DOI 10.52468/2542-1514.2024.8(3).132-141

ON THE ISSUE OF STANDARDS OF PROOF IN THE PRACTICE OF THE SUPREME COURT OF THE RUSSIAN FEDERATION IN BANKRUPTCY CASES**

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Article info
Received –
2024 March 21
Accepted –
2024 June 20
Available online –
2024 September 20

Keywords
Bankruptcy, establishing the size of creditors' claims, recognition of a fictitious transaction as invalid, standard of proof, credibility in evidence, source of evidence, balance of probabilities, clear and convincing evidence

The subject. Paragraph 3 of item 26 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation (SAC) dated June, 22, 2012 No. 35 "On some procedural issues related to consideration of bankruptcy cases" has been interpreted by doctrine and judicial practice as establishing a higher standard of proof for certain disputes considered in bankruptcy cases. However, the SAC does not mention any standards; the court's explanations are dedicated to assessing the reliability of evidence coming from a person interested in the favorable case outcome. Therefore, before concluding that the SAC introduced standards of proof, its approach should be analyzed from the perspective of concepts long known to Russian procedural law, namely: "credibility in evidence", "source of evidence".
The purpose of the study. To determine whether paragraph 3 of item 26 of the Resolution of the Plenum of the SAC dated June, 22, 2012 No. 35 establishes any standard of proof.
Methodology. Methods of analysis and comparison based on practice of the SAC, of the Supreme Court of the Russian Federation, of scientific research in the field of civil procedural law.
The main results of research and the field of their application. The approach of the SAC represents a specification of the universal thesis that credibility in evidence is linked to its source, in relation to bankruptcy cases. The addressed explanation cannot be perceived as introducing higher standards of proof for bankruptcy cases. Evidence is assessed based on properties of its source when resolving any civil law dispute.
Conclusion. The conclusion about existence of a fact cannot be made solely on the basis of evidence which source is a person interested in establishing this fact.

** The research was financially supported by the Russian Science Foundation, project No. 24-28-00565, "Standards of proof in the Russian legal system", https://rscf.ru/project/24-28-00565/.

ISSN 2658-4050 (Online)

1. Introduction

Over the last years, the subject of standards of proof has gained considerable researchers' attention [1 – 11]. As noted by A. G. Karapetov and A.S. Kosarev, the term "standard of proof" defines the minimum of a judge's subjective confidence in veracity of a disputed fact, at which the court is ready to acknowledge the burden of proof imposed upon the parties concerned as fulfilled, and the burden of refutation (proving the opposite) imposed upon the opponent, and the corresponding factual circumstance, after examination and assessment of all evidence presented by both parties, as proven. According to I.V. Reshetnikova, the standard of proof represents a degree of certainty that the circumstances of the case have been established, and the court is able to make a decision [13, p. 26-27]. A.A. Smola proposes the following definition of the standard of proof: it is a set of criteria for assessing evidence that courts are to apply when considering cases of a specific category, enabling, in particular, to determine sufficiency of evidence of required reliability (for a particular legal conclusion) [14, p. 129-165]. S.L. Budylin defines the standard of proof as a criterion, based on which, for purposes of judicial process, it is established whether a particular fact occurred [15, c. 25-57].

The subject of our consideration is the approach of the Supreme Arbitration Court, as expressed in Paragraph 3 of item 26 of the Resolution of the Plenum of the Supreme Arbitration Court dated June, 22, 2012 №35 "On some procedural issues related to consideration of bankruptcy cases". It states: "When assessing reliability of existence of a claim based on a transfer of cash to the debtor, confirmed solely by a receipt or a voucher, the court, among other things, should consider whether the creditor's financial position (considering their income) allowed providing the debtor with the respective funds, whether there are satisfactory details on how the funds were spent by the debtor, whether the receipt of the funds was reflected in accounting and tax records, etc. Also, in such cases, if there are doubts about time of documents processing, the court may order a relevant expertise, including on its own initiative (Article 50, Clause 3 of the Bankruptcy Law)".

This position has become the basis for a series of legal propositions of the Supreme Court regarding the standard of proof in bankruptcy cases. Thus, in one of propositions, the Court states: "Given debtor's bankruptcy and competition among his creditors, to prevent unfounded claims against the debtor and thereby violation of his creditors' rights, higher requirements are presented for proving circumstances related to emergence of the bankrupt debtor's indebtedness"[1].

