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THE (IN)FEASIBILITY OF SUBSTANTIAL PERFORMANCE AS A MEANS OF DEFENSE IN THE EXTRAJUDICIAL SEARCH AND SEIZURE OF A VEHICLE IN THE RTD

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ABSTRACT

The article studies whether the allegation of substantial performance is a possible means of defense, within the scope of the extrajudicial search and seizure procedure of the fiduciary sale in vehicles, at the Registry of Deeds and Documents (RTD), included in Decree-Law 911/2023, by the New Guarantees Law. To this end, it analyzes aspects of the constitutionality of the new procedure, in light of the judgments of the Federal Supreme Court regarding the extrajudicial foreclosure of the mortgage (RE 627.106) and the fiduciary sale of real estate (RE 860.631). Next, it is established that objective good faith is the meta-legal premise of substantial performance, studying its (in)compatibility with the allegation of substantial performance, in the enforcement procedure in the RTD. It presents doctrinal views of the theory of substantial performance, with evidence of its acceptance in the Brazilian legal system. Continuing, it summarizes the extrajudicial search and seizure procedure, according to the new legislation, making a parallel with the already consolidated jurisprudence, about similar procedures. It starts with the analysis of the results, whose comparison points to the inadmissibility of the allegation of substantial performance, both in court, and more in extrajudicial court, in view of the summary cognition of the registration officer, in the procedure of search and seizure of the fiduciary sale in vehicles.

Keywords: Substantial compliance, Constitutionality, Extrajudicial search and seizure, Decree 911/1969, Law 14.711/2023.

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CONSTITUTIONALITY OF EXTRAJUDICIAL SEARCH AND SEIZURE

Recently, Law 14,711/2023 (Guarantees Law) included articles 8-B to 8-E, in Decree 911/1969. Thus, it allowed the creditor to promote the consolidation of ownership of vehicles given in fiduciary alienation, directly before the Registry of Deeds and Documents (RTD), if the legal requirements are met. As a result, a new hypothesis of extrajudicial execution was established in the legal system.

As a genre, extrajudicial execution was already contemplated in special laws. There is, for example, Law 492/1937, whose articles 22 and following authorized the sale of the pledged asset regardless of legal action, provided that there was express authorization in the pledge contract. However, in the case of a pledge, possession is transferred when the guarantee is constituted, with the tradition of the asset. It differs, in this point, from the fiduciary alienation, in which the unfolding of possession occurs.

Extrajudicial foreclosure was also already provided for in relation to mortgages, in Decree-Law 70/66, although with a scope restricted to the Housing Financial System (SFH) and promoted by the fiduciary agent of the guarantee. The collateral trustee is an impartial private individual responsible for verifying the regularity and enforcing the agreement. It differs, therefore, from the extrajudicial execution promoted by the creditor himself (of any scope, including those unrelated to the SFH), as is the case of the fiduciary sale of vehicles.

The constitutionality of the procedure provided for in Decree-Law 70/66 was questioned before the Supreme Court in Extraordinary Appeal No. 627,106, alleging a disproportionate offense to due process of law and the right to property (article 5, LIV of the Federal Constitution: "no one shall be deprived of liberty or property without due process of law").

As reported by Justice Marco Aurélio, this argument was based on the "automaticity of measures, which ends up reaching the right of ownership and possession, causing the debtor to lose, without the possibility of defending himself, the asset that until then was part of his assets", in an abusive position of the creditor.

In this conception, the right to housing comprises more than the act of occupying a place in space, since it is necessary to take into account the adequacy of the place where one lives for the psychosocial development of the subject. The legal security of possession

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is considered in the protection afforded against forced evictions, illegal arrests and other threats, regardless of the type of possession that the resident presents[4].

Also, the strong sociological content of possession is defended, in which it would be the social body, by itself, that would guarantee the existence of possession, unlike property, which needs other mechanisms, in addition to the factual situation, to ensure it[5], such as state protection and the prohibition of abusive repossession of the asset, including in the registration procedure.

However, the understanding prevailed that there is no offense to these rights, since the procedure does not remove judicial control, but reverses the intervention phase, which becomes, as a rule, after the procedure. The debtor is summoned to follow the procedure, and may challenge, including in the judicial sphere, the progress of the procedure, if irregularities occur during its processing.

