COUNTER-ACTION WITH SET-OFF PURPOSE

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В данной работе, мы проанализировали встречный иск с целью зачета в качестве средства защиты ответчика против истца. Гражданская процессуальная литература, подчеркивает несколько классификаций гражданских исков, но анализированный иск рассматривается как имеющий особое место среди встречных исков.

В этой статье, мы выяснили правила взаимодействия материального права касающихся зачета и процессуальных норм, касающиеся встречного иска с целью зачета,через которые применяется судебный зачет. Особое внимание уделяется анализу условий, для подачи встречного иска с целью зачета и условий установленных нормами гражданского законодательства, которые суд должен применять.

Introduction

Material law rules which interact with civil procedural law rules in submission and examination of counter-action belong to many legal institutions of material law, such as: legal act institution (nulity of legal act), property institution, tort liability institution, material liability institution in labor law and so on.

As stated by russian author B. B. Ярков, ,, civil action" theme is the key to the theory of civil procedural law which reflects the interaction between material and procedural civil law[7, p. 255].

Counter-action generally consists of a separated material legal claim submitted by the defendant against claimant for to be examined at the same time with main proceedings in order to protect his legal rights and interests[9, p. 212].

According to art. 173, paragraph (1), letter ,,a" of procedural civil code, judge receives the action if:

a) this sues the original claim set-off;

b) its admission excludes, totally or partially, admission of initial action;

c) it and initial action are related, and their simultaneous trial would lead to quick and fair resolution of disputes.

In case of counter-action which can be received for review with the initial action under art. 173, paragraph (1), letter. ,, a «of the Code of Civil Procedure, rules of material law that are inherent with this condition are those provided by art. 651-659 of the Civil Code, section,, Settle the obligation by offsetting «.

Civil law having the function of common law, such as civil procedural law, civil rules with regard to settle the obligation by offsetting are applied to the determination by the judge of the condition stipulated in art. 173, paragraph (1), letter ,, a «of the Code of Civil Procedure, even if material legal relations pertaining to labor, family law or other private law branches.

For a comprehensive analysis of the counter-action filed under art. 173, paragraph (1), letter ,, a «of the Code of Civil Procedure, set-off purpose counter-action, we'll start from some general perceptions of civil action.

Action is one of the oldest means to protect

the rights violated or challenged, which was widely applied in ancient Rome. Action institution in roman private law was a legal phenomenon quite complex because there was a branched system of actions - for every action there existed a subjective right. Depending on the complexity of the material legal relations, new actions appeared and the old ones ceased. Simple actions directed towards restitution of goods were filled with criminal actions necessary to collect fines. Most actions were brought by individuals, but every citizen could lodge an action for the community interest, hence comes the division of private actions (actiones private) and popular (actiones populares) [15, p. 211].

Compared to those actions counter-action built up from the development of procedural means of defense of the defendant. Respectively from a historical point of view counteraction arose with the development of civil procedural rules, and its appearance mostly started from the rules of material law, namely the exceptions which a party may invoke another in civil legal relations.

In the literature the term civil action is one of the most discussed [5, p. 9-23]. Counterclaim action is a civil action, but lodged by defendant against the plaintiff. It is a means of defense of the defendant against the plaintiff, but as mentioned by В. Каменков is not only a means of defense of defendant against the initial action, but also a means of satisfying his own procedural claims [14]. Concluding the diversity of concepts given by the authors of the civil action, are highlighted three meanings of that term.

First, procedural and legal sense, that civil action in court is asking the person concerned to defend his legitimate rights and interests or the interests of other persons if the law delegates the right to trial addressing this purpose [16, p. 17]. Authors who hold this opinion state that advance civil action constitutes the basis for instituting civil proceedings. Submission civil action and the very possibility of instituting civil proceedings in the order prescribed by law proceedings shall be subject only to procedural and legal circumstances which characterize civil action as an exclusive category of civil procedure [7, p. 257]. Thus, according to this opinion addressing the court will result in civil lawsuit regardless of whether or not the applicant is the holder of subjective right violated or, in general, the merits of his claims against the defendant [1, p. 282].

