

STATUS OF MORTGAGE CREDITOR

REVIEW SCIENTIFIC PAPER

UDK 347.283:347.193-055

DOI 10.7251/DEFEN2353093S

COBISS.RS-ID 138681857

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Abstract: When discussing the legal status of a mortgage creditor, it is necessary to observe and distinguish his real estate rights from two aspects. First, his rights prior the maturity of a claim secured by a mortgage, and secondly, his rights after the maturity of the claim secured by a mortgage. The mortgage encourages the borrower to fulfill his obligation arising from the obligatory relationship. The disposability over the mortgage subject matter is only “potential”, and only if this psychological pressure shows no effect on a mortgage debtor, the realization of a mortgage follows afterwards. The mortgage operates in the sphere of responsibility and originally exists with respect to possibilities, and can be activated only if certain conditions are met. Therefore, in the legal theory, the powers of the mortgage creditor are classified into a “static” and “dynamic” phase. The aim of the paper is to show, through the analysis of the status of the mortgage creditor, from the aspect of its rights and obligations, that in Serbia, with the passing of the Mortgage Law, both in theory and in practice, its status has been improved. That a mortgage for a mortgagee is nevertheless a set of rights, not an obligation.

Key words: rights of mortgage creditor, settlement, priority, ration rights, transfer, obligations of mortgage creditor.

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1. INTRODUCTION

The mortgage is a very old legal institute that was created in the ancient times (it is found in the Hamurbi Code, in the Mosaic Laws, in ancient Greek law, and in Roman law). It is a pledge right whose main characteristic is that it is an accessory right (non-exclusive right) which is related to the right of claim for whose security it serves. It differs from the guarantee that security is a personal security, and a mortgage is real security. A mortgagee is a lien of this pledge right and can settle his claim for mortgages that are at debtor's disposal. As mentioned earlier, the mortgage was developing during the antique period. Particularly more changes occurred in Roman law, where in the beginning the subject of the mortgage was in the creditor's possession until the debt was paid, when it was again returned to the property of a former debtor. Later, the notion of a mortgage related to movable and immovable things, but the subject of the mortgage remained at debtor's disposal. In the Middle Ages, the mortgage did not develop (excluding the then most developed country, Byzantium and Justinian Code). Its full expansion of the mortgage gets the rapid development of the economy and especially finance in the new century. She becomes a constant companion of banking affairs in which she serves as security.

2. THE RIGHTS OF THE MORTGAGE CREDITOR

2.1. The right to settlement

The primary right of a mortgage creditor is the right to settle claims secured by a mortgage from the value of a mortgage item. Therefore, it is a power to authorize a mortgage creditor to collect his claim secured by selling a mortgage subject matter, which serves as a security for him.

By establishing a mortgage, mortgages produce certain effects and burden the property on the subject of mortgage. Depending on the effect of the right to settle at different moments of the existence of a mortgage, legal science sees the pledge in two phases, static and dynamic. The static phase of the pledge has the function to "conserve" the value of the pledge and protect it from potential hazards that could jeopardize the future satisfaction of the creditor. At this stage, the mortgage creditor's

authorization is valid in the event of a decrease in the value of the mortgage item, and no affirmative right of settlement has been created yet (Vicković, 2009, p. 151).

The right of settlement is a “kinetic” force whose capacity to activate depends on the fulfillment of the foreseen conditions. In the static phase, the right of settlement is subject to psychological pressure on the mortgage debtor to voluntarily settle the claim (Lazić, 1994, p. 47). In the dynamic phase of the pledge, the right of settlement can be carried out in a forced manner in the enforcement procedure and out-of-court under certain conditions.

These phases could be referred to as “previous” and “final” phases. The final phase would occur at the moment of meeting the conditions for realization of the right of settlement, and the realization would also lead to the cessation of the mortgage. In doing so, it should be borne in mind that this division is only conditional and that it does not disturb the uniqueness of the content of the mortgage. The split into the previous and final stage of the mortgage is useful to indicate the different effect of the mortgage creditor’s right to settle at certain stages from the creation to the realization of the mortgage or its termination in another way (Lazić, 1994, p. 47). The mortgage creditor does not acquire the right to settle mortgage-related assets immediately.

