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# REFUSAL OF THE PROCEEDINGS IN A CASE: THE PROBLEM ISSUES OF CIVIL PROCEDURE

*The article examines the place and importance of the procedural legal facts that determine the enacting of court decree on refusal of opening of the proceedings in a case as well as outlines the legal consequences of such a procedural action as refusal of opening the proceedings in a case. The reasons for refusal of the proceedings in a case, listed in clause 2 of article 122 of Civil Procedure Code of Ukraine are analyzed in detail. The author has concluded that the reasons for refusal of opening of the proceedings in a civil case, except the one prescribed in sub-clause 1 of clause 2 of Article 122 of Civil Procedure Code of Ukraine, are of poor effectiveness. The author has proved that the reasons set out in sub-clauses 2–5 of clause 2 of Article 122 of Civil Procedure Code of Ukraine limit their efficiency within the pages of Civil Procedure Code of Ukraine and fail to have proper practical application at the stage of opening of the proceedings in a case.*

**Keywords:** opening of the proceeding; refusal of opening of the proceeding; court decree; civil case; statement of claim.

The activity of court during the civil proceedings is committed in distinct order provided under the rules of Civil Procedure Code of Ukraine (hereinafter – the CPC of Ukraine) [1]. Under Article 3 of the CPC of Ukraine everyone is entitled to apply to the court for the protection of their violated, unrecognized or disputed rights, freedoms and legitimate interests. In other words, an individual addressing to court wishes to obtain from it the decision that corresponds with his

interests. Longing for such a result a person does not realize sometimes that on this path there can be different obstacles of legal nature or daily life events that perplex or make the realization of plans set out impossible. The mentioned circumstances exist at different stages of civil procedure, particularly at the stage of opening of the proceedings in a civil case in the form of refusal of the proceedings.

General issues related to the research of content and order of commission of separate procedural actions at the stage of opening of the proceedings in a case at the different stages of legal science development were examined by such scientists as M. I. Baliuk, V. I. Bobryk, V. V. Komarov, D. D. Luspenyk, S. V. Senyk, V. I. Tertyshnikov, M. I. Shtefan and others. However, the legal facts and procedural actions that determine enacting the court decree on refusal of opening of the proceedings in a case were not subject to profound analysis exactly from the point of their place and importance to the area of civil procedural relations.

The objective of the article is to ascertain the place and importance of the procedural legal facts that determine enacting of court decree on refusal of opening of the proceedings in a case and to outline the legal consequences of such a procedural action as refusal of opening of the proceedings in a case.

Filing a statement of claim, a statement or an application on issuing a court order in court is a driving force of the civil procedure. On receipt of the mentioned documents court commences a complicated and longstanding legal procedure referred to consideration and finding of issues set out therein. The first stage of civil procedure is the stage of opening of the proceedings in a case. At this stage court commits the complex of procedural actions that are set forth in respective procedural legal facts particularly in decrees enacted by court on leaving the statement of claim without movement, return of the statement, refusal of opening of the proceedings, opening of the proceedings.

Reasons and order of enacting of mentioned decrees are prescribed by the rules of Chapter 2 of section III of the CPC of Ukraine. Under the clause 1of Article 122 of the CPC of Ukraine the judge shall open proceedings in a civil case only on the ground of statement submitted and executed in the manner prescribed by articles

118–120 of the CPC of Ukraine. At the stage of opening of the proceedings the judge, committing mentally procedural activity, is to determine the existence of reasons for leaving the statement of claim without movement or reasons for return of statement to the claimant.

If there are no circumstances that prevent the case from being considered later the judge's next step in mentioned activity is to ascertain the possible reasons for refusal of opening of the proceedings in a case.

First of all, the refusal of opening of the proceedings in a case on the grounds of unprovedness of requirement claimed, absence of evidence to substantiate the claim, omission of limitation period or on other grounds not prescribed by law is not permitted.

Under clause 8 of Ruling of the Supreme Court of Ukraine Plenum № 2 on 12.06.2009 «On the application of the rules of civil procedural legislation during the cases consideration in court of the first instance» [2] bringing a claim to the improper defendant is not the reason for refusal of opening of the proceedings because the replacement of the improper defendant occurs in order set out in Article 33 of the CPC of Ukraine. If the rule of substantive law that is to be applied at the claimant's request indicates that the other person and not the one to whom the action is brought shall be liable, upon the absence of the claimant's consent court shall involve in the case other person to join on its own initiative. After replacing the improper defendant or involving in the case other person to join upon the request of a new defendant or defendants involved or if the case was suspended it shall be reviewed from the beginning.

