

## THE SALE OF THE MORTGAGED ASSET AND PROPERTY TAKING IN THE ACCOUNT OF THE CLAIM

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**Abstract:** *The mortgage lender may petition the court for enforceability the mortgage securities by selling the mortgaged movable asset. At the request for the approval there will be attached documents proving the existence mortgages and of the mortgage securities along with proof of drawing up the mortgage. The court will consider the existence of debt, and of the mortgage legally executed and will approve the sale, summoning the interested parties. Application for a declaration of enforceability of the mortgage securities by selling the mortgaged movable asset interrupt the prescription right to obtain enforcement. The mortgage lender can sell mortgaged movable property in the state in which they are, or after taking commercially reasonable measures to their recovery. The lender may sell the mortgaged movable property by public auction or by private treaty through one or more contracts, in bulk or separately in any time or place, on reasonable commercial terms. The creditor may take for itself the mortgaged asset to settle the claim, unless the law provides otherwise, the settler consents and those mentioned, do not oppose. The consent of the settlor to take over the property by the creditor in the account of the claim must be expressed in writing and be subsequently non-performance. The lender who wants to take over the mortgaged asset to settle his claim, will score in the archive, a notice of taking in the account of the claim and notify the persons referred to, this offer.*

**Keywords:** *credit, mortgage, taking over the property, foreclosure, debt.*

**JEL Classification:** *K3, K34.*

### 1. The sale of the mortgaged asset

According to art. 2445 of the Civil Code, the mortgagee may petition the court for enforceability of the mortgage securities by selling the mortgaged movable asset. At the request for the approval there will be attached documents proving the existence residential mortgages and of the mortgage securities along with proof of drawing up of the mortgage. The court will consider the existence of debt, and of the mortgage legally executed and will approve the sale, summoning the interested parties. Application for a declaration of enforceability of the mortgage securities by selling the mortgaged movable asset interrupt the prescription right to obtain enforcement.<sup>1</sup>

The mortgage lender can sell mortgaged movable property in the state in which they are, or after taking commercially reasonable measures to their recovery.

The lender may sell the mortgaged movable property by public auction or by private treaty through one or more contracts, in bulk or separately in any time or place, on reasonable commercial terms.

The parties may agree, by the mortgage agreement, the way, of valorization of property encumbered.

In all cases, the sale must be carried out in a commercially reasonable manner with regard to the method, time and location, conditions and other aspects of it.

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<sup>1</sup> Law No. 71/2011 published in M.Of. nr.409/10.06.2011, GEO no. 79 / 2011 regulating measures for the entry into force of the Law nr. 287/2009 on the Civil Code, as amended by GEO no. 1/2016 amending Law no. 134/2010 on the civil procedure Code and certain related acts, published in M.Of. nr. 85/04.02.2016.  
Art. 1811

(1) enforceability of mortgage securities by selling the mortgaged asset referred to in art. 2445 of the Civil Code is for the court in whose jurisdiction the domicile or, where appropriate, place the lender.

(2) Opposition to execution under Art. 2452 of the Civil Code is for the court that approved of the sale of mortgaged movable asset.

Sale of goods is commercially reasonable if it takes place:

- a) in how they are disposing, typically of the same type of goods on an organized market;
- b) the price established through an organized and valid market at the time of sale;
- c) in accordance with reasonable commercial practices followed by those who sell goods typically of the same kind;
- d) in accordance with the rules set by the mortgage agreement, when there is no organized market for the mortgaged asset or if there is no standardized business practices.

In those circumstances, the mere fact that they could get a higher price if the sale had occurred at a different time or by a method other than that chosen by the creditor does not make the sale to be considered commercially unreasonable.

### **The sale of the mortgaged property owned by the debtor**

According to art. 2447 of the Civil Code, the creditor may sell the mortgaged asset, even if it is in possession of the debtor. The buyer has the right to take possession.

