

Mortgagee Liability for Not Registering a Real Estate Mortgage

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Abstract: According to the principle of distinction, the failure of the parties to register a mortgage on immovable property does not affect the validity of the mortgage contract. The purpose of the parties' mortgage contract is to create a mortgage to secure the realization of a claim, and the mortgage contract does not have the effect of creating security other than a mortgage. Therefore, in the absence of registration, but the mortgage contract is effective, the creditor has the right to request the mortgagor to assume the liability for breach of contract due to the failure to fulfill the obligation of registration. The liability for breach of contract can be assumed in two ways: continuation of performance and liability for damages, both of which have no limitation in their application, and the creditor can choose freely. At the same time, the scope of the mortgagor's damages should be limited to the value of the collateral.

Keywords: Mortgage Registration; Immovable Property; Mortgagor Liability; Liability for Default; Security Liability

1. Formulation of the Problem

As one of the safest forms of security, real estate mortgages play a pivotal role in facilitating transactions. Article 41 of the former Law of the People's Republic of China on Guarantees (hereinafter referred to as the "Guarantees Law") stipulates that a mortgage contract on immovable property that has not been registered is invalid. This rule has been widely criticized: firstly, the establishment and entry into force of a contract is an act of creditor's rights, while the establishment of a mortgage is an act of property rights. Under the system of separation of property and debt, the validity of the contract should not be judged by the rules of change of property right. Secondly, this provision does not conform to the logic of jurisprudence, the obligation of

registration originates from the effective mortgage contract, and then there is a logical contradiction to take registration as an element of the effective contract. In addition, this provision is not conducive to the protection of creditors' rights and interests.

Based on this, Article 9 of the former Property Law of the People's Republic of China (hereinafter referred to as the "Property Law") changed the above rule and stipulated the principle of distinction, whereby the validity of a contract is judged in accordance with the relevant provisions of the Contract Part, and the registration is a publicity element of the change of property right. Therefore, in the absence of registration, although the mortgage is not created, the mortgage contract is established and effective without violating the provisions of the law and public order and morals. Based on this, the creditor can request the mortgagor based on the effective mortgage contract, but the mortgagor should bear what nature of responsibility? How should the mortgagor undertake? The Property Law is silent on this matter.

Article 46 of the Interpretation of the Supreme People's Court on the Application of the Civil Code of the People's Republic of China Concerning the Guarantee System (hereinafter referred to as the Judicial Interpretation on the Guarantee of the Civil Code) distinguishes between different situations and makes further provisions on the liability of the mortgagor, which provides the basis for the resolution of disputes over immovable property mortgage contracts arising in judicial practice, but still does not make a clear stipulation as to the nature of the liability of the mortgagor. Due to the convergence of the old and new law, there is a conflict in the application of law, resulting in judicial practice, the court ruled that there are differences, but for the effectiveness of the mortgage contract has reached a consensus. Therefore, this article in the contract is valid under the premise, discuss the nature of the mortgagee's responsibility and how the

mortgagee should be liable.

2. Status of the Judiciary

This article takes "China Judgment and Documentation Network" as the platform, takes "failure to register mortgage" as the keyword, and searches 9,286 civil cases under the cause of "immovable property", and selects 102 representative cases which are related to it. 102 representative cases, which are related to the following decision paths of the civil liability of mortgagors for failure to register mortgages on real estate: (1) The court held that the failure to register only resulted in the non-establishment of the mortgage right, and did not affect the legally binding nature of the mortgage contract, and that the mortgagor's failure to perform its obligations, which resulted in the failure to realize the purpose of the contract, constituted a breach of contract, and should be held responsible for the breach of contract. (2) The court held that in conjunction with the overall content of the contract, the parties had the intention to provide security for the creditor's loan, and although the mortgage was not registered, the mortgagor should still undertake the contractual obligation to provide security, and that the liability was an atypical security liability. (3) The court held that in the case of failure to register the mortgage in order to reduce the cost of the mortgage, the parties would choose the way of guarantee provided by the mortgagor to ensure the smooth fulfillment of the contract, and therefore the mortgage guarantee contract could be converted into a guarantee contract according to the theory of conversion of invalid acts, and the mortgagor was found to bear the guarantee responsibility. (4) The court held that the mortgagor has two obligations, to register the mortgage and to guarantee on the contract. Based on this, the creditor has the right to claim for damages and the right to claim for liquidation, which constitutes a competing claim, and the creditor can choose to exercise one of them.