The purpose of the mortgage is to serve for the present coverage and future satisfaction of the claim of the lien creditor (Stojanović, 1980, p. 292). Thus, the purpose of the mortgage is to secure the receivables. In this respect, the Mortgage Law itself in Article 1 stipulates that it is regulated by a mortgage, “for the purpose of securing and collecting receivables.” Also, if we return to the notion of a mortgage that is defined as a lien on immovable property, which is authorized by the creditor, that if the debtor does not pay the debt on the maturity of the claim, the collection of claims secured by a mortgage from the value of the real estate...

In the Law on Mortgage, in general rules, Article 24 paragraph 1 stipulates that “a mortgage creditor may, if the debtor does not pay his maturity, settle his claim on the value of the mortgaged real estate, regardless of the property or state of the mortgaged property in that moment.”

In order for a mortgage creditor to activate his right through settlement, it is necessary to fulfill three conditions: that the claim has become due, the debtor's delay and the choice of settling the claims through the realization of the mortgage.

The claim is due at the moment when the mortgage creditor is authorized to seek settlement of his claims. From this it follows that for the occurrence of the delay of the borrower, the assumption of the maturity of the claim of the mortgage creditor is necessary. In this case, we distinguish two situations: when the deadline for fulfilling the obligation is determined by the contract and when the time of fulfillment of the obligation has not been done. The first case is clear and the right settlement occurs when the debtor fails to meet the deadline for fulfilling the obligation. In the second case, when the deadline has not been determined, the debtor is late when the creditor invites him to fulfill the obligation. Article 324 of the Law on Obligations regarding the delay of the debtor stipulates: "The debtor is in arrears when he fails to fulfill the obligation within the deadline set for fulfillment."

The third condition is the choice of the way of settling matured receivables.

In the Article 25 regarding the choice of settlement, the Mortgage Act stipulates that:

"A mortgage creditor may require that his due claim be settled:

1. first from the value of the mortgaged real estate, then from the other property of the debtor;

2. at the same time, from the value of the mortgaged real estate and from the debtor's property, or;

3. first from the debtor's property, and then only from the value of mortgaged real estate."

It is only at the moment of choosing a mortgage creditor that his demand settles from the mortgaged real estate comes to the realization of his rightful settlement.

The remedy will be implemented in accordance with the rules of the Mortgage Act, the law establishing the compulsory collection of tax receivables on immovable property (the Law on Tax Procedure and Tax Administration) as well as the out-of-court sale procedure if the mortgage

agreement is made in the form of a credible document or executive document in accordance with Article 15 paragraph 1 of the Mortgage Act (Službeni glasnik, no. 115/2005, 60/2015, 63/2015 - decision of the Constitutional Court and 83/2015).

The mortgage law envisaged that a mortgage creditor can be settled from the value of the mortgaged real estate and after the obsolete secured claim. This is subject to the condition that his right is entered in the public book.

Also, paragraph 2 of Article 26 of the same law provides that in cases of obsolete claims, interest and other occasional benefits can not be settled from the subject of the mortgage.

The rules of Article 26 of the Mortgage Act are in accordance with Article 368, Paragraphs 1 and 2 of the Law on Obligations, which stipulates that when the outdated period of obsolescence expires, the creditor whose claim is secured by pledge or mortgage can only be satisfied from the burdened thing if held in the hands or if his right is entered in the public book. However, outdated interest payments and other occasional bonuses can not be settled out of burdensome things. So mortgage and pledge is a real right at all that does not become obsolete. The right of ownership is the absolutization of the effect of claims, so that this obligation right in the part secured by the pledge acquires the features of the real right and can be realized through the stock regardless of the obsolescence (Lazić, 1994, p. 60).

“In the banking sector, uncollectible claims are a serious threat to the stability of the entire financial system and require urgent resolution in the most efficient way possible. Unlike developed countries with more experience in the treatment of uncollectible claims, developing countries are in a position to use the experience of other countries, with the additional specificity that these countries need to absorb a much higher amount of risk in the absence of an efficient market (Mirković, 2015, p. 402).”

2.2. Rights in case of a decrease in the value of a mortgage item

In the previous part of the presentation, we pointed out the right of settlement as the primary right of mortgage creditor. In addition to that primary right, the mortgage creditor also has secondary rights (powers) that have ancillary character and represent “modalities of right

of satisfaction that serve to make it safer and more successful (Marković, 1911, p. 172).”

Secondary rights include, among others, the rights of mortgage lenders in case of a decrease in the value of the mortgage item. These include the right of priority, the right of follow-up, the right of transfer, and so on.