In the Ruling dated August 22, 2022, №305-ES22-7163, the Judicial Chamber on Economic Disputes of the Supreme Court of the Russian Federation, having annuled acts of the lower courts, pointed out that they had not established the fact of the creditor making payment in the light of the standard provided by Item 26 of the Plenum of the Sumpreme Arbitration Court of the Russian Federation Resolution dated June 22, 2012, №35 "On some to consideration of bankruptcy cases"[2].

2. Is a higher standard of proof established for cases determining the size of creditors' claims?

Concluding that the Supreme Arbitration Court's approach is essentially a standard of proof, the Supreme Court simultaneously determines the nature of such a standard. For example, the Court

[1] Ruling of the Judicial Chamber on Economic Disputes of the Supreme Court of the Russian Federation dated September 25, 2017 № 309-ES17-344(2) in case № A47-9676/2015. Law-inquiry computer system "ConsultantPlus".

[2] Ruling of the Judicial Chamber on Economic Disputes of the Supreme Court of the Russian Federation dated August 28, 2022 № 305-ES22-7163 in case № A41-34210/2020. Law-inquiry computer system "ConsultantPlus".

ISSN 2542-1514 (Print)

states: "The basis for entrering the register is the creditor's presentation of evidence that clearly and convincingly confirms existence and amount of debt to him" (Item 26 of the Resolution of the Plenum of the Supreme Arbitration Court dated June, 22, 2012 №35 "On some procedural issues related to consideration of bankruptcy cases"[3]. The words "clearly and convincingly" definitely refer to the proof standard of "clear and convincing evidence", used by courts in the USA and explored in the Russian doctrine for possible borrowing. As S.L. Budylin notes, the "clear and convincing evidence" standard is stricter than the "preponderance of evidence"[4], and its essence is that the party must convince the jury (or the judge) that reliability of a considered fact is highly likely, or to convict them of the fact's truthfulness. However, this standard does not require eliminating all reasonable doubts. [15, p. 25-57].

Apparently, the Supreme Court adheres to the following logic. Had there been no bankruptcy, and if the creditor approached the debtor with a claim for recovery of funds received under a loan agreement, presentation of a properly drafted receipt would have allowed the plaintiff to successfully prove the fact of cash transfer. However, in a situation of bankruptcy, rules change, now, a receipt is insufficient for establishing the required fact. Therefore, the standard of proof "has been increased", and now it is not the "preponderance of evidence", applied according to the Supreme Court's in ordinary lawsuit process, but "clear and convincing evidence".

It must be acknowledged that differentiating the role of various pieces of evidence for different disputes and procedures is absolutely justified; however, fundamentally, it does not mean application of different standards of proof. Let's propose the following assumption: Item 26 of the Resolution of the Plenum of the Supreme Arbitration Court №35 isn't about standards of proof, but about the connection between reliability of evidence and its source.

Any piece of evidence must have a source of origin[5]; specifying the source is a requirement that allows to consider the evidence as judicial. Yet, a source disclosed by a process participant sometimes possesses its unique features, characteristics, flaws, important for evaluating information provided by the parties. Therefore, the question arises: is it possible to assess reliability of evidence based on properties of its source? And if so, to what extent?

In the doctrine of civil procedure, debates on this subject are mainly centered around personal evidence, unsurprisingly: the position of subjects providing pleadings or testimonies to the court can often serve as a reason for doubting reliability of the information they provide.

Reflecting on assessment of reliability of personal evidence, K.S. Yudelson notes that "asessment of personality of the subject providing the court with information, as well as their relationships with the parties and personal interest in the outcome of the case cannot be a criterion for reliability of evidence" [16, p. 99]. At the same time, the author believes that this does not exclude considering these circumstances in relation to other case data when assessing reliability of evidence [16, p. 100] and agrees with impossibility of ruling in favor of the plaintiff based solely on testimonies of witnesses who are hostile to the defendant [16, p.