Secondly, material and legal sense, that the civil action is a legal material claim submitted by a person to another to be examined in a certain procedural order [8, p. 187]. Most of these authors claim that civil action would be the very attribute to subjective right to be achieved by applying coercive force of the state [10, p. 18-19; 11, p. 72].

Both the first and second sense are as subject to criticism in the literature. Regarding procedural legal sense stated that this approach does not delimit the civil and other addresses to specific organs or appeals jurisdiction by the court in special procedure [8,p. 187]. On the other hand, the critical material and legal acceptation make the following argument: the claim that the legal requirement of a material-legal report of the parties to each other is one way to resolve the dispute without the intervention of the court . But civil action, unlike the claim, constitute a means of settling the dispute between the parties report using material-litigious court [5, p. 18].

Thirdly, the civil action is analyzed in terms of a unitary meanings, which includes two aspects: procedural and material legal means [12, p. 14; 13, p. 38]. According to this acceptance, a civil action exists only when the plaintiff and defendant itself refers their disputes to the court to be resolved. Any address of the applicant in court entails submitting a claim against the respondent. In this regard, civil action consists of two claims (requirements): a) a legal claim filed by defendant-material and b) procedural legal requirement to the court to settle the dispute arose under the substantive and procedural legal rules. So the court to give an answer to the plaintiff's claim and legal material provides an answer procedural legal requirement [6, p. 398].

Nature of counter-action with set-off propose can be cleared within the meaning of the third sense of the term civil action: legal material and procedural unitary meaning. The defendant in the civil action is addressed in court, in the trial at the request of the appli-

cant, and an exception as double quality the creditor and the debtor in material-legal relations against the other party, which in turn has the same quality double .

The exception submitted is set-off. This actually is one way of civil rights. The method of defense is a category of substantive law, including measures that can be applied as a solution for civil rights law disputes. Rights protection methods in principle are provided by the laws governing relationships as appropriate material. The provisions of art. 11 of the Civil Code of RM provides methods of defence of civil rights, which are: recognition of the right, restoring the previous situation and suppressing infringement actions that violate the law or is a danger of abuse, outlawing legal document, the declaration document issued by a competent public performance of the obligation imposed on nature, self-defense, damages, collection of penalty clause, moral damages, abolish or alter the legal relationship, the failure of the court to act contrary to the law issued by a public authority other means provided by law [1, p. 28].

However, the question arises whether counter-action with set-off propose in sens of art. 173, pragrapf (1), lit. ,, a «of the Civil Procedure Code of RM can be applied only in obligation relations?

Starting from a literal interpretation of art. 173, paragraph (1), lit. ,, a «Code of Civil Procedure of RM does not limit the meaning of the text receiving this action counterclaim by court for consideration whether material-legal relations are obligation relations or not. The legislature has provided that it must follow the initial claim set-off. Accordingly if the plaintiff employer filed claims against the defendant on the material damage at work and asked the defendant by counterclaim action collecting outstanding remuneration will be in the presence of a counter-action with set-off propose. In this case, we are in the presence of two claims that are opposite each other. Although not directly arising from acts of civil nature, however, the mechanism that can be applied is partially similar to that provided by art. 651, paragraph (1) of the Civil Code of RM. According to art. 651, paragraph (1) of the Civil Code of RM, set-off is an obligation and mutual extinction of a claim opposing certain, liquid and payable the same nature. But the court can take counter-action for review without meeting the condition of being debts, liquid and payable. Material and legal exigency that is intrinsic to that provided by art. 173, paragraph (1), lit. ,, a «of the Code of Civil Procedure of RM, is that these two claims to be opposed. Based on the above, the purpose of compensatory counter-action may be brought if there is at reek two obligation relations between the parties.

According to art. 172, paragraph (1) and (2) of the Code of Civil Procedure of RM, before the commencement of judicial proceedings, the defendant is entitled to bring an action against the applicant counterclaim to be judged with the first action. Action counterclaim filed under art. 173, paragraph (1), lit. b) may be lodged before the end of the examination of the case on the merits. (2). Bringing the action counterclaim is made under the general rules of bringing the action. The purpose counter-action with set-off propose receiving the court shall, in addition to material and legal condition referred to above, to establish whether the premises so as well as arrangements for exercising the right of action.

