the statement of the Constitutional Court of the Russian Federation that leaving a statement of claim without movement does not prevent the further movement of the case sounds somewhat paradoxical and it is no coincidence that in practical comments it is noted that some courts consider complaints against rulings on leaving a statement of claim without movement with reference to Art. 331 of the Code of Civil Procedure, which establishes that the rulings of the court of first instance may be appealed to the appellate instance separately from the decision of the court by the parties and other persons participating in the case (private complaint) if: 1) this is provided for by the Code of Civil Procedure; 2) the ruling of the court excludes the possibility of further progress of the case. Examples of such an approach to the implementation of the provisions enshrined in Article 136 of the Code of Civil Procedure are given by A.Yu. Gusev [18].

Overcoming the impossibility of appealing against the decision to leave the statement of claim without movement through appealing the decision to return the statement in the literature is considered as a "circumvention of the law", there are also time costs for these procedures [19, 33-37].

In some cases considered by the Supreme Court of the Russian Federation as a court of cassation on the complaints of plaintiffs, whose statements of claim were returned without consideration on the basis of their failure to provide evidence, he indicated that the courts should have assisted the parties in collecting evidence, in particular, when access to the last to private individuals was closed. An example is the decision of the Judicial Collegium for Civil Cases of the Supreme Court of the Russian Federation dated May 14, 2013 No. 5-KG13-12 in the case of invalidating a marriage.[5] In this case, the plaintiff was prevented from presenting the marriage certificate of her husband in China. The collegium formulated the need for the following actions: since the applicant fulfilled part of the requirements of the court ruling on leaving the application without movement, the statement of claim should have been accepted (note that the marriage document was not submitted). In the ruling of the board, it was noted that the return of the application to her in this situation violated her right to judicial protection.

The rule on appeal speaks of an obstacle to the progress of the case. When the application is left without movement, formally there is no case yet, it has not been initiated. E.F. Evseyev considers the reference to the absence of the civil case itself at the time of the ruling to be a "deliberately weak" argument and sees the main problem in the unsuccessful wording of Part 1 of Article 331 of the Code of Civil Procedure ("the exclusion of the possibility of further progress of the case"), believing that the best option would be a direct indication the legislator on the possibility of appealing against a specific definition [19, 33-37].

The problem is also seen in the fact that the absence of the possibility of appeal, as it were, presumes the innocence of the judge, even excluding the assumption that the imposition was erroneous.

Issues arising from the implementation of the provisions of Article 136 of the Code of Civil Procedure, as well as Articles 128 of the APC and 130 of the CAS, are actively discussed in the procedural literature. Some authors propose to abandon the rules providing for the possibility of leaving the application without movement, since the right of the court to leave the claim without movement and the right to file a complaint against such an action of the court lead to the complication

[4] Determination of the Constitutional Court of the Russian Federation dated November 25, 2020 No. 2705-O "On the refusal to accept for consideration the complaint of Mrs. Yakovleva G.N. to the violation of her constitutional rights by Article 136 of the Code of Civil Procedure of the Russian Federation". ConsultantPlus.

[5] Reference legal system «Consultant-plus».

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and delay of the process, and compliance with the requirements for the statement of claim can be checked when preparing the case to trial [20, 70-78]. One can hardly agree with such a position, since it will be the same “excessive indulgence”, the inadmissibility of which the ECtHR warned, removing responsibility for improper execution of the statement of claim and complicating the work of the court at the stage of preparing the case.

It seems that the problem would be solved much easier if Article 136 of the Code of Civil Procedure provided for the obligation of the court to accept the statement of claim after the expiration of the period set by the court for the presentation of additional evidence, provided that the applicant justifies the impossibility of obtaining the required documents for reasons beyond his control. Then it would be possible for him to receive the assistance provided by law from the court.

4. Deviation from the principle of competitiveness?

The obligation of the persons participating in the case to present the evidence necessary for the consideration of the case to the court is an important aspect of the competitiveness in civil proceedings. Under the necessary evidence understand the means of proof, the use of which is mandatory within a certain category of cases. The nature of this obligation is interpreted in different ways. S.V. Nikitin proposes to develop clear and mandatory lists of mandatory evidence for a particular category of cases, which it is advisable to cite in the decisions of the Plenum of the Supreme Court of the Russian Federation [21, 64]. The proposed option in practical terms is interesting in that it allows all the evidence to be divided into two categories: mandatory (for the failure to present which at the stage of filing an application, such an application will be left without movement) and all others, which are not difficult to collect at the stage of preparing the case for trial, especially since Articles 149 and 150 of the Code of Civil Procedure provide for specific procedural actions for this.