### **The creditor's rights**

According to art. 2435 of the Civil Code, in case of failure to execute, the lender has the right, at its discretion:

- a) to sell the mortgaged asset;
- b) to acquire the property to extinguish mortgages;
- c) to take over the good for management purposes under art. 2468-2473 of the Civil Code.

### *Separation of a property's accessories*

When the holder of mortgage on a movable accessory of a building, is preferred to holders of other real rights on the property in question, he can, in the event of failure by the debtor, separate the two goods.

In this case, the mortgagee is obliged to compensate the holders of real rights on the estate, except the settlor, of expenditure necessary for repairing damage caused by the separation of the two goods.

The lender is not obligated to give compensation for the decrease in value of real estate as a result of eliminating the mortgaged asset or the need to replace it.

Those entitled to compensation may refuse separation of assets while the mortgage lender does not offer a sufficient guarantee for the payment of compensation.

These provisions do not apply to common building materials that are incorporated into a building.

### *The right to take the goods*

The mortgagee is entitled:

- a) to take over the mortgaged assets, with all their accessories;
- b) without moving them, to take measures to ensure that equipment, and other such goods can no longer be used to dispose of them later.

### *Taking over the good*

The lender can take over the mortgaged property by their own means or through an organ of execution.

### *Taking over the good by their own means*

When the mortgage agreement for movable property, expressly allows the creditor can take movable property as well as titles and records, that find the ownership of the settler on the asset by its own means, after prior notification through judicial executor.

The creditor can not however disturb public order or use, directly or indirectly, coercion, even if the act does not constitute a crime. Any stipulation limiting this obligation is considered unwritten.

### *Remission of the mortgaged asset*

The holder of a movable asset is obliged to hand over to the mortgagee who seeks the good according to the procedure provided for in this chapter. He can, however, refuse to surrender the good, if the creditor does not prove its right to take the property.

Except for the senior mortgagee which started in turn, execution, any no other creditor can ask the lender that took over the asset to remit it.

### *Forced takeover of the property*

A creditor may ask judicial executor to take the contest good.

The creditor's request will be accompanied by the copy of the contract of guarantee, a description of the property to be taken and, if applicable, a certified copy of the registration of the mortgage in the archive.

At the request of the bailiff, the public security force agents are obliged to give full support to take over the property.

### *Obligations the bailiff*

Within 48 hours of receiving the request, the bailiff moves to the location of the mortgaged asset, takes it and surrenders it to the creditor immediately.

The bailiff draws up a report in two copies, one of which is kept on the file of execution, and the other is communicated to the debtor under the Code of Civil Procedure.

The lender advances the costs and bears the risk of transport and storage of goods.

Where it is necessary to resort to coercion the bailiff is obliged to return the same day, accompanied by agents of the the public security force to take over the property affected by warranty. Not necessary to submit a court decision or other act, from the administrative authorities.

### *The creditor's rights and obligations*

The creditor, holder of the mortgaged asset has the rights and obligations of an administrator of the property of another, empowered with simple administration, the provisions of art. 795-799 being applied properly.

### *Buying the mortgaged asset, by the creditor*

According to art. 2448 of the Civil Code, a mortgage lender can only buy the good:

- a) in a public auction;
- b) direct sales, but only if goods of the same type are typically sold on a regulated market.

In these cases, the creditor may file the claim in account for the price.

### *Notification of sale*

If he would like to sell the property after the procedure, regulated in this section, the lender is required to inform the persons referred to in art. 2,450 an enforcement notice and to enter the enforcement notice to the archive.

The communication of the notification, registration and enforcement notice must be made at least 15 days before the date set for the sale.

Failure to comply with these formalities void the sale.

The provisions of this Article shall not apply where goods that are prosecuted are subject to destruction, deterioration or rapid depreciation or are typically sold on an organized market.

