

Study on the Scope of Damage Compensation for Lessee's Preemption Right

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Abstract: The lessee's right of preemption system was established as early as 1999 in the "Contract Law", and in the "Civil Code" also clearly stipulates that the lessee can carry out right relief based on the claim, but there are no detailed provisions on the nature of the right and the relief methods, ways, standards, etc., resulting in many "same case and different sentences" in judicial judgment. As a result, the legitimate rights and interests of the lessee cannot be effectively protected. By combing the theory of tort law and collecting the civil judgment documents related to the damage compensation of lessee's preemption right before and after the implementation of the Civil Code, the empirical research finds that: the lack of a unified definition of the nature of preemption right leads to the court hearing cases with unclear reasoning; In the identification of the nature of compensation liability, there are tort liability, contracting negligence liability, breach of contract liability and so on, so that the basis of the lessee's claim for damages is not clear; In terms of the scope of damage compensation, the court has no uniform standard on whether and what part of the damage compensation requested by the preemption right holder, resulting in a very inconsistent judgment result. Therefore, through the nature of the lessee's preemption right, the nature of compensation liability and the scope of damage compensation, the judicial application suggestions are put forward in order to help standardize the judicial trial results in judicial practice.

Keywords: Lessee's Right of First Refusal, Damages, Liability for Breach.

1. Introduction

The contract law promulgated in 1999 only stipulates that the lessee can claim the liability for damages when the preemptive right is infringed, but does not specify the nature and scope of the liability for damages. There is no new provision in the Civil Code, which leads to disputes in judicial practice when determining the scope of specific damage compensation, so it is of practical significance to study the lessee's preemptive right. This paper sorts out and summarizes the existing views, and through consulting a large number of judicial cases, sorts out and analyzes the judicial practice issues involved, and finally determines the nature and scope of the lessee's preemptive right damage liability.

2. Judicial Status Quo Of the Scope of Damage Compensation for Lessee's Preemptive Right

In order to investigate the determination of the scope of damage compensation for the lessee's preemptive right in judicial practice, the author consulted a large number of cases, mainly from the "China Judgment Document Network" and "Peking University Magic", and retrieved hundreds of cases related to the scope of damage compensation for the lessee's preemptive right. Among them, the damages involved in the case are mainly divided into "rent loss", "cost for rent seeking" and "housing price difference". There are differences in the judgment of different courts on the lessee's claim to the lessor to compensate for the loss of difference. Some courts found that this requirement did not conflict with existing law and upheld the claim. However, some courts held that the real estate market is volatile, housing prices are not stable, so it is not appropriate to treat the housing price difference as expected income, and some courts did not

support the lawsuit. The confusion of judges in defining the scope of preemption damages in judicial practice not only reflects the difference in the judgment results of the same claim for damages, but also reflects the difference in the nature of liability for damages, the basis of claims for damages is different, and the scope of damages ultimately determined is different, so we must first determine the nature of liability for preemption damages.

3. The Theoretical Basis of Damage Compensation Scope of Lessee's Preemption Right

Through the investigation of the judicial status quo of the scope of damage compensation of the lessee's preemptive right and the analysis of the problems therein, we know that the nature of the liability of damage compensation must be determined before the scope of damage compensation can be determined. In the civil law system of our country, the common nature of damage liability includes tort liability, breach of contract liability and contracting negligence liability. However, the nature, exercise conditions and exercise period of the right of preemption affect the liability of the infringer after impairing the lessee's right of preemption to varying degrees. Therefore, this paragraph discusses the relevant theories of determining the scope of damages for the above-mentioned influence.

3.1. Exercise of preemption right

3.1.1. The nature of the right to preemption

At present, the controversy about the nature of preemption right in our country mainly focuses on whether it belongs to the right of compulsory contracting or the right of formation. Scholars who support the right of compulsory contracting believe that "the right of preemption is the right