The understanding was well applied, because, in the face of a collision of fundamental rights in a concrete case, they must be weighed and verified which of them should prevail in the concrete case, so that the rights are conformed in the concrete case, one right prevails over the other and the fundamental right is not excluded[6]. Thus, the right to property was weighed against the right to housing and the social function of credit.

In fact, the submission of traditionally civil and registry law cases to the STF reflects an inadequate understanding of the so-called principled constitutional dogmatics, well pointed out by Paulo Ricardo Schier[7], since, certainly, not everything can be brought back to the principles and even to the principle of the dignity of the human person, in an unacceptable pan-constitutionalist vision.

Thus, the thesis of general repercussion established in RE 627.106 was: "It is constitutional, because it was duly received by the Federal Constitution of 1988, the extrajudicial execution procedure, provided for in Decree-Law No. 70/66".

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[4] GOUVÊA MARTINS, E.; MASTRODI, J. Right to housing: between autonomous realization and subjection to the right to property. Journal of Fundamental Rights and Democracy, v. 23, n. 2, p. 79-80, 2018. Available at: https://doi.org/10.25192/issn.1982-0496.rdfd.v23i2760. Accessed on: 19 Aug. 2024.
[5] DE OLIVEIRA, A. B.; MACIEL, M. L. State of the art of possessory theories. Journal of Fundamental Rights and Democracy, v. 5, n. 5, 2009, p. 11. Available at: https://revistaeletronicardfd.unibrasil.com.br/index.php/rdfd/article/view/90. Accessed on: 19 Aug. 2024.
[6] LOYOLA, L. The company and the social function of property. *Revista Direitos Fundamentais e Democracia, v. 1, n. 1, 2007, p. 5. Available at: https://revistaeletronicardfd.unibrasil.com.br/index.php/rdfd/article/view/3. Accessed on: 19 Aug. 2024.
[7] SCHIER, Paulo Ricardo. New challenges of constitutional filtering at the time of neo-constitutionalism. Available at: http://www.mundojuridicoadv.com.br. Accessed on August 18, 2024, p. 20.

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It should be noted that the rite of Decree-Law 70/66 was expressly revoked by the New Law of Guarantees, and no longer exists. Even so, it is a relevant precedent to support the constitutionality of the procedure for extrajudicial execution of vehicles, incorporated into Decree 911/1969.

In addition, the same reasons of the general repercussion thesis established in RE 627.106 were used by the STF to declare the constitutionality of the extrajudicial execution procedure of the fiduciary sale (Law 9.514/1997), in RE 860631, "given its compatibility with the procedural guarantees provided for in the Federal Constitution".

Therefore, we conclude that the same grounds justify the constitutionality of the extrajudicial search and seizure before the Registry of Deeds and Documents, regulated by article 8-A et seq. of Decree-Law 911/69, incorporated by the New Guarantees Law (Law 14,711/23). After all, its deferred and postponed adversarial proceedings do not rule out possible judicial control, reconciling it with the creditor's interest in the speedy execution of the guarantee.

OBJECTIVE GOOD FAITH: PREMISE OF SUBSTANTIAL PERFORMANCE

Initially, as it constitutes the main meta-legal basis for substantial performance, it is necessary to briefly incur into the theme of objective good faith.

According to Claudio Godoy[8], based on Robert Alexy's oft-cited perspective, principles differ from rules, which are seen as "defining commands." While rules determine specific application, principles function as "optimization commands" that confer unity and coherence to the legal system. The principles seek to be realized in the broadest possible way.

Although principles are a form of norm, just like rules, and can serve as the basis for concrete should-be decisions, they always require the most extensive compliance possible within legal and real possibilities. This includes maximum proportionality, which involves weighing up principles, and the need for adequacy in the application of these principles.

In the words of Ruy Rosado Aguiar, objective good faith represents an objective standard of conduct, of acting with rectitude, probity, honesty and loyalty, in the mold of the common man, taking into account the peculiarities of the uses and customs of the place[9].