### *Recipients of the notification*

According to art. 2450 of the Civil Code, the creditor must send the notification:

- a) to the debtor of the obligation secured by mortgage, endorsers and solidary co-debtors thereof;
- b) to the settlor or, where appropriate, successors in title;

c) to all mortgagees whose mortgages have become opposable by inclusion in the archive of a notice identifying the encumbered asset and which after notification is entered in the name of the debtor;

d) to all persons from which receiving the notice of the existence of a right or a claim on the the mortgaged asset and those from which the asset was taken or where it is, if known;

e) to all mortgage lenders and privileged whose warranty has become opposable another way, under the law, if the the mortgage lender knows their identity and address.

*The content of the notification*

The notification of the sale must clearly indicate:

a) the settlor and the mortgage lender;

b) the goods subject to prosecution;

c) the starting amount for tracking;

d) the method by which it will achieve the property exploitation;

e) the date, time and place at which the public auction will take place and the price for the auction or, where applicable, the date and time starting from which the creditor will dispose of the property.

*Opposition to the execution*

Within 15 days of the communication of the notification or, where appropriate, from the registration of the notice of enforcement, in the archive, those interested or aggrieved by the enforcement may raise objections to the execution.

Opposition rightfully suspend a sales procedure pending final determination of the case. The mortgagee who took over the property will still be able to do so during the trial of opposition.

The court will settle the opposition within 5 days. The court decision can be appealed only on appeal within 5 days of notification. If the opposition is rejected the appeal does not stop the creditor to proceed to sale of such goods. The appeal is settled, urgently following the rules in the presidential ordinance.

The court may terminate execution started by the creditor if the debtor has paid, as well as the return of the property to the lender. If the court finds that the sale would be made in breach of this section, it shall establish appropriate conditions and rules and approve sale of such goods.<sup>1</sup>

*The payment of residential mortgages*

At any time until the sale of the property by the creditor, the debtor and any interested person may perform the obligation, while paying reasonable expenses made for the acquisition and sale of the property. In this case, the creditor is obliged to accept payment, to immediately cease any action for enforcement and to return the property to the debtor.

*Preference to execution*

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<sup>1</sup>Law No. 71/2011 published in M.Of. nr. 409/10.06.2011, GEO no. 79/2011 regulating measures for the entry into force of the Law nr. 287/2009 on the Civil Code, as amended by Ordinance nr.1/2016 pentru modificarea Legii nr. 134/2010 privind Codul de procedur civil precum i a unor acte normative conexe, publicat în M.Of.nr. 85/04.02.2016.

Art. 181<sup>1</sup>

(1) Încuviin area execut rii ipotecii mobiliare prin vânzarea bunului ipotecat prev zut la art. 2.445 din Codul civil este de competen a judec toriei în a c rei circumscrisp ie î i are domiciliul sau, dup caz, sediul creditorul.

(2) Opozi ia la executare prev zut la art. 2.452 din Codul civil este de competen a judec toriei care a încuviin at vânzarea bunului mobil ipotecat.

The senior mortgagee is preferred to junior creditors regarding exercise of the right to enforce the mortgage and perhaps as long as the asset was not sold, to continue the execution started, or to start a new execution.

He can, however, be held to reimburse expenses incurred by a junior creditor if being notified of the foreclosure, fails to invoke his rights in a reasonable time.

*Acquiring the good by the buyer*

The sale of the property in the procedure covered in this chapter:

- a) transfers to the buyer all the rights that the settlor has on the asset;
- b) extinguishes the mortgage under which the sale took place;
- c) extinguishes all other mortgages and privileges, unless the law provides otherwise.

Titles or documents that find the ownership of the settlor on the asset, the mortgage agreement together with the indication settlement guarantee archived prove ownership of the acquirer.

*Personal obligation of the debtor*

The debtor remains personally bound for the portion of debt that is not covered by the price obtained from the sale.

*The sale of the property not belonging to the debtor*

The creditor, must repay the owner either the thing or sale price as soon as he learned that the debtor is not the owner of the mortgaged asset.

If the creditor does not know this circumstance to the price distribution, he is relieved of any liability if the to the debtor repaid the remainder of the sale of the property.