of the right holder to request the seller to conclude a sale contract with him, and the seller has the obligation to undertake at his request."^[1]When the lessor violates the statutory notification obligation and infringes the lessee's right of priority to purchase, the lessee may request the intervention of the public authority to force the lessor to make a commitment to express its intention. That is, the lessor has the obligation of compulsory commitment to the lessee's request to purchase the leased house."^[2]According to the theory of the right of compulsory contracting, the intention of the lessee to buy the house under the same conditions is only an offer, and the contract can be established only after the consent of the lessor. Scholars who hold the formation right theory hold that "the preemption right, no matter whether it is legal or agreed, is a formation right in its nature, that is, the preemption transferee can form a contract with the same conditions as the obligor's sale to a third party, without the obligor's commitment."^[3]"The formation right of the lessee's preferential purchase right means that a sale contract with the same conditions as the house sale contract between the lessor and the third party is formed according to the intention of the lessee only, without the commitment of the lessor."^[4]The so-called right of formation refers to the right holder's right to change the legal relationship between himself and other people according to his own behavior, and its main function is that the right holder can make the effect of the established legal relationship occur, change or eliminate according to his unilateral intention.^[5]The author believes that the nature of the lessee's preemptive right is a better choice than the right of compulsory contracting. The formation right can change the result of legal relationship only by unilateral expression of intention, without the participation of the counterpart. The interest protected by this system is the interest of the lessee to buy the house, and the formation of the right nature can better facilitate the realization of its right content.

3.1.2. Equal condition

The same condition is the essential element of the lessee's preemptive right, which affects the establishment of the liability for damages. There are two viewpoints on the applicable criteria of the same conditions: "absolute equivalence theory" and "relative equivalence theory". The absolute equivalence theory holds that the conditions under which the lessee buys the house must be exactly the same as those paid by the third party. This theory has been criticized by some scholars because of its harsh conditions. The theory of relative equivalence holds that the purchase conditions of the preemption right holder are roughly the same as those of other buyers.^[6]The "roughly the same" is too general to determine its standard in practice, so the view remains open to debate. Because laws, regulations and judicial interpretation have not made specific provisions on the "roughly the same" standard, the judge's subjective determination determines the exercise of the lessee's preemptive right to a certain extent in practice. Generally speaking, the reference factors for identifying the same conditions are the price of the house, the method of payment, the period of performance, etc. One of the most critical factors in house price room.

3.1.3. Exercise period

Since the exercise of the preemptive right is directly related to whether a legal sale contract can be established between the seller and the third party, the preemptive right shall be exercised within a reasonable period of time in order to determine the legal relationship as soon as possible, reduce

the unstable state of the transaction order caused by the existence of the preemptive right, promote the normal transfer of property, and protect the legitimate rights and interests of the seller and the third party. That's how long the preemption is supposed to last.^[7]Article 726, paragraph 2, of the Civil Code stipulates that "if the lessor fails to express his purchase within 15 days of the lessor's performance of the notification obligation, the lessee shall be deemed to have waived the preemptive right." The period of 15 days shall be the exercise of the right of preemption, calculated from the date on which the lessor's notice reaches the Lessee, and shall not apply to the provisions concerning the suspension, interruption or extension of the limitation of action, which is a period of exclusion in nature.^[8]

3.2. Nature of preemption right damage liability

3.2.1. Tort liability theory

Some scholars believe that "the preemption right is the formation right, which is a separate act, and the exercise of power makes the sale contract established." The transfer of land ownership to the buyer without notice to the lessee is not a breach of the lessor's obligation to perform the contract entered into at the request of the lessee, but a breach of the notification obligation, an infringement of the right of formation, and the inability to exercise it, so it should be liable for damages."^[9]The infringement of the preemption right of the lessee can be regarded as a kind of tort, so it should bear the tort liability. The lessor has violated the lessee's right of preemption under the law, resulting in the lessee suffering losses, so the lessor should bear the liability for compensation.

3.2.2. Liability for breach of contract

Some scholars believe that "if the lessor sells the leased house to a third party and completes the ownership transfer procedures without notifying the lessee, and the lessee sues the lessor in court for infringement of its preemptive right, the court can only investigate the lessor's liability for breach of contract according to the relevant provisions of the Contract Law."^[10]This view holds that the lessor's notification obligation stipulated by law belongs to the collateral obligation of the house lease contract. If the lessor violates the statutory collateral obligation, it is a breach of contract and shall bear the liability for breach of contract.