The right of a mortgage creditor in the event of a decrease in the value of a mortgage subject matter is primarily for securing and protecting the interest of the mortgage creditor, from the moment of constituting the mortgage until the moment of realization of the mortgage.

From the moment of constituting the mortgage to its realization, there is the so-called static phase of the mortgage, where the right of settlement is stationary and not activated. This is the waiting period for whether a mortgage debtor will fulfill his voluntary commitment or not. The mortgage debtor, that is, the owner of the mortgaged real estate, in accordance with Article 16 of the Mortgage Act, has the right to hold the mortgage object, use it as usual, to collect the natural or civil fruits that the mortgage is subject to, and to omit the subject of the mortgage and transfer the right to an acquirer, in which case nothing changes in the debtor's obligation and secured claim.

It happens that the mortgage debtor does not behave like a good host in the subject of the mortgage, so that his behavior leads to a reduction in its value.

The protection of interests of the mortgage creditor was regulated differently in certain legal systems. Here we will look at some interesting cases. German law in the comparative legal systems developed the idea of protecting the interest of the mortgage creditor from the actions of the mortgaged property owner and third parties.

A mortgage creditor may, if the risk of damage and endangering the security of the mortgage threatens, require the court to order the owner of the mortgaged real estate or a third person who adversely affects the immovable property, to stop the threat of harm. When the harmful action arises from the owner of the matter, the court will, on the proposal of the creditor, force the owner to stop harmful activities. If the harmful action originates from a third party, it is required, through the court, to the owner of the matter to take protective measures against a third person.

Also, pursuant to paragraph 1133 of the German Civil Code, a mortgage creditor may, in the event that a deterioration of the immovable property has been affected to the extent that the security of the mortgage is endangered due to the harmful action of the owner or a third party, determine in particular an appropriate period for removing the consequences of the threat. If this deadline is unsuccessful, the mortgage creditor may request the fulfillment of a claim from the value of the mortgage regardless of the fact that the claim was not due.

In order to protect the interests of the mortgage creditor, it is also possible to ask the court to place the stocked item at the creditor's expense or to be given in the sequester, so that the old administrator is the sequester.

The previously applicable Law on Basic Property Relations stipulates that "if a mortgage debtor decreases the value of a real estate burdened by a mortgage or otherwise aggravates its condition, the mortgage creditor may require the court to order the mortgage debtor to refrain from such actions, and if he does not do so, may require forcible collection of a claim secured by a mortgage before its maturity."

The Mortgage Act also states in Article 17, paragraph 1 that "the mortgagee's owner must not physically change the subject of the mortgage (partitioning, upgrading, demolition, merger, division, etc.) without the creditor's written consent, which the creditor will not refuse to issue without justified reason." Paragraph 2 of the same article stipulates: "The owner is obliged to keep and maintain the subject of the mortgage as a good host, that is, a good businessman, so that his actions will not reduce the value of the real estate."

The novelty in the Mortgage Law is the obligation of the owner to secure the subject of a mortgage against all common risks before concluding the mortgage agreement, and that the right of access to real estate can not be used in the period from 22:00 to 07:00, as well as during the celebration of the holiday.

Article 18 of the Mortgage Act regulates that a mortgage creditor, if due to the behavior of the owner of the real estate, has a decrease in the value of the real estate or threatens the reduction, requires additional security. If the debtor does not provide additional security, the mortgage creditor may request the collection of all claims from the real estate value without delay.

The reduction of the value of a mortgage item shall be determined by a court expert at the request of the creditor. Unlike this legal solution, according to Article 982 of the Law on Obligatory Relations, sale before the maturity of the receivables serves for self-disclosure, and not an arrears, because the received monetary amount is deposited with the court up to the maturity of the receivables.

Also, the Law on Mortgages in Article 19, paragraph 1, foresees a court injunction against damage to the real estate object.

A mortgage creditor may ask the court, or he has the right to demand that the owner or the immediate holder be allowed to stop the behavior that caused the value of the mortgaged property to be reduced, that is, to stop the behavior they intend to take, which would directly reduce the mortgage value real estate.