Court also shall refuse of the proceedings in a case if several requirements that are to be reviewed by the rules of different kinds of legal proceedings are claimed, because under Article 16 of the CPC of Ukraine merging of requirements to be reviewed by the rules of different kinds of legal proceedings into one proceeding is not allowed, unless otherwise provided by law.

Apart from listed, under clause 2 of Article 122 of the CPC of Ukraine the judge shall refuse of the proceedings in a case if

*1) the statement is not subject to review in the courts in the procedure of civil process*. The mentioned clause fixes theoretical provision on competence of courts on civil cases, the content thereof

implies that statement of claim or statement filed in court are subject to review, if a person addressing with the requirement on judicial defense has an adequate level of civil procedural capacity. In addition a person addressing to court shall have legal interest in this case.

The legislation stipulates the circumstances under which the subject of dispute is to be resolved in the procedure of civil process, but due to existence of temporary barriers filing a claim in court could be impossible. For example, the legal action for marriage dissolution may not be taken during the wife's pregnancy and within one year after the child has been born, save cases when one of spouses has committed unlawful conduct containing elements of crime in respect of the other spouse or the child (clause 2 of Article 110 of Family Code of Ukraine (hereinafter – the FC of Ukraine) [3].

As V. I. Bobryk states, court is entitled to refuse of opening of the proceedings in a case if the requirement claimed does not belong to «indifferent to law» [4, p. 284]. Among those «indifferent to law» one can name for example the claim for cards debt collection, debt on the results of illegal gambling etc.

Under clause 1 of Article 15 of the CPC of Ukraine the courts view on civil process cases concerning the protection of affected, unrecognized or disputed rights, freedoms or interests arising from civil, housing, land, family, labor relations and other legal relations, except when reviewing of such cases is performed under the rules of other legal proceedings. Upon the rules of other legal proceedings the competence of administrative or commercial courts on resolving specific dispute is meant.

The aforesaid legal situation determines the existence of chronic problem of distinction of competence between general and administrative courts on resolving the particular disputes. As the Head of the Supreme Court of Ukraine Y. M. Romaniuk stresses: «administrative courts in disputes concerning real estate, housing, land disputes, if in the process of solving of these issues the subject of the authoritative power has made a decision, continue to assign them to their jurisdiction regardless of whether the respective decision of the subject of authoritative power has been realized by citizen. Supporters of this position don't take into consideration the fact that an attempt to appeal the realized decision of the subject of authoritative power is the

dispute on the private right, because in the result of realization of decision the property right arises and the legal relations pass from the public law into the private law area» [5].

Thus in the case the dispute belongs to the area both of civil and administrative legal relations the judges of general courts use provided possibility with the aim of enacting of decree on refusal of opening of the proceedings in a case in order to free themselves from "extra" job while shifting the problem on deciding of the competence for existing dispute directly to the claimant.

*2) there exists a decision or court decree on closing the proceedings in connection with claimant's denial from the claim or signing a settlement agreement by the parties on the dispute between the same parties on the same subject and for the same reason that has come into legal force*. The mentioned clause stipulates the necessity of existence of three separate procedural legal facts in the form of decisions or decrees that has come into legal force. It is particularly: a) court decision; b) court decree on closing the proceedings in connection with claimant's denial from the claim c) court decree on signing a settlement agreement by the parties on the dispute between the same parties on the same subject and for the same reason.

Not diving into theoretical provisions on determining of the content of each of these kinds of procedural documents we have to note that at the moment of opening of the proceedings in a case the judge does not have the practical ability to ascertain whether there exist decisions and decrees previously approved on the dispute between the same parties on the same subject and for the same reason. Nowadays the issue on possibility of total opening of judges' access to the Unified State Register of court decisions, in which full data about the parties to the process will be reflected, is almost settled. Solving of this issue should to some extent contribute to the transformation of the provision prescribed by sub-clause 2 of clause 2 of Article 122 of the CPC of Ukraine from the "dead" state at the point of practical realization into viable one, because at the stage of opening of the proceedings the judge will be able to obtain information about the existence of decisions and decrees listed above. However the issue on the order of legalization of information obtained by the judge from the

Unified State Register of court decisions with the aim of justification the refusal of opening of the proceedings still remains unsolved.