3.2.3. The theory of liability for contracting negligence

The liability for contracting negligence is the liability that one party should bear when the other party's trust interests are damaged due to the violation of the principle of good faith in process of contract conclusion.^[11]According to the theory of liability for contracting negligence, if the lessor fails to sign a contract with the lessee according to the content of the contract signed between the lessor and the third party, the contract cannot be established, the lessor should bear the liability for the contracting negligence. "The lessor's violation of the notification obligation is a violation of the compulsory contracting obligation, which occurs in the contracting stage and belongs to the contracting negligence liability. The lessor should compensate the lessee for the loss of trust interests."^[12]

4. Determination of the Scope of Compensation Under Different Nature of Liability

4.1. Tort liability

The lessee's preemption right has the nature of forming right, so the lessor's infringement on the lessee's preemption right constitutes tort. The scope of compensation for tort liability includes the direct economic loss and other indirect economic loss caused directly by the tort. The difference theory, also known as the interest theory, sums up damage as the difference between "the amount of property a person would have at a particular point in time after the event of damage" and "the amount that person would have at that point in time if a particular event of damage had not occurred."^[13] That is, when determining whether the damage exists, what would be the total amount of the victim's current property if the fact of causing the damage had not occurred, and then subtract this assumed total amount from the total amount of the victim's existing property, the difference is the damage.^[14] The balance theory holds that "all subsequent damages that would not have occurred had they not occurred should be compensated, whether or not they were direct, inevitable, or foreseeable, and the benefits that could have been obtained should also be compensated in addition to the positive property losses."^[15] Therefore, according to the difference theory, after the lessee fails to purchase the house through the exercise of the preemptive right, he has to buy a similar house at a higher market price than the sale contract, and the resulting house price difference, the lessor should bear the liability for damages.

4.2. Liability for breach

The lessee's preemptive right has the nature of forming right, once exercised, it will form the legal relationship between the lessor and the lessee. The lessor shall have the obligation to transfer the ownership of the house for the lessee. If the lessor violates this obligation, he shall be liable for breach of contract. According to Article 584 of the Civil Code, the liability for breach of contract shall include the losses caused by the breach and the benefits that may be obtained after the performance of the contract. Direct losses, indirect losses, and expected gains. French scholar Poitier first proposed the rule of foreseeability, arguing that "in addition to the obligation to the creditor's foreseeable damages and interests at the time of the conclusion of the contract, the debtor no longer has corresponding obligations to other parties."^[16] Accordingly, the lessor's liability for breach of contract should not only compensate the actual loss suffered by the lessee after the purpose of exercising the preemptive right falls through, but also include the expected benefits of the lessee, that is, the benefits that can be obtained after the performance of the contract. However, the author believes that the housing price difference is not predictable, and the real estate market itself is uncertain, so the unforeseeable housing rise cannot be regarded as the expected income, and the difference is imposed on the lessor, which violates the principle of equity. Therefore, the difference in housing price cannot be included in the scope of damages.

4.3. Contracting negligence liability

In the liability for contracting negligence, compensation is the loss caused by the trust of the parties due to the violation

of the principle of good faith by the other party. In addition to compensation for the cost loss that may occur after the performance of the contract and the actual loss that the contract is invalid, modified or revoked due to the contracting negligence, it also includes the loss caused by the parties losing the opportunity to conclude the contract with others. Therefore, the difference in house price can be used as the scope of compensation.

5. Specific Calculation of Damages

House price difference is an inevitable loss due to lost trading opportunities. When determining the loss of housing price difference, attention should be paid to: first, determine the time of loss. From the point of view of protecting the interests of the lessee, we should reasonably determine the time when the loss occurs by considering the date of termination of the lease contract, the date of registration of the transfer of the house and the market price of the house. 2. Deduct the necessary transaction taxes. In the process of housing registration, there will be various taxes and registration fees, which should be deducted from the loss of the difference. Third, determine the real transaction price. If the real transaction price is inconsistent with the contract transaction price recorded in the real estate registration department, the difference shall be determined according to the real transaction price, rather than the loss of the difference calculated according to the contract price recorded.

6. Conclusion

This paper mainly discusses the damage compensation of the lessee's preemption right. In order to determine the legal liability that the lessor needs to bear, it is necessary to clarify the nature of the lessee's preemption right, and then determine the compensation liability that the lessor needs to bear according to the actual situation. There are many theories about the nature of liability for damage compensation of lessee's preemptive right. The author thinks that the liability for breach of contract is more operational and its compensation scope is more favorable to the right holder.

Acknowledgment

This work was supported in part by a grant from AUFU The Graduate Student Innovation Fund Program (ACYC2022235).

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