Counter-action with set-off propose is a incidental civil action. Based on the criteria for the classification of civil actions - after the procedural law chosen by the parties to defend differ: main actions, actions accessories, incidental actions.

Main actions are actions which is brought judicial proceedings. Following the submission of the court initiates this action lawsuit under the terms of the Code of Civil Procedure of RM. Accessories actions are actions whose solution depends on the outcome of the complaint of a principal. For example, the divorce action is the main action, and on the determination of the place of residence of the child is an incidental action. Incidental actions are formulated in a process already initiated, that is currently under way. An example of such incidental actions as intervener main action (Art. 65 of the CCPRM) and counter-action (Art. 172 of the CCPRM) [1, p. 295-296].

Besides that action counterclaim is an incidental action, it is also an action of transforma-

tion. Thus, the subject of civil action [7, p. 262; 17, p. 155] are distinguished:

Civil actions for achieving the right are those actions by which the applicant seeks application of coercive force to achieve its right. Addressing the court to defend the law by applying coercive force is determined more by the fact that the defendant disputes the applicant's right, unenforceable obligations incumbent. Following the dispute arose with the applicant becomes uncertain. The right applicant will not be achieved by applying coercive force, until not be determined whether there is a right which is subjective and disputed its contents. The action of making law comprises two interrelated requirements: the recognition of the right and order the defendant to contest the obligation lies [8, p. 194].

Civil actions for failure or confirmation is action seeking recognition of the existence or non-existence of a right or obligation. The purpose of these actions is to remove the conflicting and uncertain nature of the applicant's right [8, p. 194].

The judgment issued on action of finding whether or not the law is not enforceable and its effects are not only valid for the future, but also retrospectively [3, p. 46].

Civil actions processing or establishment have the purpose of occurrence, modification or extinguishment of material-legal relations. The action is directed towards establishing saying a court decision that will establish a new legal material relationship between the parties [9, p. 204]. The judgment in this case, is actually fact material-legal wich change legal material report structure [7, p. 263], for exemple: rezolution, settle the obligation, etc.

Counter-action with set-off propose, namely the category is civil actions transformation, given that seeks to extinguish obligation. These obligations may be partially or completely extinguished after admission set-off puropose counter-action.

Counter-action with set-off propose is to be distinguished from judicial compensation, which exists in French law, Romanian, as well as other countries but is not specific to that in Moldova.

It's called judicial compensation that they do justice, on application by a complaint and a counter-action; for example, the request for payment of rent, the tenant requires, in turn, be reimbursed for certain expenses out of the scope of repairs housing repairs. Although in such cases the claim to the counterclaim is liquid, it may be liquidated by court; as a consequence, the claims will be compensated and uncompensated rest borrower will be required to pay. It is that form of compensation that is (has) by the court, usually at trial counterclaims [2, p. 386]. It operates pursuant to a court judgment became final, so it can be ordered even if they satisfy the requirements for legal compensation [4, p. 584].

Therefore it is possible that offsetting mutual debts are not liquid or object does not have the money or fungible. In this case either of the two lenders may address the court may order that compensation up to the lesser of the amounts competition [4, p. 584].

Judicial compensation make same effect as legal compensation, specific French civil law, except that these effects flowing from the time when the judgment ordering compensation became final [4, p. 584].

From this we find that judicial compensation mechanism presented above is not stipulated in civil and procedural law of the Republic of Moldova. The absence of these legal rules make it impossible to apply judicial compensation.

Conclusions:

After synthesizing the exposed find that counter-action with set-off propose is the same counter-action as incidental civil action and transformation through whose admission extinguish all or part obligation certain reports filed against the initial action.

Upon receiving counter-action with set-off propose the court shall declare whether the premises an conditions for exercising the right to share, and material and legal condition - there are two opposing claims.

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SUMMARY

In this article we analyzed the counter-action with set-off propose as a means of defense of the defendant against the plaintiff. Civil procedure literature highlights several classifications of civil actions but the action under review is seen as having a special place in several categories of actions counterclaim.

The work is essentially a study of the interaction of substantive law rules of set-off with the counter-action procedural rules by which judicial compensation is applied. Particular attention is given to analysis of the conditions of submission of counter-action with set-off propose and conditions established by the rules of civil law wich the court will be lead to its acceptance.

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