The court may then allow the mortgage creditor to take the necessary measures to avoid the reduction in the value of mortgaged real estate. If the circumstances do not suffer a delay, the mortgage creditor may take the necessary measures even before receiving the court's license, if the mortgage is based in accordance with Article 15 of the Mortgage Act (executive document) or if it is explicitly provided for by the mortgage agreement or the pledge statement. The owner is obliged to pay the fee for the court costs incurred. They are provided without enrollment and enjoy primarily billing in respect of all recorded loads.

3. PRIORITY RIGHT OF THE MORTGAGE CREDITOR

Under the real right of the mortgage lender (*ius prioritatis*) in collecting receivables, it implies an authorization given to the mortgage creditor to seek the settlement of claims from the value of a mortgage subject before creditors who do not have a mortgage on their mortgage (ordinary, hypothecation creditors), and prior other mortgage lenders who got a mortgage on the same thing earlier.

The right of priority is a consequence of the fact that the real right is more in competition with the law of obligations and with the same real right of the later date (Stanković and Orlić, 1980, p. 5).

Therefore, between the pledge rights on the same real estate, a

mortgage ranking is established, so that the right of the mortgage creditor to prioritize the collection of claims is called a mortgage ranking.

The right of the priority can be viewed from two aspects: the right of collection priority and the right of ranking priority (Krkljuš, 1980, p. 4).

The right of charge collection is regulated by the relationship of the mortgage creditor and ordinary (high-risk) creditors. The claim of ordinary creditors is not secured by a mortgage and is guaranteed by the debtor for all of his property. Here, the mortgage creditor is in a protected position and has the priority of collecting receivables.

When there are more mortgages on the same real estate, the order of settlement of the mortgage creditor is determined by the moment of creation and registration in public books, according to the principle of the prior period of the *potior jure* (first in time, stronger in law). This is about the right of priority.

This new principle also came up with the new Law on Mortgages, which regulated the order of settlement of mortgage creditors by Article 40 in a similar way: "When one mortgage object is pledged to a number of mortgage creditors, the order in which their claims from the price obtained by selling the mortgage items are determined according to the day, time and minute of the creation of the mortgage, counting on the receipt of the application for registration of the first mortgage." And in the concept of a mortgage, the law prescribed that a mortgage creditor performs collection of claims before ordinary creditors and before late mortgage lenders.

The novelty of the Mortgage Act is the possibility of constituting a mortgage on a building under construction. Here one can ask an interesting question on the manner in which the priority of collection between mortgages based on the whole building under construction and on its special part (apartment, business premises) is exercised. The advantage is the first mortgage mortgage. If a mortgage is first entered in the apartment, then on the whole facility, a mortgage on the whole property is a second-class mortgage in relation to a mortgage at the apartment and vice versa applies the same rule.

4. THE SEQUENCE OF A MORTGAGE SUBJECT

Tracking the subject of a mortgage represents the possibility of the owner of the real right to exercise the content of his right against any third party in whose hands the matter as the subject of that right is found (Stanković and Orlić, 1980, p. 5). The right to follow is the consequence of the functioning of the real rights *erga omnes* (according to everyone). So the mortgage works for everyone.

In the case of a mortgage, the right of follow-up is reduced to the possibility given to the mortgage creditor to settle his claim regardless of the ownership and mortgages of the mortgaged real estate. It is constituted as a form of protection and security of mortgage creditor claims.

The right of priority of collection is not capable of protecting the claim of mortgage lenders, so that the immovable property remains in the debtor's state, and as a fee, the creditor is given the right to collect from the mortgaged property always, regardless of whose property the mortgage has in the meantime passed (Marković, 1911, p. 521).

The right to follow the mortgage creditor was also familiar with the earlier Serbian legislation. Thus, Article 328 of the Serbian Civil Code prescribed: "If such property, under inherited lien, is transferred to another party, it bears with itself the entered debt as well. Whoever pays out for such property, and does not pay attention whether or not there is a debt inherited (intra-burdened) on it, he/she should be assigned by himself/herself when that debt has to be paid for."

The Law on the Basic property rights relations in Article 63, Paragraph 1, stipulated the right to follow "regardless of the change of the owner of the burdened real estate."

The right of follow-up arises from the real-legal character and direct attachment of a mortgage to a mortgaged real estate. The mortgage operates according to the everyday owner of the pledged thing as a mortgage debtor. Changing the owner of a pledged item does not change the content of a mortgage (Lazić, 1994, p. 91).