[3] Ruling of the Judicial Chamber on Economic Disputes of the Supreme Court of the Russian Federation dated January 31, 2024 №303-ES23-17584 in case №A73-6893/2021, see also: Ruling of the Judicial Chamber on Economic Disputes of the Supreme Court of the Russian Federation dated July 13, 2018 №308-ES18 -2197 in case №A32-43610/2015. Law-inquiry computer system "ConsultantPlus".

[4] In Enlish - "balance of probabilities".

[5] This conclusion follows from the provisions of Part 2 of Article 50 of the Constitution of the Russian Federation: "In administration of justice, the use of evidence obtained in violation of federal law is not permitted".

99]. As far as we can see, K.S. Yudelson's point is that the interest of a person being a source of evidence is not an unequivocal testament to its unreliability (otherwise, statements from the parties and third parties should be immediately excluded from the set of evidence for the case) [16, p. 99], however, such evidence can be considered reliable only if there are other evidence.

M.K. Treushnikov, regarding pleadings from the parties, says: "The complexity of assessing pleadings of the parties is due to the fact that the information subject to assessment comes from individuals interested in the outcome of the case… This circumstance requires the court's special attention when deciding on reliability or falseness of facts provided by the parties" [17, p. 193]. The author states the same difficulty in relation to witnesses' testimonies, "when witnesses of either party have a certain, albeit non-legal, interest in the outcome of the case and present facts from the perspective of the interests of either party" [17, p. 210].

It should be noted that confirmation of connection existing between reliability of evidence and its source is found in the norms of procedural law. For example, under Part 2 of Article 177 of the Civil Procedure Code of the Russian Federation, when questioning of a witness, a presiding officer clarifies witness's relationship to persons involved in the case. It is quite obvious that this rule is aimed at establishing witness's prejudice against any of the persons involved in the case, their motives to provide inaccurate, false testimony. Information provided by a witness about their relationship with the parties to the dispute may serve as a motive for assessing evidence as reliable or, conversely, not worthy of trust. Regarding the ruling of Part 2 of Article 177 of the Civil Procedure Code, M.A. Fokina notes that most witnesses in civil cases are in friendly, familial, or work-related relationships with a party, and knowing the nature of relationships between a party and a witness is important for correct assessment of witness's testimony [18]. V.V. Molchanov comes to a similar conclusion [19].

Part 1 of Article 68 of the Civil Procedure Code establishes that pleadings from parties and third parties regarding circumstances known to them, significant for correct consideration of the case, are subject to verification and assessment along with other evidence. As I.V. Reshetnikova points out, this rule is conditioned by specificity of pleadings from parties and third parties, namely that these are provided by interested parties themselves, who are best informed about the essence of the dispute under consideration. When verifying reliability of information provided by named persons, their interest in the outcome of the case should be taken into account[20].

Bearing in mind that reliability of evidence, in general, can be assessed based on characteristics of its source, let's examine the clarification given by the Supreme Arbitration Court in item 26 of the Resolution of the Plenum №35. In the procedure of establishing validity of creditors' claims, the court resolves a dispute over rights between the creditor and the debtor. However, a dispute in the bankruptcy case fundamentally differs from an ordinary lawsuit process: due to the debtor's bankruptcy, satisfaction of creditor's claims to enter the register will affect interests of other creditors. Firstly, bankruptcy creditors claim the debtor's property, which is insufficient to cover all the bankrupt's debts; and secondly, they are interested in preserving their influence on the bankruptcy procedure management. At first glance, interests of bankruptcy creditors determine their right to object to claims of creditors to enter the register (Part 2 of Article 71 of the Bankruptcy Law) [6].

At the same time, from the moment signs of bancruptcy appear, the debtor ceases to act in the interests of treir creditors [21, p. 353-354]. It is

[6] Federal Law dated October 26, 2002 N127-FZ "On Bankruptcy". Law-inquiry computer system "ConsultantPlus".

ISSN 2542-1514 (Print)

assumed that they are driven by other goals: to hide assets that could be subject to recovery, as well as to increase the volume of fictitious, controlled indebtedness to prevent distribution of assets between real creditors. In this sense, interests of the debtor are opposed to interests of the creditor objecting to other persons' entry im register.

