

Constitutional Aspects of Protecting the Interests of Non-Professional Participants in the Shared-Equity Construction Market

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ABSTRACT

This article examines the problems of legal regulation in the civil-law institution of shared-equity housing construction. In particular, we consider possible measures to protect the non-professional participants of this market. Our research indicates that at this time the latest amendments to the shared-equity construction law are aimed to protect primarily the interests of co-investors. Nonetheless, these changes in legislation violate the rights and interests of both the developers and non-professional participants of the shared construction market, which means that the problem of protecting the interests of co-investors remains relevant. This paper contains statistics and case examples that illustrate the existing situation. Using the results of this author's research, we suggest some measures that can be taken to protect the interests of not only the co-investors, but the developers as well.

Keywords: *shared-equity construction, defrauded co-investors, right to housing, right to property, fraudulent developers*

1. INTRODUCTION

According to the official statistics of the Ministry of Construction, Housing and Utilities of the Russian Federation, as of 2019 in Russia 894 development projects remain unfinished. The money used in these developments was raised from co-investors in compliance with the provision of the Law on Participation in Shared Construction (hereinafter – the Shared Construction Law). «Defrauded co-investors», a common term for the participants of the shared-equity construction market who were unable to realize their rights to housing and property, can be found in 68 out of 85 regions of Russia, the list of shared construction fraud victims includes around 40,000 citizens.

However, there are also other statistics relating to shared construction. According to the official website DOM.RF – a financial institution promoting improvement in housing founded by the government of Russian Federation in 1997, - the DOM.RF registry of all problematic developments lists 16,9 million sq. meters of housing belonging to defrauded co-investors (3281 houses).

2. LITERATURE REVIEW

As the numbers of defrauded co-investors increase, more and more researchers turn their attention to designing an efficient mechanism of legal regulation for equity-share

construction that would meet the needs of both citizens and the government, amongst them are papers by A. R. Kirsanov, O. V. Teveleva, O. L. Verbina, E. P. Gladneva, E. G. Donskih, E. N. Gorbunova, D. B. Korotkova and others. Some noteworthy papers were also written by authors outside of Russia studying equity-share construction and project financing: N. Abdullah, F. Kari, I.N. Nawang, E.R Yescombe, P. Barlow.

This author also attempts to study the problems of shared-equity construction field by using methods of scientific knowledge such as dialectical, system analysis, comparative legal, formal legal and statistical methods.

Analysts believe that the number of defrauded co-investors might double with the amendments made to the shared construction law. The Federal Law No. 175-FL dated July 1, 2018 «On Amending the Federal Law «On Participation in the Shared Construction of Apartment Buildings and Other Real Estate Objects and on Amending Certain Legislative Acts of the Russian Federation» and Certain Legislative Acts of the Russian Federation» introduces a new payment mechanism between the developers and other participants of the shared construction process. Now all Russian developers are obligated to use escrow accounts in shared construction. The clients deposit their money to a specific bank account, and the developer will not be able to make withdrawals until the clients receive their apartments. Note that with the Government

Regulation of RF No. 480 dated April 22, 2019 this is relevant not only for new developments, but for all developments that are not completed.

3. RESULTS AND DISCUSSION

Even with this one amendment, all developers that were unable to receive a loan or get permission to finish development of their projects without switching to the new payment mechanism using escrow accounts will suffer. According to the Ministry of Construction, Housing and Utilities of the Russian Federation, as of this time, 3850 developers operate in Russia, creating 118, 2 mill. sq. meters of housing. Only 774 of them (responsible for less than 20 mill. sq. meters) were able to receive bank loans for their projects using escrow accounts, while 700 other developers (with around 30 mill. sq. meters under construction) are in the danger zone, as finances are too limited to complete their projects.

In his Address to Federal Assembly on December 4th of 2014 the president of Russian Federation, V. V. Putin noted, «We all want the same thing – what’s best for Russia. The relationship between our businesses and government has to be founded in shared philosophy, partnership and dialogue between equals».

As the guarantor of the Russian Federation Constitution, the president of Russia is responsible for making sure that all mechanisms protecting human rights and citizen rights function without a hitch, and he was absolutely right when pointing out that one of the major ideas of Russian Constitution is equality for the good of all.

However, taking into account the conclusions voiced by experts in this field, one has to wonder if some of the constitutional human and citizen rights may be violated by current legislation. For example, according to research done by the Central Economics and Mathematics Institute, RAS, these changes in law can lead to the following:

Bankruptcy of a significant percentage of developers, and as a consequence, loss of jobs occupied by Russian citizens;

Increase of housing prices by 25%;

Construction businesses going into the «shadow» («shadow economy»);

Increase in numbers of defrauded co-investors of equity-share construction amongst the citizens.

We feel that it is also important to note the increase in interest on bank loans on bail of apartments (mortgage), insufficient government subsidies to socially vulnerable groups in the population, as well as concerns about the quality of newly constructed housing.

As you can see, even this one change in the government regulation of equity-shared construction jeopardizes the constitutional rights to property (Art. 35 of RF Constitution), housing (Art. 40 RF Constitution), social security (Art. 39 RF Constitution), equality of rights and freedoms (Art. 19 RF Constitution) etc. And this is only one side of the issue. We have considered situation from the point of view of the citizens participating in equity-shared construction, but not from the developers’.

Russian Federation presents itself as a welcoming environment for investments and businesses, but at the same time the current laws create additional barriers for interested parties and entrepreneurs, as well as putting existing developers to the test. That’s why we have to consider the delicate balance between the interests of developers-entrepreneurs and citizen investors and make sure the law protects both sides equally.