By virtue of Article 24, paragraph 1, the Mortgage Act regulated the right of follow-up in the manner that it stipulated that "a mortgage creditor may, if the debtor does not pay at its maturity, settle his claim on the value of the mortgaged real estate, regardless of whose property or disposal he is found at that moment."

The right to keep track of the mortgage is different from the law of property tracing and manual stocks. The owner and the mortgagee have the right to possess, and the right of follow-up enables him to demand the return of things from a person who holds the thing without a legal basis or on a lesser legal basis. The mortgagee is not entitled to hold the mortgage subject either at the time of the occurrence or at the time of the realization of the mortgage (Lazić, 1994, p. 91).

The mortgagee creditor has the right to follow if the mortgage registration is made before the mortgaged property is alienated. The realization of the right of follow-up is made possible by the publicity of a mortgage, which is done by registering in the real estate registers (Vicković, 2009, p. 159).

The publicity of the mortgage is used by the mortgage lender because it allows him to keep track of things without compromising the legal certainty of third parties, but also uses the mortgage debtor as potential lenders and buyers are free from fear of the existence of hidden pledges and allows the mortgaged property to be disposed of without the consent of the mortgage creditor (Kovačević and Lazić, 2004, p. 320).

5. TRANSFER OF MORTGAGE

The right to transfer a mortgage to a third party can only be carried out with the transfer and claim as the main legal transaction.

The mortgage is in this case a minor right that is transferred to another title only with the transfer of claims as the main right.

Independent transfer of the mortgage is not allowed, although there is an understanding that “in contrast to the availability of the stock, it is its substantive character and that a special transfer of liens is possible (Gams, 1955, p. 145).”

The old Law on the Basis of Property Relations stipulated by Article 66, paragraph 1, the right to transfer a mortgage by stipulating: “Mortgage can be transferred to the other only with the transfer of claims secured by the mortgage.”

The mortgage law envisaged the right to transfer a mortgage through the provision on the transfer of claims in Article 20. Thus, in paragraphs 1 and 2, it is stipulated: “The claim secured by a mortgage can be given on

the basis of a contract between the creditor and the person to whom the claim is given.

A mortgage transfer contract that is concluded separately from the transfer of the claim does not produce a legal effect. Contract referred to in paragraph 1 of this Article:

1. it is concluded in the form prescribed by Article 10, paragraph 1 of this Law, that is, in the form of a public notary or a publicly-recognized certified document;
2. transfers the mortgage to the person to whom the claim is granted;
3. Produces legal effect to third parties from the date of registration in the real estate register.

The rules contained in this article in their entirety are the principle of access to the mortgage, according to which mortgages and claims constitute an inseparable entity. Legal transactions in which the mortgage without a claim and vice versa will be canceled are null and void. For the transfer of receivables, as well as for the transfer of a mortgage, contracts are required in written form and the entry of such a contract into the real estate register.

In the legal theory, there is an opinion that in the case of a mortgage for the purpose of securing loans and in the case of a mortgage, no further separation is possible, to transfer the mortgage, although no credit transfer has occurred. Specifically, the secured claim is transferred out of the ground. The mortgage then survives (Selma, 1994, p. 54).

Amendments to the Mortgage Act of 2015 introduced a new article that gave the possibility for a mortgage creditor or more of them to order a third party or some of them to undertake legal actions to protect their claims. The name of that third party shall be entered in the register of immovable property. The reason for inserting this provision into the new text of the Mortgage Law is the need to allow creditors to make the so-called syndicated loans (affiliates) are determined by one person who will take care of their rights and obligations.

Transfer of receivables is most often done by transferring receivables, i.e. by the assignment of claims, which is regulated in detail by Article 436-446 of the Law on Obligation Relations.

For the assignment of claims, the consent of the cedant is necessary, i.e. the former mortgage creditor who gives the claim and the depositary, as a new mortgage creditor, which takes over the claim and the mortgage by the contract.

The assumption that a mortgage monitors the claim as its accessory is provided for by Art. Article 437, paragraph 1 of the Law on Obligatory Relations, by “transferring to the receiver the subsidiary rights, such as rights of collection, mortgage, pledge, rights from the contract with guarantors, right to interest, contractual penalty, etc.”

The transfer of receivables requires the agreement of the will of the Contracting Parties, the Securities and Creditors. The consent of the debtor is not required, but according to the Law on Obligations, the assignor is obliged to inform the debtor about the performed assignment. After that, the debtor can no longer fulfill the obligation to the assignee.

