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Mortgage agreement under the Russian law: some features

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Abstract

The article deals with the key features of the mortgage agreement under the Russian law, identified problematic aspects of the content of the mortgage agreement.

Keywords: mortgage lending, mortgage, mortgage agreement, real estate mortgage

Аннотация

В статье рассмотрены ключевые особенности договора ипотеки по российскому законодательству, выявлены проблемные моменты содержания договора ипотеки.

Ключевые слова: ипотечное кредитование, ипотека, договор ипотеки, залог недвижимости

The scope of civil law relations is the most extensive in terms of its variety of objects and objects of transactions, it covers the widest range of issues, both provided by the legislator and not provided. Moreover, the conclusion of any type of agreement is realized only on the basis of the principle of freedom of agreement. A mortgage agreement is a specific, but still not an independent civil law agreement, it is a type of pledge agreement. A mortgage agreement has certain characteristics.

The first sign of the mortgage agreement is that it is accessory, i.e. additional in relation to the main contract and legally dependent on it. The second feature is that not only the loan agreement issued for the purchase of housing, can be targeted. The loan for the purchase of housing is also targeted. For example, in accordance with the provision on certain conditions of the loan agreement, used in the framework of the pilot version of the Moscow mortgage program, a mandatory condition of the loan agreement is to indicate the address of the purchased housing and data on its owner. In the standard form of the mortgage loan agreement AHML also contains an indication of a specific dwelling, which is purchased at the expense of credit funds. Thus, the loan agreement in question is a target loan for the purchase of residential premises. Accordingly, it is subject to the provisions of the Art. 814 of the Civil Code on the intended use of the loan amount.

The next feature of the concluded loan agreement is connected with its association within the framework of functioning of the system of mortgage housing crediting with the loan agreement.

Despite the unlimited range of possible lenders in accordance with the general provisions of the loan agreement, the mortgage law emphasizes its targeted nature, separate legal entities as lenders, which allows you to approve the commercial orientation (retribution), not only the loan agreement, but also the loan agreement.

This conclusion is based on the following conclusions. Interest for the use of the loan is not a mandatory condition of the contract, but the indication of legal entities as lenders suggests the following logic of the legislator. Such loans can be issued to their employees on the terms of repayment, but not pay as such, although the stimulating nature of obtaining such a loan-a guarantee of flawless performance of their labor functions is much more effective than receiving decent pay. The situation of granting a loan on the above conditions, that is, without payment for the use of the loan, it is difficult for third parties to imagine, given the cost of residential premises.

On the basis of the above, the following conclusion can be drawn. In the framework of the system of housing mortgage lending there is no differentiation of contractual structures of loan and credit. This position is quite justified in view of the existing equalization by the legislator of the arising rights and obligations of the parties to both the mortgage loan and the mortgage loan. However, under the system of mortgage lending is more expedient to use the concept of a mortgage credit agreement, as banks and other credit institutions in their core lending activities carried out, while not all legal persons engaged exclusively in issuance of trust mortgage loans for their refinancing.

As previously mentioned, the mortgage loan agreement involves two parties. First, the lender is a Bank or other credit institution that has received a license of the Central Bank of the Russian Federation in accordance with the Federal law of 02.12.1990 N 395-1 "on banks and banking activities" (hereinafter - the law on banks).

Secondly, as a borrower can act any person, both an individual and a legal entity. Thus, the legislator provided special requirements on the subject structure of the credit agreement only for the creditor.

Given the above-mentioned specifics of the functioning of the housing mortgage lending system, it is necessary to note the following. With regard to the mortgage housing loan agreement, there are grounds for the conclusion that the conclusion of such a contract by an individual is of a consumer nature. According to the Law of the Russian Federation of 07.02.1992 N 2300-1 "About protection of the rights of consumers" the consumer is the citizen having intention to get or getting or using goods exclusively for personal, family, house and other needs which are not connected with implementation of business activity.

When the mortgage agreement is included in the loan agreement, the mortgage will enter into force only from the moment of state registration of a certain property. Accordingly, the provisions of the law on mortgages conflict with the norms of the Civil Code, since in accordance with paragraph 3 of the Article 10 of the law on mortgages in respect of a loan or other agreement when it includes a mortgage agreement in respect of the form and its state registration, the requirements established for the mortgage agreement must be met. Thus, the legislator establishes that the loan agreement or the credit agreement are considered concluded and come into force only from the moment of their state registration.

According to the general requirements of the Art. 819 of the Civil Code in the loan agreement should be an indication of the term of repayment of the loan amount. The concept of development has fixed the basic standards and requirements for long-term mortgage housing loans: the loan term is 3 years or more (optimally 10-15 years), the loan amount is not more than 60-70 percent of the market value of the purchased housing. Most of the population today is not able to really accumulate 30-40 percent of the cost of the apartment, so the proposed concept option is available to a very limited circle of the population, especially since the monthly payment on the loan should not exceed 30-35 percent of the total income of the borrower. The latter requirement puts the borrower in an even narrower framework of the possibility of obtaining a mortgage loan, although the legislator stipulates that the fixed standards and requirements for mortgage loans are developed on the basis of established practice, both Russian and foreign.

The object of the loan agreement, as well as the loan agreement, are the actions of the creditor aimed at obtaining debt from the debtor, committed by the creditor after the

performance of its contractual obligation to transfer funds to the debtor. But unlike a unilaterally binding loan agreement, the object of the loan agreement also includes the actions of the borrower to repay the loan and pay remuneration for its use.

The main distinctive feature of the mortgage loan agreement is that the loan repayment is secured by real estate collateral. And not any, but a specific dwelling, an indication of which is contained in the loan agreement. In other words, a bank or other credit institution, issuing a loan, among other things, necessarily provide in the concluded loan agreement for the intended use of the issued funds for the purchase of a particular dwelling with the payment of part of the cost of housing by the borrower.

Based on the above, there are reasons to conclude that compliance with all the conditions of the mortgage loan agreement is possible in two ways.

1. Recognition of the mortgage credit agreement concluded between the creditor bank and the borrower for acquisition of premises containing the obligation of bank to provide the credit under the security of the acquired premises, the contract preliminary. In accordance with the Art. 429 of the Civil Code of the Russian Federation under a preliminary contract, the parties undertake to conclude in the future a contract on the transfer of property, performance of works or provision of services (the main contract) on the terms provided for in the preliminary contract.

The preliminary contract shall be concluded in the form established for the main contract, and if the form of the main contract is not established, then in writing.

2. Application of the above-mentioned contradiction of the law on mortgage concerning the moment of entry into force of the credit agreement not only to the mixed form of the agreement, but also to the credit agreement made by the separate document. Thus, the mortgage loan agreement will come into force from the moment of state registration of the residential mortgage.

The result of the use of any of the above methods is the conclusion that the moment of entry into force of the mortgage loan agreement is due to the proprietary rights of the creditor-pledgee and directly depends on the state registration of these rights.

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