The source of written evidence, as well as personal evidence, is a person [16, p. 192]. The Supreme Arbitration Court, formulating its approach, points to two pieces of evidence of transferring cash to the debtor: a receipt and a cash order voucher. The source of both these documents is the debtor, a person opposing the creditor, a person whose legal position necessarily implies their interest in creditor's entry in register. Therefore, the court concludes that ruling cannot be substantiated solely by evidence obtained from the debtor (in terms of the source). Without other confirmations of cash transfer, a receipt or a voucher do not deserve trust. Furthermore, in full accordance with our interpretation, the Supreme Arbitration Court notes that other evidence is required (or establishment of evidential facts: financial position of the creditor, the debtor's expenditures, etc. [17, p. 22]); only if they are available can the court draw a conclusion about existence of a disputed fact.

The Supreme Arbitration Court does not change the standard of proof, it remains the same as for the ordinary lawsuit process. One can convince the court on the "balance of probabilities" level, but this probability is entirely lacking if only evidence provided comes from an unreliable source.

A clarification is needed here. As we stated above, there exists an approach that defines standards of proof as criteria for evaluating evidence [14, p. 129-165]. Agreeing with it, it must be recognized that the Supreme Arbitration Court established a standard of proof, for the rule "evidence, the source of which is a person interested in the outcome of the case, cannot be seen as reliable in the absence of other evidence" refers to the court's evaluation of evidence. Then, the subject of the standard of proof in the considered resolution is a question of a new (possibly, correct) term for a known phenomenon, a question seemingly devoid of practical significance.

At the same time, defining the Supreme Arbitration Court's rule as an higher standard of "clear and convincing evidence", it must be concluded that this rule is applied only in bankruptcy cases.[7]. Such a conclusion, however, should be subjected to criticism.

Let's give an example. A member of a limited liability company files a claim for recovery of losses from the director (Article 53.1 of the Civil Code), stating that the latter signed a contract with the company, the works under the contract were not performed, yet they were paid from the company's account. Moreover, the defendant is also the director and the sole participant in the contractor company. Objecting the satisfaction of the claims, the director states that the works were actually performed and submits acts of acceptance of completed works, signed by both parties to the contract as evidence.

Should we conclude that presenting acts of acceptance will allow the defendant to win the case? Or, as in bankruptcy cases, here too, such an evidence in the absence of other factual evidence must be assessed by the court as unreliable because its source is an interested party?

Reasoning in the context of standards of proof, we inevitably conclude that the higher standard cannot be applied to the director's

[7] This thesis is found in court practice. See, for example: Resolution of the Arbitration Court of the Ural District dated March 18, 2022 №F09-3/22 in case №A60-20544/2021; Resolution of the Arbitration Court of the West Siberian District dated March 28, 2022 № F04-4644/2021 in case № A81-558/2020. Law-inquiry computer system "ConsultantPlus".

ISSN 2658-4050 (Online)

objections against the claim from the member arising from the director's violation of fiduciary duties. On the contrary, there are reasons to believe that the higher standard of proof must be met by the plaintiff[8]. The result is obvious - by proving on the "non-bankruptcy" standard level that the works were performed, the respondent will win the dispute. However, postulating the connection between the source and the reliability, the acts of completed works, signed by the defendant on behalf of both organizations, will not be recognized as reliable, and for substantiating the defendant's objections, other evidence will be required. It is easy to see that the latter decision is much more equitable.

It should be noted that Item 26 of the Resolution №35 was not originally perceived by the doctrine as establishing standards of proof [23, 24]. For example, according to E.D. Suvorov, the given clarification outlines the presumption of creditor's claim absence. At the same time, the author believes that applying such logic to other processes, not being proceedings on establishing creditors' claims in a bankruptcy case, is unacceptable: the presumption of debt absence should be applied only when considering disputes about establishing such a debt [23]. However, this approach is debatable. Firstly, it is the creditor who presents their claims who should prove the facts underlying the claims (Article 65 of the Arbitration Procedure Code), and therefore the presumption of debt absence lacks any sense. Secondly, the bankruptcy creditor cannot be forced to prove a negative fact "cash funds were not transferred to the debtor", underlying their objection. To explain this circumstance, any special presumption is also unnecessary. The Supreme Arbitration Court does not redistribute the burden of proof, resting on participants of the process due to general norms of procedural law.