The assignee does not respond to the receivable for the collection of the transferred claim, but only for the existence of a claim at the time of assignment, and only when the transfer is effected by a contract of compensation. The aforementioned rule could also apply analogously to the mortgage.

The transfer of the contract should be different from the transfer of the claim. The contractual obligation, ie all the rights and obligations arising from that relationship, is transferred to the contract. The consent of the other contracting party is necessary for the validity of the contract award. Also, the transfer of the contract does not work, in contrast to the transfer of the claim, in relation to the secondary rights. The pledge and the pledge that secured the claim from the transferred contract do not transfer to the recipient, unless the guarantor and the pledgee agree to respond to the new creditor (Article 145, paragraphs 4 and 449, paragraph 1 of the Law on Obligations); (Lazić, 1994, p. 95).

6. THE RIGHT ON *IUS OFFERENDI*

The right of the mortgage creditor to the *ius offerendi* is the authorization of the mortgage creditor to pay the claim to another mortgage lender whose claim requires the forced sale of a mortgage item and enters its place. A mortgage creditor using the *ius offerendi* pillar

(subrogate) in the place of the creditor whose claim has paid off, both in an obligatory relationship - by taking the claim, and in a mortgage - by taking up a mortgage (Lazić, 1994, p. 97).

By using this right to take over claims, a mortgage creditor acquires another mortgage without losing it so far (Kovačević and Lazić, 2004, p. 322).

The Mortgage Act has adopted a fixed mortgage ranking. The interest of the creditor with a later mortgage rate to pay off the creditor with the earlier rank remains, since he will take his place and have both mortgages (both in respect of claims and in respect of mortgages). The hypothesis is that a mortgage lender of a later rank will use this right in the event of a collapse in the value of the mortgage (Vicković, 2009, p. 162).

In Roman law, initially only the first creditor had the right to sell the pledged thing (*ius distrahendi*), and the other to pay the first and take its place (*ius offerendi et succedendi*). Later the right to *ius offerendi* is received by other creditors.

The right to *ius offerendi* belongs also to the real debtor, who, by paying out to the mortgage creditor of the receivables for which the requested sale of the item is acquired, acquires the right of recourse or receivables towards the personal debtor.

The right to an *ius offerendi* can be made from the moment when the sale is requested until the moment of selling the object of the mortgage (Vizner, 1980, p. 356).

The Serbian Civil Code only in paragraph 833, modeled on the first version of the Austrian Civil Code, foresaw that “whoever pays for the second debt, it has the first charge from the principal debtor, and all means are appropriately used for it.” According to him, the right to *ius offerendi* was not explicitly accepted. Our current law does not explicitly authorize mortgage creditor and real debtor to *ius offerendi*. Their right to repay the claims of other mortgage creditors is derived from the general rules on the creditor’s right to fulfill the subrogation, which is regulated by the provisions of Articles 299-311. law on bonding relations.

Subrogation under Article 299 of the Law on Obligatory Relations may be voluntary and legal (Article 300 of the Law on Obligatory Relations).

Legal subrogation exists when the obligation to the creditor in place of the debtor is fulfilled by a person with a legitimate interest in it (Lazić, 1994, p. 98).

In the case of legal subrogation, the creditor's claim with all secondary rights is transferred under the law itself. A mortgage creditor and a real debtor could call for legal subrogation.

The right to *ius offerendi*, in essence, allows the mortgage lender to prevent the sale of mortgage items at a time that is not favorable to him and at the same time improve his legal position. This right also confirms that the mortgage is essentially a property right and is closely related to the claim, without which it can not be transferred, nor to determine the value of the mortgage (Lazić, 1994, p. 99).

7. RIGHTS IN BANKRUPTCY PROCEEDINGS

If a bankruptcy procedure is initiated against the debtor, the mortgage creditor in bankruptcy proceedings has the status of a different creditor. Namely, the Law on Mortgages in Article 42 regulated the rights of the mortgage creditor in bankruptcy proceedings. The same member gave the member a mortgage creditor the status of a separate creditor or "a distinct right of a separate settlement from the value of immovable property." The Bankruptcy Act provides permission to the different creditors to settle their claims separately in the execution procedure, i.e. outside the bankruptcy procedure. In practice, it turned out that the only secured creditor is settled in full, with accrued interest and all expenses, while other creditors remain, if anything, very little to settle. By such legal possibilities, the disconnected creditors question the possibility of reorganization because the most often bankruptcy debtor is not able to continue the business without using the pledge asset (Dukić, 2010, p. 199-200).