*Rental of the good after sale*

It may be agreed that, after the sale, the settlor to use the property as lessee.

the settlor law will be enforced against any purchaser of the property that was included in in the archive or if it was known in some other way.

*Distribution of amounts from the property sale*

After deduction of reasonable expenses made by creditor takeover, preservation, taking measures to capitalize the asset and the sale, the lender distributes the monies realized from implementing preferential creditors and mortgage, according to the order of preference, even if they have claims affected by the standstill period or terminate condition. With respect to these amounts, the lender has rights and obligations of an administrator of the property of others empowered with simple administration, the provisions of art. 795-799 being applied properly.

Debtor surrenders the remaining amount available within 3 days of receipt of proceeds of sale of such goods. If payment can not take place, the amount will be deposited in a bank account by following the debtor to be notified of this by the lender.

The lender will immediately prepare a report about the release or distribution of the amount resulted from execution. It shall immediately notify the debtor settlor and other privileged creditors and mortgage will be recorded and archived.

Any agreement between the lender and the borrower that establishes a new destination of sums from execution is considered unwritten.

*Answering the mortgaged asset account receivable*

According to art. 2460 of the Civil Code, the creditor may itself mortgaged asset to settle the claim, unless the law provides otherwise, the settlor consents, and the persons referred to in art. 2,450<sup>1</sup> do not object.

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<sup>1</sup> art.2450 of the Civil Code

The creditor, must send the notification:

- a) the debtor of the obligation secured by mortgage, fideiusorilor and solidary co-debtors thereof;
- b) the settlor or, where appropriate, successors in title;

Settlor consent to taking account asset by the creditor claim must be expressed in writing and be subsequently non-performance.

The lender wants to take over the mortgaged asset to settle his claim in the archive will score an opinion taking account of the claim and notify the persons referred to in Article offer 2,450.

*Resisting the mortgaged asset taking into account debt*

Resisting taking into account the good of the claim made by the persons mentioned in art. 2,450 take effect only if it is communicated to the creditor within 15 days of notification.

According to art. 2452 of the Civil Code, within 15 days of notification or communication, as applicable, the registration notice of enforcement archive or harmed by executing those interested may submit opposition to execution.

Opposition rightfully suspended sales procedure pending final determination of the case. Mortgagee who took over the property will still be able to do so during the trial of opposition.

The court will settle the opposition within 5 days. The court decision can be appealed only call within 5 days of notification. If the opposition rejected the appeal does not stop the creditor to proceed to sale of such goods. Emergency call is resolved according to the rules of the presidential ordinance.

The court may terminate execution started by creditor if the debtor has paid, and return of the property to the lender. If the court finds that the sale would be made in breach of this section, shall establish appropriate conditions and rules and approve sale of such goods<sup>1</sup>.

*The effects of taking over the account receivable*

Taking the asset by the creditor on account of the claim:

- a) off mortgages;
- b) the creditor transfers all the rights that the settlor has the asset;
- c) off all mortgages and lower-level privileges.

Mortgage contract with the notification of taking in account receivable in lieu of property title.

**References**

1. Law no.71/2011 published in M.Of. No. 409/10.06.2011, No. 79/2011 for regulating the measures necessary for the entry into force of Law No. 287/2009 on the Civil Code, as amended by the ordinance 1/2016 for changing the Law No.134/2010 relating to the code of civil procedure and the normative acts related matters, published in M.Of. No. 85/04.02.2016.

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- c) to all mortgagees whose mortgages have become opposable by inclusion in the archive of a notice identifying the encumbered asset and which after notification is entered in the name of the debtor;
  - d) to all persons from the receiving the notice of the existence of a right or a claim on the the mortgaged asset, as well as the those from which the good times when it was raised is, if known;
  - e) to all mortgage lenders and privileged whose warranty has become opposable another way, under the law, if the the mortgage lender knows their identity and address.

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Art. 1811 of the Law no. 71/2011

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