According to the court's decision of the comb concluded that the decision of the dispute mainly lies in the subject of the obligation to register and the form of liability for damages for breach of contract, the details are as follows:

(1) The subject of the obligation to register is

attributed. There are two main views of the courts on this matter: one holds that the mortgagor is the obligor, on the grounds that the signing of the mortgage contract creates a burden for the mortgagor to carry out the registration; the other holds that the registration is a joint obligation of the two parties, on the grounds that it cannot be accomplished without the participation of any of the parties, and that therefore both parties should bear the consequences together.

(2) Forms of liability for damages for breach of contract. There are two views of the court on the relationship between the liability of the mortgagor and the main debtor. First, the court held that the mortgagor bears supplementary liability for the part of the main debtor's liability that cannot be discharged, since the application of joint and several liability requires clear legal provisions, which the law does not provide for. Second, it held that joint and several liability was assumed, the reasoning being that the mortgagor, when concluding the contract, was able to foresee that it would be liable to the extent of the collateral, and therefore the mortgagor and the debtor should be in the same legal position.

3. Unregistered Mortgagor Liable for Default

At present, on the premise that the mortgage of immovable property has not been established and the mortgage contract is valid, whether the creditor can claim rights from the mortgagor and what kind of rights are claimed, there are mainly the above four adjudication paths in the judicial practice. In this paper, we believe that it is more reasonable to say that default liability, unregistered real estate mortgage contract cannot produce the effect of establishing guarantee or atypical security between the parties, for the following reasons: Firstly, to hold a mortgagor liable for an atypical security is a departure from the intention of the parties. At the time of the conclusion of the contract, the parties did have the intention to create a mortgage security, but did not indicate a willingness to create a security other than a mortgage. In addition, according to Article 46 of the Judicial Interpretation of the Civil Code on Guarantees, the mortgagor is not liable within the scope of the agreed guarantee when the failure to register is not due to the mortgagor. However,

if the liability of the mortgagor is recognized as atypical, the mortgagor is still jointly and severally liable in the event of failure to register for reasons not attributable to the mortgagor, which clearly and unduly aggravates the liability of the mortgagor.[1]

Secondly, Mortgages are statutory typical guarantees and the decision path of atypical guarantees cannot be applied. According to Article 388 of the Civil Code, the types of security contracts are mortgage contracts, pledge contracts and other contracts with security functions. From this, it can be seen that other contracts with security functions should be other contracts excluding mortgage contracts and pledge contracts, such as financial lease contracts. If it is held that a mortgage contract is capable of creating a security right other than a mortgage, it may lead to difficulties in distinguishing between the two types of contracts and confusion as to the different types of security rights.

Thirdly, Atypical liability or warranty claims are not conducive to the protection of creditor interests. The purpose of a creditor entering into a mortgage contract is to enjoy the priority of payment of the collateral in order to satisfy the debt when the claim becomes unsatisfiable at the end of the term. By converting the creditor's security in rem into a claim, the deterioration in the nature of the security causes the creditor to lose the benefits of the security in rem, such as priority of payment and recourse.

Fourthly, the method of applying the liability theory of invalid conversion of legal acts to this issue does not conform to its theoretical rules, and there are also problems in applying it to empirical law. First of all, from the point of view of China's current legal provisions, did not make provisions for the conversion of invalid legal acts system, so in the application of the lack of legal basis. Secondly, it does not meet the conditions of invalid legal act conversion.[2] The effectiveness of the mortgage contract has nothing to do with whether or not to register, in the premise of not violating the provisions of the law and good customs, unregistered mortgage contract is valid, therefore does not meet the conversion of invalid legal acts. At the same time, when the parties entered into the contract, the mortgagor did not show that it is willing to other security to ensure the realization of the

claim, at this time the conversion to guarantee the liability may be contrary to the will of the parties. In addition, the mortgage guarantee is material insurance, even in the case of mortgage registration, the mortgagor only in the mortgage this particular property value within the limited liability. And guarantee is the person insurance, need to bear unlimited liability, which obviously aggravate the responsibility of the mortgagor, so the guarantee contract as a mortgage contract as a substitute behavior lack of legitimacy.[3] Finally, if through the party's language, transaction habits and other factors can judge the true meaning of the parties, should give priority to the application of the general meaning of the interpretation of the rules, without borrowing the theory of conversion of legal acts.