Otherwise the judge will obtain information about existence of mentioned court decisions and decrees that has come into legal force only during the preliminary or the first court session in the case that will result in enacting of the decree on closing the proceedings under sub-clause 2 of clause 1 of Article 205 of the CPC of Ukraine.

*3) in proceedings of this or another court there is the case on the dispute between the same parties on the same subject and for the same reason.*

Under article 110 of the CPC of Ukraine the claimant is entitled to file the claim in several courts upon territoriality on his own choice (alternative jurisdiction). For example, the claims on consumer protection may be filed in local courts apart from the defendant's place of residence, at the place of residence of the consumer or the place of inflicting harm or implementation of the contract. Let model the situation under which the claimant files the same claim in court at the place of residence of claimant as well as in court at the place of residence of defendant at the same time. When deciding the issue on opening of the proceedings the judge will not be able to ascertain whether the same civil case is decided in other court. Less possible but real is the situation when the claimant after the opening of the proceedings and before the beginning of the case considering in essence files the same claim in the same court hoping that other judge will approve the decision upholding the claim. Therefore ascertaining the existence of the other case in proceedings of this or another court on the dispute between the same parties on the same subject and for the same reason at the stage of opening of the proceedings is almost unreal. Revealing this fact is possible only during the preliminary or the first court session in this case that will allow the judge to enact the decree on leaving the statement without consideration if the dispute between the same parties on the same subject and for the same reason is decided in another court (sub-clause 4 of clause 1 of article 207 of the CPC of Ukraine).

When analyzing the provision of sub-clause 3 of clause 2 of Article 122 of the CPC of Ukraine we conclude that it is said therein

about the reason for refusal of opening of the proceedings if in proceedings of this or another court there is the case on dispute between the same parties on the same subject and for the same reason. In its turn sub-clause 4 of clause 1 of Article 207 of the CPC of Ukraine stipulates that court shall leave the statement without consideration if a dispute between the same parties on the same subject and for the same reason is considered in another court. Comparison of these two sub-clauses allows to ascertain a contradiction between them that is as follows: court shall refuse in opening of the proceedings if in proceedings of this or another court there is the case on the dispute between the same parties on the same subject and for the same reason (article 122 of the CPC of Ukraine), and leaving the statement without consideration occurs if a dispute between the same parties is considered in another court (article 207 of the CPC of Ukraine). Then the question arises whether court is entitled to leave the statement without consideration if a dispute between the same parties is considered not in another but only in this court? The answer to this question is ambiguous because Article 207 of the CPC of Ukraine does not permit directly to leave the statement without consideration if a dispute between the same parties on the same subject and for the same reason is considered in this court.

*4) there is a decision of the arbitration court, taken within its competence, on the dispute between the same parties on the same subject and for the same reason, except when the court refused to issue an enforcement order on compulsory execution of the decision of the arbitration court or rescinded the decision of the arbitration court and the consideration of the case at the same arbitration court appeared to be impossible.* Under article 17 of the CPC of Ukraine the parties are entitled to refer the dispute to the arbitration court, except as prescribed by law. Under Article 5 of the Law of Ukraine "On arbitration courts" [6] legal entities and (or) individuals are entitled to refer to the arbitration court consideration any dispute arising from civil or commercial legal relations except as prescribed by law.

The parties that have referred the dispute to arbitration court determination are obliged to enforce voluntarily the arbitration court

decision unconditionally and without any delay. The parties and the arbitration court take all necessary measures to secure the enforcement of the arbitration court decision (article 50 of the Law of Ukraine «On the arbitration courts»). The decision of the arbitration courts is ultimate and without appeal, except as prescribed by law (article 51 of the Law of Ukraine «On the arbitration courts»).

Thus, the provision of clause 2 of Article 122 of the CPC of Ukraine is similar to the provision of sub-clause 3 of clause 2 of article 122 of the CPC of Ukraine in part of its practical application. The court is able to ascertain the existence of the decision of the arbitration court, taken within its competence, on the dispute between the same parties on the same subject and for the same reason only during the preliminary or the first court session, after obtaining the mentioned information when communicating directly with the parties to the case. If this circumstance exists court will have all the reasons for enacting the decree on closing the proceedings in a case under sub-clause 5 of clause 1 of article 205 of the CPC of Ukraine.