These latest additions to the law were predicated on the need to create an additional barrier preventing fraudulent developers from entering the housing construction market. Russian law enforcement has seen many a case in shared-equity construction of a single apartment being sold two, or even three times. As an example, this is exactly the situation that the co-investors participating in the construction of an apartment complex on Fedorovskaya str., No. 6, Saratov found themselves in. More than 60 people were left unable to receive their apartments because of this double-selling.

In addition, there are still cases of developers bypassing the law and not signing the legally required contract for participators of shared-equity construction including all of the terms specified by the shared-equity construction law. For example, the descriptions of a case in Krasnodarsky Krai have been widely distributed across internet media sites. A man was signing preemptive sale contracts on the apartments in a building still under construction with no intention of passing ownership to the consumers.

In order to prevent such cases in the future, the lawmakers systematically implement policies creating barriers to prevent fraudulent developers from entering the housing market. For example, the term “developer” is defined by law in such a way that in order to be legally allowed to raise funds from citizens, the developer has to have three years or experience working in construction of multi-floor housing buildings with no less than 5,000 sq. meters of area (p. 1 art. 2 Shared construction law).

The developer is also obligated to sign the contract of shared-equity construction with the co-investors. Preemptive contracts or investment contracts are not permitted. With these changes to the law, the lawmakers made sure that all of the necessary clauses making the developer more open with the co-investors are included in the contract.

The legal requirements the developer has to meet at the stage of submitting the project declaration to the authorities have also been defined by law. The developer has to prove their legitimacy and ability to finish the construction of the housing building by providing additional information for the supervisory authority. This information includes absence of previous bankruptcy procedures, presence/absence of a criminal record for the director or the accountant-general of the developer, as well as the confirmation that there are no arrears in their obligatory payments to the government, etc.

All these measures were intended to become the necessary barrier protecting the market from fraudulent developers. However, the changes asking the developer to have the specified amount of multi-level housing construction experience spark some concerns. There are many

developers that have only ever worked with commercial real estate, and these new laws require such a developer to acquire experience in housing construction before they can receive permission to start a shared-equity housing construction project. Does this not present a barrier for new legitimate developers wishing to enter the housing construction market and create a kind of monopoly? How does this provision correlate with the freedom of business (Art. 34 of RF Constitution)? The same argument can be applied to some other amendments to the shared construction law as well.

With the implementation of Federal Laws No. 175-FL and 478-FL, Russia has entered a transitory period in legal regulation of shared-equity construction. The lawmakers reject the notion of raising money for construction projects directly from the citizens in favor of bank loans.

The aforementioned amendments are widely discussed by practicing layers and theoretical law scientists. One point of view, formulated by Teveleva O. V., suggests: «These major amendments to the Law No. 214-FL make it's implementation impossible, as well as causing the construction business to become less open, maybe even unprofitable. How can we, in this situation, expect to continue providing our citizens with housing and solving other social issues is a mystery to me. Another question, perhaps even more urgent, is where are the banks expected to find enough funds to provide the necessary housing construction for the Russian citizens? It's no less 3,6 trillions of rubles. It is already apparent that even as we solve the problem of defrauded co-investors, we simultaneously create many other problems and a possible social collapse».

On the other hand, the opposing opinion suggests that these amendments can solve some of the present issues: clear the market of many persons, who are only trying to

4. CONCLUSION

In conclusion, shared-equity construction regulation is, perhaps, the most dynamically changing part of the construction field. The intentions of the lawmakers are clear: to create an open and reliable relationship between developers and citizens participating in shared-equity construction in the existing market conditions. But in fighting the issue of defrauded co-investors, the lawmakers impose more and more responsibilities upon the developer. Let us note that the amendments to the shared construction law were predicated on the need to protect the constitutional rights of Russian Federation citizens, such as the right to housing, to property, to equality of rights and freedoms and social security provided by the government. However, the law also has to be consistent with the government policy on the specified field of social relations, the spirit of the law must be accurately represented by the wording of the document, and the implementation of this law in regulation of the field should take into account the interests of the professional participants of this market - the developers - as well, as

achieve personal gain by deceiving investors; cut away the unnecessary and unreasonable requirements the specialist developers have to meet; create an environment in which the numbers of defrauded co-investors will not increase, as this kind of abuse of the law will become impossible.

We think that both of these positions adequately describe the pros and cons of this next stage Russian construction market using outside investments will go through. The lawmakers have to take both into account, and find the necessary balance between the interests of developers, citizens and banks that would guarantee competitive conditions in the housing market and control the cost of bank credit to ensure that housing prices for the citizens do not increase.

Another issue in shared-equity construction that requires consideration is ensuring the conscionable conduit of the co-investors in court cases with developers on recovering a penalty for not finishing construction in the specified time. In one such case in Kaliningrad, a co-investor received a penalty of almost a million rubles for an apartment that cost two million. In another case, the developer made an appeal, but the Moscow regional court upheld the ruling of the Electrostal city court in the Moscow region to penalize the developer for 2,5 million rubles, the cost of the apartment in question 4 million rubles. The issue of consumer extremism is being discussed in the Ministry of Construction, Housing and Utilities as well.

It is apparent that in an attempt to provide the economically weaker party, the co-investors, with more guarantees and opportunities to better protect their rights, as well as create a balanced relationship between the developer and the consumer, the lawmakers created a situation where the developer has no choice but to pay for the construction of the co-investors real estate out of pocket.

they too have rights and interests guaranteed by the main law of Russian Federation.

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