Undoubtedly, the requirements of part 1 of article 136 are aimed at ensuring the presentation of evidence on time, and for the timely presentation of evidence to the court, mechanisms are needed to influence the participants in procedural legal relations [22, 33-37]. The only question is the effectiveness and fairness of such mechanisms.

Thus, in a particular case, it was clearly unacceptable to leave the statement of claim without movement with a proposal to the plaintiff to provide evidence that would confirm the nature of the legal relationship between him and the defendant and would make it possible to apply the law "On Protection of Consumer Rights", since this requirement conflicts with Art. 148 of the Code of Civil Procedure, according to which, at the stage of accepting a statement of claim, the determination of the law governing the disputed legal relationship is premature, since this is the task of the stage of preparing the case for trial. The requirement of the court to provide additional evidence at the stage of initiating a civil case is in conflict with the principle of competition [23, 53-60].

Almost all publications that address the issue of leaving a statement of claim without movement note the active use of this power by the courts, both illegally (in the above case, demanding additional evidence from the plaintiff to confirm the nature of the legal relationship) and simply “petty” [24, 31 -34]. At the stage of accepting applications for proceedings, judges often make mistakes, including excessive pickiness, as evidenced by numerous judicial practice [19, 33-37]. Such reasons for leaving the statement of claim without movement include the requirements of the courts to attach to the statement of claim, in addition to notification of the delivery by the plaintiff to other persons participating in the case, copies of the statements of claim and documents attached to it, also an inventory of the investment, calling into question the good faith of the plaintiff [14 , 34-35; 25, 46-48]. In fact, it is presumed that the applicant is abusing his rights. Meanwhile, in the literature, the category of "abuse of the right" is sufficiently developed and is defined as an unlawful form of opposition to the implementation of the law, which implies the onset of harmful consequences or the threat of their onset, associated with the abusing subject's desire to obtain benefits of various nature by leveling legal requirements [26, 12]. It is unlikely

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that the situations under consideration fall under such a definition.

The problem of exclusion from Art. 136 of the Civil Procedure Code, the possibility of challenging the ruling on leaving the statement of claim without movement, despite the confirmation by the Constitutional Court of the Russian Federation of the constitutionality of this innovation, is not considered unequivocally resolved in procedural science. On the one hand, there is an opinion that this innovation should contribute to procedural economy, simplification of the judicial process [27, 50]. According to other authors, which we join, this innovation limits the accessibility of justice [24, 31-34; 28, 3; 14, 34-35]. In addition, the faultlessness of the actions of the judge at this stage of the procedural activity is presumed.

We agree with the opinion of a number of authors that there are still deviations from competition in the amended provisions of the Code of Civil Procedure. On the one hand, changes in a number of norms of the Code of Civil Procedure (including new requirements for the content of a statement of claim and the obligation to disclose evidence) are aimed at developing procedural activity, the responsibility of interested parties, but at the same time, these same norms shift some of the traditional for the court in civil proceedings duties on the persons involved in the case, unloading the court and complicating the process for those for whom this court exists [29, 121]. Deviation from the adversarial principle and conducting a trial outside this principle significantly infringes on the rights and freedoms of citizens and does not add authority to those who are obliged to administer impartial and fair justice [30, 27].

S.V. Lazarev notes that, due to the principle of adversarial nature, the parties have the freedom to determine the internal (substantive) side of the evidentiary activity, they decide what evidence to present in what form. However, the formal (external) side of evidentiary activity is not at their disposal. Judicial leadership exists objectively, regardless of the position of specific authors about it, timely and fair resolution of cases by the courts is unthinkable without judicial leadership in the course of the case [31, 43, 53, 56]. It seems that such a proposal contains the necessary balance between the actions of the parties and the court, taking into account their real possibilities.

5. Conclusion

Summing up, it should be emphasized that the statement of claim in form and content, of course, must meet the requirements prescribed by law. In particular, it must indicate the circumstances on which the plaintiff bases his claims, and evidence confirming these circumstances (clause 5, part 2, article 131 of the Code of Civil Procedure). Moreover, this evidence must be attached to the application. If the applicant has not fulfilled this requirement, then the court should have the right to indicate the need to fulfill it, which is carried out by issuing a ruling on leaving the statement of claim without movement, indicating the deadlines for execution. Failure to provide evidence within the time limit set by the court shall result in the return of the application to the plaintiff. At this moment, the balance in the implementation of the principles of competitiveness and judicial activity is possible. It is with this that our proposal is connected - to accept the statement of claim after the expiration of the period appointed by the court for providing evidence, provided that the applicant justifies the impossibility of obtaining them due to circumstances beyond his control, and to assist the plaintiff in obtaining them. Otherwise, the court has abstained from its obligation to assist the person concerned in exercising his right, including the right to a court.

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