This means that a mortgage creditor has the right to settle from the value of mortgaged immovable property of the debtor irrespective of other bankruptcy creditors.

In Article 49, the Bankruptcy Law regulated the detailed position of the secured and liable creditors.

The mortgage right through the application of the bankruptcy law institute, i.e. the rights of mortgage creditors in bankruptcy proceedings

come to be of full significance, since the diversified creditor *vis-à-vis* other creditors has an extremely privileged position.

The bankruptcy law left the possibility for the creditors to be entitled to a proportionate settlement from the bankruptcy estate, as bankruptcy creditors, if they renounced their status as a separate creditor or if they could not settle their separate claim without their guilt. Then they proportionally settle their claims against the debtor in relation to the amount of these receivables. Separated creditors are settled from assets that have been the subject of separate settlement - a distinct right on which the right of separate settlement is based. In order for the secured creditors to settle down as bankruptcy creditors, it is necessary that the bankruptcy debtor is personally responsible to them (Dukić, 2010, p. 213).

8. ESTABLISHING A SUPER – MORTGAGE

The creation of a mortgage-backed mortgage creditor is, according to the new Mortgage Act, set up as an advocate of secured mortgage (and not as a mortgaging mortgage).

The establishment of a super-mortgage is carried out by a contract, which is concluded between the mortgage creditor on the one hand and the super-mortgage creditor on the other, and the and it is only formal, ie it needs to be in the same form in which the mortgage agreement is concluded, in accordance with Art. 10. st. 1. and Art. 15. st. 1. The Mortgage Act. It is not necessary to approve the hypothetical debtor.

This contract must also contain *clausulu intabulandi* ie. explicit and unconditional statement of the mortgage creditor that the super-mortgage creditor can be registered in that capacity in the public register of real estate. The property is acting towards the debtor as of the day when a written advisory notice is received, and from that moment the debtor can only fulfill his obligation to the super-mortgage creditor. According to third parties, the above-mortgage company produces a legal effect from the date of registration of the property in the register of immovable property.

Thus, on the basis of a contract on the realization of the secured mortgage claim, the super-mortgage creditor gets a security that primarily consists of claiming a mortgage creditor against a mortgage debtor, and

only in the second line this claim is accompanied by a mortgage as an accessory right.

The earlier Law on the basics of property relations was known to the institution of the super-library. Article 66, paragraph 2 stipulates that “a mortgage creditor may initiate a mortgage on an existing mortgage in favor of a third party, without the consent of the mortgage debtor (sub-mortgage).” What is important for a mortgage is the fact that it can not last longer than a mortgage, and a super-mortgage creditor can not have more rights than a mortgage creditor.

9. OBLIGATIONS OF MORTGAGE CREDITOR

The purpose of the mortgage is to serve as a mortgage creditor as a security for the execution of an obligation by the debtor, based on the repayment of the loan or the payment of the debt. The creditor's actions towards the debtor were made even during the establishment of a mortgage. The function of the mortgage is to provide enforcement against the performance of the debtor. Mortgage therefore represents for the mortgage creditor a predominantly set of rights or powers, and not obligations (Lazić, 1994, p. 100).

Unlike the pledger, the mortgage creditor does not have the right to establish a possession on the subject of the pledge, and therefore, neither the obligation to keep the pledged item nor the obligation to keep it from being used. Nevertheless, the mortgage creditor as a property right holder derived from the property of a mortgage debtor has a certain obligation.

It is the obligation to grant the mortgage debtor the mortgage from the real estate register where it is registered.

This is a so-called wipe-out statement by a mortgage creditor that agrees to delete the mortgage from the real estate register. This is his formal legal action.

The mortgage law regulated this obligation through the terms of mortgage printing at the request of the owner of the real estate, provided that the mortgage debtor's debt was paid in full.

On the one hand, it is a matter of the obligation of a mortgage creditor, and on the other hand, the right of the owner of the immovable property to erase the mortgage.

What is important here about the obligation of a mortgage creditor is that it is a statement that is given in writing that it agrees and agrees to print a mortgage.