3. Is there a higher standard of proof established for cases on declaring a sham transaction invalid?

Item 26 of the Resolution of the Plenum of the Supreme Arbitration Court №35 is also mentioned in the Review of judicial practice of the Supreme Court of the Russian Federation №5 (2017) (Item 20) [9], where the Supreme Court formulated the following position: "If a bankruptcy creditor substantiated significant doubts confirming the signs of fictitiousness in a transaction made between the debtor and another bankruptcy creditor, the latter bears the burden of proving the deal's validity".

This clarification is ambiguous. On the one hand, it's indicated that the bankruptcy creditor needs to substantiate significant doubts regarding the deal's validity. Therefore, significant doubts are sufficient to deny the creditor entry in the register. This is how the "beyond reasonable doubt" standard is understood in the laws of England and the USA, its implementation means that there should be no reasonable doubt in the fact's reliability (the guilt of an accused in a criminal case). This standard must be met by the creditor under the burden of proving the

[8] The Ruling of the Judicial Chamber on Economic Disputes of the Supreme Court of the Russian Federation dated September 30, 2019 № 305-ES16-18600(5-8) expresses the following position: "the standard of proof for claims (Article 53.1 of the Civil Code of the Russian Federation) for recovery of losses from persons having the actual ability to determine actions of a legal entity (clear and convincing evidence) differs from the corresponding standard for disputes regarding invalidation of transactions on special grounds of bankruptcy law (balance of probabilities)" (Ruling of the Judicial Chamber on Economic Disputes of the Supreme Court of the Russian Federation dated September 30, 2019 № 305-ES16-18600(5-8) in case № A40-51687/2012. Law-inquiry computer system "ConsultantPlus"). The question of which facts in a case of losses recovery should be subject to a higher standard of proof is the subject of a separate discussion [See: 22].

[9] Review of judicial practice of the Supreme Court of the Russian Federation №5 (2017), approved by the Presidium of the Supreme Court of the Russian Federation on December 27, 2017. Law-inquiry computer system "ConsultantPlus".

ISSN 2542-1514 (Print)

deal's validity. On the other hand, the Supreme Court's thesis can be understood in the sense that substantiating significant doubt (i.e, presenting prima facie evidence) only leads to shifting of the burden of proof to the bankruptcy creditor, the party to the transaction, and this burden must be fulfilled by them according to the ordinary "balance of probabilities" standard applicable to civil cases.

Subsequently, the position of the Supreme Court, expressed in item 20 of Review №5 from 2017, was reproduced in item 1 of the Review of Judicial Practice on resolving disputes related to establishment of claims controlling debtors and affiliated persons in bankruptcy cases[10], but with some clarifications: "The affiliated creditor bears the burden of refuting reasonable doubts about fictitiousness of the contract on which their claim, filed in the bankruptcy case, is based". This conclusion leaves no room for interpretation. As soon as the entry in the register becomes impossible when doubts remain about authenticity of the transaction, the creditor must meet the "beyond reasonable doubt" standard of proof.

Leaving aside the question of whether such a high standard of proof is generally permissible outside criminal proceedings, it should be noted: despite the final explanations, the arguments of the Court and the circumstances of the cases considered indicate that, in reality, no higher standards of proof were introduced by this act.

In Review № 5 of 2017, the Supreme Court provides the following explanation: "Typically, to establish circumstances that substantiate the plaintiff’s or defendant's position, the body of evidence (documents) usual for business operations underlying the dispute, is sufficient. However, in the context of the debtor's bankruptcy and competition between their creditors, the interests of the bankrupt debtor and the affiliated creditor (hereinafter also referred to as the 'friendly' creditor) in the legal dispute may coincide, to the detriment of other creditors' interests. To create the semblance of a debt, externally impeccable evidence of fundamentallly fictitious deal can be presented to the court. Hiding the true intent of the transaction is in the interests of both parties. The real goal of the transaction parties might be, e.g., to artificially create indebtedness for subsequent distribution of the bankruptcy assets in favor of the "'friendly creditor". Next, the Court refers to item 26 of Resolution № 35 and concludes that when examining claims about the defects of a transaction, the courts must establish other facts (whether the company owned the assets listed in the storage contract, whether the depositary could fulfill the obligation taking into account characteristics of the stored item, etc.). Similar explanations are provided in the Review of Judicial Practice on resolving disputes related to establishment of claims controlling debtors and affiliated persons in bankruptcy cases: "…when objections to fictitiousness of a transaction arise within a bankruptcy case, the court should not limit its examination to checking the documents presented by the creditor for compliance with the formal requirements established by law. The court needs to establish whether sufficient evidence of actual contractual relationships has been presented".