In this paper, it is believed that determining the default liability of the mortgagor based on the fact that the mortgagor fails to fulfill the registration obligation is in line with the systematic requirement of the separation of property and debt, and is the most appropriate path of adjudication. If the mortgagor is unable to set the mortgage registration, the requirement of default liability is in line with the general principle of contract law and can fill the creditor's loss. Therefore, the mortgagor is deemed to bear the responsibility of default in accordance with the law and can reduce the burden of argumentation.[4]

4. Assumption of Liability for Default by an Unsecured Mortgagor

4.1 Attribution of the Obligation to Register

According to the Interim Regulations on Real Estate Registration, the registration of real estate mortgages is based on the principle of joint application by both parties. The Minutes of the 7th Judges' Conference stipulate that the mortgagor is bound by the contract and has the obligation to register, and is the subject of the obligation to register. The Minutes of the 9th Judges' Conference, however, amended the preceding paragraph to hold that the creditor has the right to request the mortgagor to register, without specifying the subject of the obligation to register. Against this background, the attribution of the obligation to register is highly controversial.

This paper argues that the mortgagor is the

subject of the registration obligation as a matter of course of contract. The mortgagor and the creditor are not in the same position as far as the registration of real estate mortgages is concerned. The implementation of the principle of joint application is mainly aimed at reducing the burden of examination of the registration authority, but this does not mean that the parties are obliged to register. [5] Assuming that the creditor's failure to cooperate in the registration process only results in its inability to obtain the mortgage, the mortgagor has no loss, and therefore the obligation to register is not an obligation to pay or an accessory obligation to the creditor, but rather a non-genuine obligation. Therefore, the creditor's failure to cooperate with the application does not constitute a breach of contract, and the principle of joint application only indicates that the creditor should cooperate with and assist in the registration process, and that if the creditor fails to assist in the registration process, it will have to bear the unfavorable consequences, and the mortgagor's liability may be reduced or exempted. Whether or not to register for the realization of the purpose of the contract has a decisive role, the mortgagor as the right holder of the mortgaged property, registration is the main obligation to pay, its status is like the seller in the contract for the sale of immovable property, the seller fails to perform the obligation to register for the purpose of the contract for the sale of the sale of the contract cannot be realized, and therefore bear the responsibility of the breach of contract.

4.2 Subordination of Continued Performance and Damages

Article 46 of the Judicial Interpretation of the Civil Code on Security provides for two ways of assuming liability for breach of contract, namely, continuation of performance and damages for breach of contract, but the order of application of the two is not stipulated. At present, there are different views on this, some scholars advocate the free choice of claims, it is believed that the creditor can choose to apply, the default liability is the creditor's remedy, should be weighed by their own choice of the most suitable for their own remedy.[6] Some scholars believe that based on the principle of strict adherence to the contract, should be given priority to continue

to perform.[7]

In this paper, it is argued that there should be no sequential limitation on the continuation of performance and damages, and that the creditor should have the right to choose in this regard. The creditor can choose to request the mortgagor to continue to perform the contract, can also choose to request the mortgagor to bear the responsibility for damages, both are the way of assuming responsibility for breach of contract, choose to exercise. First of all, our country "civil code" did not make the order of the two kinds of liability for breach of contract, in the provisions, the use of the word "or" connect the two kinds of assumption, indicating that the parties for the application of the two enjoy the right to choose, if the strict restriction is incompatible with the existing law, but also to the parties to the freedom of contract is also improper restriction. [8] Secondly, the order of restriction is not conducive to the protection of the interests of creditors. Because in the mortgagor did not register the mortgage, the mortgagor's behavior may have caused damage to the creditor, then the creditor should have the right to claim damages. Such liability is the liability for damages in lieu of payment, and the content of compensation is the benefit of performance that could have been brought about by the original payment, i.e., if the mortgagor fulfilled the obligation of registration, the creditor could have realized the benefit of liquidation in respect of the mortgage if the debtor failed to pay the debt when it became due. If it can only be raised in the absence of registration does not protect the creditor's interest well. Finally, the default liability is a creditor's means of redress, its purpose is to make up for the creditor's loss, by the defaulting party to choose the most in line with their own interests of the assumption of the way more able to make up for the damage suffered by them, but also fully in line with the purpose of the setting of the default liability. Therefore, when the mortgage is not registered, the two kinds of default liability in the application of the requirement of no subjugation. In the event that the mortgaged property is destroyed or lost and other objective circumstances make it impossible to continue the performance, the mortgagor no longer bears the responsibility to continue the performance.