According to Article 44, paragraph 4 of the Law on Mortgages, “the creditor is obliged to issue a receipt to the debtor and the owner of the immovable property, without delay, after the debt has been settled, and to give him the consent to delete the mortgage.” The formal legal termination of the mortgage by deleting the registration is necessary because the mortgage “although economically and legally dependent on the claims for which security has been established and exists, exists *ipso iure* and without receivables, it can only, as a rule, be enforceable in full (Stojanović and Pop-Georgijev, 1980, p. 224).”

Amendments to the Law on Mortgages introduced a new paragraph 5 of Article 44 of the Mortgage Law which stipulated that if there are more mortgage creditors and if only some of them settle down from the value of immovable property realized through out-of-court sales, then the Cadastre of Real Estate obligation to delete all registered mortgages of the real property.

When the mortgage is being wiped out, the mortgage debtor's property right on the subject of the mortgage is freed from the burden and the right to property is restored in its full extent, the so-called property recapitalization.

A mortgage creditor also has an obligation not to abuse his rights. It is a general ban that all titles of subjective rights have, and which is prescribed by the Law on Obligations.

The prohibition of misusing the mortgage through the right of disposal particularly refers to the establishment of a super-mortgage, for which the mortgage creditor does not require the consent of the mortgage debtor. A mortgage creditor would abuse this right if, after the material termination of the mortgage, and prior to its deletion, or formal termination, he / she would establish a super-mortgage. It's essentially about overstating here, rather than abuse of rights (Lazić, 1994, p. 101).

10. CONCLUSION

The adoption of the 2005 Mortgage Act, with amendments from 2015, and preceded by the re-establishment of the private property institute in Serbia, and the change in property relations has essentially changed. Private property has become a dominant form, and with it, mortgage law has become important.

The mortgage becomes the safest means of securing claims, and the status of mortgage creditor is significantly secured.

In this paper we have seen that the right of mortgage mortgage settlement is “kinetic” power. In a static phase, it exerts a certain psychological pressure on the mortgage debtor to voluntarily fulfill its obligation, while in the dynamic phase it is executed in a forced manner in the enforcement procedure and out-of-court.

What the Mortgage Act introduced as a novelty in favor of mortgage lenders is that the mortgage-holder’s mortgage must not physically change the mortgage object without the creditor’s written consent, and to keep it as a good host, so as not to diminish the value of the mortgage item.

Also, we saw that it is a significant novelty of the owner’s obligation to secure the subject of the mortgage, and that the right of access to real estate can not be used in the period from 22:00 to 07:00, as well as during public holidays. All these newspapers have significantly improved the position of the mortgage creditor in Serbia.

Regarding the right of priority of the mortgage creditor, and bearing in mind that the new Mortgage Law enabled the establishment of a mortgage on a building under construction, the question arises as to how the priority of collection between mortgages based on the whole building under construction and on its special part (apartment, business premise). The answer is that the mortgage that is first registered in the Real Estate Cadastre is preferred. If the first mortgage registered in the apartment, then on the whole facility, a mortgage on the whole property is a second-class mortgage in relation to the mortgage on the apartment and vice versa, the same rule applies.

With the amendments to the Mortgage Act of 2015, a new article was introduced giving the possibility for a mortgage creditor or more of them to determine a third party or one of them to undertake legal actions

to protect their claims. The Real Estate Cadastre shall enter the name of that third party. The reason for the insertion of this provision is the need to allow creditors to use the so-called. syndicated loans (affiliates) are determined by one person who will take care of their rights and obligations.

Mortgage lenders in a bankruptcy procedure have a special position. They have the status of secured creditors, that is, the “separate right of separate settlement from the value of real estate.” Bankruptcy law provides permission to creditors to settle their claims separately in the enforcement proceedings, ie outside the bankruptcy procedure.

Also, what is causing special attention is the establishment of a super-mortgage, as a real mortgage creditor. According to the new Mortgage Act, it was set up to advocate mortgages secured by mortgages (and not as mortgage mortgages). And what is very important is that the mortgage debtor’s consent is not required for the same.

Based on the stated rights of the mortgage creditor, it is clear that the norms of the new Mortgage Law have achieved the purpose of the mortgage institute in our legislation and practice. The mortgage is in the service of a mortgage creditor as a security of execution of a mortgage debtor’s obligation and the status of mortgage creditors in Serbia has been significantly improved. Of course, the time ahead will open up new needs and work on improving the mortgage institute. Therefore, it can rightly be said that a mortgage for a mortgage creditor is a set of rights, not obligations.

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