*5) after the death of an individual, as well as in connection with the suspension of the legal entity, who is one of the parties to the case, the disputed legal relationships are not liable to legal succession*. The disputed legal relationships mentioned in this sub-clause belong to the substantive law area and concern such subjects of civil legal relationships as individuals and legal entities. So, in substantive law there can be general (universal) succession of subjective civil rights as inheritance or the winding-up of legal entity (article 1218; clause 2 of Article 107 of Civil Code of Ukraine) [7].

Under article 1219 of Civil Code of Ukraine the rights and obligations inseparably connected with the testator shall not be included in the inheritance, particularly: personal non-property rights; the right to participation in partnerships and the right to membership in associations of citizens, unless otherwise established by law or the constituent documents thereof; the right to compensation of damages resulting from mutilation or other health disturbance; rights to alimony, pension, aids or other payments established by law; creditor's or debtor’s rights and obligations envisaged by Article 608 of Civil Code of Ukraine. Some family legal relationships also are not liable to

legal succession, particularly succession does not occur during court consideration of the case on parental affiliation (article 129 of the FC of Ukraine) or on deprivation of parental rights (Article 164 of the FC of Ukraine).

When considering legal entity, succession does not occur in the case of its liquidation that is total cessation of activity. Under Article 110 of Civil Code of Ukraine the legal entity shall be liquidated:

1) by the decision of its members or the legal entity's body empowered therewith by the constituent documents including in connection with expiring the term and the achievement of the goal, for which this legal entity has been created, as well as in other cases provided by the constituent documents.

2) by the decision of the court on the liquidation of the legal entity due to violations committed during its establishment that cannot be rectified upon the lawsuit of its member or the respective agency of State power.

3) by the decision of the court on the liquidation of the legal entity in other cases provided by law upon the lawsuit of the respective agency of State power.

Besides, the liquidation of the legal entity could be a result of its bankruptcy that is recognition by commercial court debtor's failure to restore its solvency with the aid of financial rehabilitation and settlement agreement procedures and satisfy creditors' pecuniary requirements, provided in order prescribed by the Law of Ukraine «On debtor's solvency restoration or recognition of its bankruptcy» on 14.05.1992 [8] not otherwise the application of liquidation procedure therewith.

As under previous sub-clauses 2–4 of clause 2 of Article 122 of the CPC of Ukraine ascertaining the fact that the disputed legal relationships are not liable to legal succession becomes possible generally not at the stage of opening of the proceedings in a case but during the preliminary or the first court session in the civil case.

Thus, taking into consideration mentioned above we can conclude that among all the analyzed reasons for refusal of opening of the proceedings in a case only the one prescribed by sub-clause 1 of clause 2

of Article 122 of the CPC of Ukraine can be possibly realized completely. The rest provisions set out in sub-clauses 2–5 of clause 2 of Article 122 of the CPC of Ukraine limit their efficiency within the pages of the CPC of Ukraine and fail to have proper practical application.

The judge shall solve the issue on refusal of the proceedings not later than in three days after receiving the statement to the court or the expiration of the deadline set for eliminating defects and not later the next day after obtaining the information about individual's place of residence from the respective individual place of residence registration authority.

The judge shall enact a decree on refusal of the proceedings that shall be immediately sent to the claimant along with the statement and all the papers enclosed thereto.

The main procedural consequence of enacting of the decree on refusal of the proceedings is that individual will have in future legal barriers on re-appealing to court with the same claim.

The detailed analysis of the reasons for refusal of the proceedings in the civil case allows testifying their poor procedural effectiveness. We can declare with certainty that only the reason set out in sub-clause 1 of clause 2 of Article 122 of the CPC of Ukraine could be procedurally realized completely. In their turn the reasons set out in sub-clauses 2–5 of clause 2 of Article 122 of the CPC of Ukraine limit their efficiency within the pages of Civil Procedure Code of Ukraine and fail to have proper practical application at the stage of opening of the proceedings in a case. Besides the provision of sub-clauses 2–5 of clause 2 of Article 122 of the CPC of Ukraine are duplicated respectively by the ones of sub-clauses 2–5 of clause 1 of Article 205 of the CPC of Ukraine as well as the one of sub-clause 4 of clause 1 of Article 207 of the CPC of Ukraine.

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