4.3 Determination of the Extent of Liability Assumed by the Mortgagee

The size of the liability for damages should be judged by first determining the size of the creditor's loss, but there is still controversy over the criteria for the size of the creditor's loss. There are mainly the following two points of view: the first point of view that the creditor's actual loss is the part of the claim that has not been satisfied. That is to say, after the expiration of the debt performance period, the debtor has not performed the debt is the creditor's loss, the mortgagor should be liable for damages; The second view is that the claim cannot be satisfied part of the creditor's real loss. Because when the debtor failed to pay the debt, the creditor did not actually incur losses, but only possible losses.[9] According to this view, the creditor's loss can be determined only if the claim is not fully satisfied after enforcement of the debtor's liable property. In addition, some scholars have suggested that the legal consequence of the failure to register a mortgage lies primarily in the creditor's loss of its right to priority payment of the collateral, and that the rules of invalidity of the security contract may therefore be applied by analogy.[10]

This paper argues that it is more reasonable to recognize the creditor's loss as the unliquidated portion for the following reasons: first, it is not reasonable to apply by analogy the rules on the invalidity of a security contract to recognize the creditor's loss. The rule of analogy can only be applied when there is no express provision of law, and the general rule of damages for breach of contract has corresponding provisions in the Civil Code, so there is no room for analogical application. Secondly, in real estate mortgages, if the mortgagor registers the mortgage and the mortgage is validly established, the creditor may require the mortgagor to bear the liability for damages to the extent of the debtor's failure to perform, and does not need to be premised on the enforcement of the debtor's property. Thirdly, from the perspective of enforcement, it is difficult to specify the criteria for the inability to satisfy the debt. At the same time, the application for enforcement of the mortgagor's property can only be made after the debtor's liable property has been enforced, consuming a great deal of time and effort,

which undoubtedly aggravates the burden of the creditor.

4.4 Forms of Liability for Liquidated Damages

In the case that the mortgagor fails to register the mortgage and causes losses to the creditor, can the creditor directly request the mortgagor to bear the responsibility of damages for breach of contract? In this regard, the theoretical and practical circles have not reached a consensus, there are mainly the following two views.

One view is that the mortgagor should be jointly and severally liable, and that the scope of its liability should be limited to the value of the mortgaged property.[11] The main reason for this is that, where a mortgage can be validly created, the creditor may request priority payment of the collateral on the basis of the mortgage when the debt remains unpaid at the end of the term, without the need to first make a request to the debtor.[12]

Another view is that the mortgagor's liability for breach of contract is a supplementary liability. In the case of a mortgagor's default, it is the debtor's inability to pay that is the creditor's true loss. The real loss is the mortgagor to bear the basis of damages, only the creditor requests the debtor to settle the debt, after enforcement and still cannot settle the debt, the creditor has the right to request the mortgagor on the unliquidated portion of the corresponding responsibility. The liability of the mortgagor is in the nature of a supplementary debt with a right of first refusal.[13]

This paper endorses the view that the liability should be recognized as joint and several. First, from the point of view of the expression of meaning, according to the contractual predetermination, the creditor should enjoy the right to mortgage. This means that it meets the conditions for the exercise of the right to mortgage, you can choose to the main creditor to claim the realization of the claim, can also choose the mortgagee to claim the security responsibility. The goal of the mortgagee's remedy is to enable the mortgagee to enjoy its rights as foreseen in the contract. Therefore, the only way to achieve this goal is to give the creditor the right to choose. Secondly, from the point of view of repairing the victim's damage, joint and several liability is more in line with

the requirements of the principle of full reparation. According to the requirement of full compensation, all damages suffered by the creditor should be compensated. If the mortgage contract is successfully performed under normal circumstances, the mortgagor should bear the guarantee liability when the debtor fails to settle the debt. And now there is no registration, can't according to the original state of smooth performance, at this time in order to protect the creditor's rights and interests, should ensure that the final state and the normal smooth performance of the contract state. Thirdly, the view that supplementary liability should be assumed is actually confusing the direct loss of the creditor with the result of the damage. When there is no mortgage registration, the unsuccessful creation of the mortgage is clearly and practically occurring, only the objective value of the mortgage cannot yet be determined. In the real estate mortgage contract, if the mortgagor fulfills its registration obligation, the mortgage right is successfully established, the creditor can freely choose to exercise the mortgage right or request the debtor to pay off the debt, and these two requests are not in any order.[14] Therefore, it is more appropriate to recognize it as a joint and several liability, which is more capable of balancing the interests of all parties.