At the same time, to prove that a transaction was conducted with the intent to create corresponding legal consequences (and therefore is not fictitious), the "body of evidence (documents) usual for business operations underlying the dispute" is never sufficient. As researchers rightly point out, it is impossible to state fictitiousness of a deal merely from its text since those engaging in such a deal count on their declaration of intent being accepted at face value. Hence, fictitiousness of a

[10] Review of Judicial Practice on resolving disputes related to establishment of claims controlling debtors and affiliated persons in bankruptcy cases approved by the Presidium of the Supreme Court of the Russian Federation on January 29, 2020. Law-inquiry computer system "ConsultantPlus".

deal is usually established based on assessing factual circumstances associated with its conclusion and execution [25]. Seemingly impeccable evidence of conclusion and execution of a contract is typically characteristic of fictitious deals because this basis for invalidity implies creating semblance of a legal relationship without an intent to acquire, alter, or terminate rights and obligations.

Let alone impeccable evidence tends to emerge where a fictitious deal is opposed by a third party – a subject that is not a party to the disputed legal relationship and who had no opportunity to influence the creation of written evidence. The interests of defendants – parties to a fictitious transaction in a dispute against a person who is not a party to the contract, typically align and are centered on preserving the agreement; this, contrary to the conclusions of the Supreme Court, is not a feature of bankruptcy cases. In both ordinary processes and in procedurees for establishing creditor's claims in bankruptcy cases, written evidence provided solely by the parties to the agreement cannot form the basis for a court's conclusion about validity of a transaction.

This thesis is essentially supported by the Supreme Court itself. For example, when assessing judicial actions taken on a cessionary's lawsuit for loss recovery under a supply contract[11], the Supreme Court noted: "When addressing the issue of fictitiousness of the supply contract and documents proving the transfer of goods, the court should not restrict itself to verifying whether the presented documents meet the formal requirements set by law. In verifying validity of a transaction, the court must determine the presence or absence of actual relationships under the transaction". As we can see, the Court finds it necessary to scrutinize the argument about fictitiousness of a contract in a judicial process in the same way as in bankruptcy procedures: not just by checking documents' compliance with "formal requirements". The Chamber then noted: "The presence or absence of actual relationships under a transaction is a legally significant circumstance, which must be established in the case, and cannot be considered a higher standard of proof applicable only for bankruptcy cases".

The presented approach is definitely correct, but it is correct because establishing presence or absence of factual relationships cannot be regarded as a higher standard of proof neither in cases on including creditors' claims in the registry, nor in other disputes.

4. Conclusion

The Resolution of the Plenum of the Supreme Arbitration Court № 35, used by the Supreme Court as the foundation for the thesis on higher standards of proof in bankruptcy cases, in reality, does not introduce such standards, nor does it provide premises for their introduction. The Supreme Arbitration Court merely specified a universal thesis in relation to bankruptcy cases: the reliability of evidence is assessed based on its source as well.

[11] Ruling of the Judicial Chamber on Civil Cases of the Supreme Court of the Russian Federation dated September 10, 2019 № 46-KG19-17 (clause 3 of the Review of Judicial Practice of the Supreme Court of the Russian Federation № 1 (2020) (approved by the Presidium of the Supreme Court of the Russian Federation on June 10, 2020). Law-inquiry computer system "ConsultantPlus".

ISSN 2542-1514 (Print)

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ISSN 2658-4050 (Online)

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BIBLIOGRAPHIC DESCRIPTION

Platonova N.V. On the issue of standards of proof in the practice of the Supreme Court of the Russian Federation in bankruptcy cases. *Pravoprimenenie = Law Enforcement Review*, 2024, vol. 8, no. 3, pp. 132–141. DOI: 10.52468/2542-1514.2024.8(3). 132-141. (In Russ.).