5. Conclusions

The Judicial Interpretation of the Guarantees of the Civil Code distinguishes between different cases of failure to register, providing a more specific legal basis for judicial practice in resolving disputes over immovable property mortgages, but still fails to clarify the nature of the mortgagor's liability. As far as the real estate mortgage contract is concerned, the mortgagor signs the mortgage contract only indicates that he is willing to use the collateral as the security for the claim, and does not make other commitments, if it is directly presumed that the parties have reached a mortgage other than the security willingness is not in line with the intention of the parties. Failure to do real estate mortgage, the mortgage was not successfully established, but the mortgagor did not fulfill the contract main payment obligation that is registered, constitutes a breach of contract, should bear the liability for breach of contract, in order to

fill the creditor's loss. The specific ways of assuming the liability for breach of contract are to continue to perform and to compensate for damages, and both of them have no precedence in application, so that the creditor can choose freely according to its own needs. Meanwhile, the liability of the mortgagor to compensate for losses should be within the actual value of the collateral. Its liability is joint and several, not supplementary, and is in the same position as the debtor.

References

- [1] Fan Xiaohua. Research on mortgagor liability in real estate mortgage contract without mortgage registration. *Law Application*,2015,4:116-120.
- [2] Yin Qiushi. Conversion of invalid behavior and interpretation of legal behavior--An argument on the necessity and legitimacy of the conversion system. *Law*, 2018, 2: 106-108.
- [3] Ran Keping. On the effect of unregistered real estate mortgage contract. *Legal Science (Northwest University of Politics and Law Journal of Disclaimer)* 2020, 1: 129-133.
- [4] Wang Yegang. On the Effectiveness of Real Estate Mortgage Contracts in the Absence of Mortgage Registration--An Appraisal of Article 46 of the Judicial Interpretation of Guarantees of the Civil Code. *Modern Law*,2022,1:121-124.
- [5] Wu Xinyi. An analysis of the liability of unregistered real estate mortgagors under the vision of the Civil Code. *Shanghai real estate*, 2023, 6:45-51.
- [6] Ni Longyan. Exploration and analysis of the effectiveness of real estate mortgage contract--Taking the legal remedy adjudication path in practice as the starting point. *Rule of law research*, 2019,1:105-106.
- [7] Wang Hongliang. The nature of the right to request compulsory performance and its exercise. *Law*,2013,1:105.
- [8] Wang Mingyang,Wen Yueying,Zhang Wenpeng. Interpretation of the Rules of Effectiveness of Immovable Property Mortgage Contracts--An Appraisal of Article 46 of the Interpretation of the Guarantee System. *Journal of Guizhou Normal College*,2023,4:42-49.
- [9] Sun Chen. Liability of mortgagor without

- real estate mortgage registration. Postgraduate Journal of Zhongnan University of Economics and Law, 2019, 6: 36-38.
- [10] Gao Shengping. Legal Consequences of Unregistered Real Estate Mortgages--Expanding and Analyzing Based on Decision Disagreements. Politics and Law Forum, 2019, 6: 167-170.
- [11] Wang Qiuyang. Decision Rules and Contingent Paths for Disputes on Unregistered Real Estate Mortgages--An Appraisal of Article 60 of the Proceedings of the Working Conference on Civil and Commercial Trials of the National Courts. Shanghai Law Research, 2019, 24: 98-100.
- [12] Yang Daixiong. Dual effect of mortgage contract as burdensome behavior. Chinese and foreign jurisprudence, 2019, 3: 768.
- [13] Liu Yanjie and Wang Minghua. What kind of responsibility should the mortgagor bear when the mortgage is not registered. People's justice, 2013, 3: 56-59.
- [14] Song Ping. Liability of unregistered mortgage contract. China real estate, 2018, 9: 43.