[8] GODOY, Claudio Luiz Bueno. Social function of the contract. São Paulo: Saraiva, 2004. p. 100.
[9] AGUIAR Jr., Ruy Rosado. Termination of contracts due to default of the debtor: resolution. Rio de Janeiro: Aide, 1991. p. 239.

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In this sense, probity is an objective aspect of good faith, reflecting honesty in proceeding or the judicious manner of fulfilling one's duties, based on the constitutional value of solidarity (art. 3, I of the Federal Constitution).

Good faith finds several foundations in the Civil Code: legal transactions must be interpreted in accordance with good faith and uses and customs (art. 113); the abuse of rights is prohibited, being an unlawful act if its exercise exceeds the limits imposed by good faith (art. 187); the contracting parties are obliged to maintain good faith probity in the conclusion and execution of the contract (art. 422); in insurance, the strictest good faith follows (art. 765); the guardian must act with zeal and good faith in the administration of the assets of the guardian (art. 1741). Also, in the Economic Freedom Law, contracts are interpreted in favor of good faith as a guiding principle (art. 1, §2 c/c art. 2, II), and it is the right of every person to enjoy the presumption of good faith in acts performed in economic activity (art. 3, V).

At the same time, reflecting the principles indicated in the explanatory memorandum of[10] the Civil Code, objective good faith is a general clause, reflecting the principle of operability. It enshrines ethics, as a desirable and expected behavior, as well as sociality, when considering meta-legal factors and general principles.

In this sense, Statement 27 of the First Conference on Civil Law highlights that, in the interpretation of the general clause of good faith, the system of the Civil Code and the systematic connections with other normative statutes and meta-legal factors must be taken into account. Customs, local culture and the living habits of the inhabitants are considered as an example.

Furthermore, due to its nature as a principle, with a high degree of semantic vagueness, it requires criteria for concreteness in concrete cases, granting greater discretion in its application by magistrates and, with the topic addressed, by registrars of titles and documents.

Furthermore, objective good faith is a precept of public order, under the terms of article 2,035 of the Civil Code, and applies even to agreements prior to its validity. Thus, Statement 363 of the IV Conference on Civil Law establishes that the principles of probity and trust are of public order, and it is the obligation of the injured party only to demonstrate the existence of the violation.

[10] The guiding principles of the Civil Code of 2002 are divided into sociability, ethics, and operability, as highlighted in its explanatory memorandum, prepared by Miguel Reale.

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Also, objective good faith is a fundamental principle in contract law that applies in all phases of the contractual relationship: in negotiations, in the formation and in the fulfillment of the contract.

During negotiations, objective good faith requires that the parties act with honesty and transparency, ensuring that all relevant information is shared so that decisions are well-informed and balanced, protecting the unjustified breach of legitimate pre-contractual expectations.

In the contract formation phase, objective good faith guides the behavior of the parties, requiring them to conduct themselves with loyalty and honesty, ensuring that the contract accurately reflects the intention of the parties involved.

In the performance of the contract, objective good faith remains relevant, requiring the parties to perform their obligations in a loyal manner and as agreed, respecting the legitimate expectations of the other party.

Thus, objective good faith is a principle that permeates all phases of the contract, promoting integrity and trust in contractual relationships.

As other consequences, good faith reflects the prohibition to benefit from one's own turpitude and, in terms of the burden of proof, good faith is presumed, while bad faith is proven.

Finally, it is necessary to mention Clóvis do Couto e Silva[11], who, inspired by the German doctrine, teaches that the obligation should be seen as a process of continuous and effective collaboration between the parties, leading to the fulfillment or fulfillment of the obligation. For the latter, good faith has the interpretative function, giving meaning to the norm (articles 112 and 113), the function of control (article 187), as legal ethical conduct, repudiating formally licit situations, but materially illicit (abuse of rights and their partial figures), as well as the integrative function (article 422), as a source of rights, annex or lateral duties, of protection, cooperation and information.

SUBSTANTIAL PERFORMANCE

Article 475 of the Civil Code establishes that the party injured by the default may request the termination of the contract, if it does not prefer to demand compliance, and in any case, compensation for losses and damages is applicable.

[11] COUTO E SILVA, Clóvis do. Obligation as a Process. São Paulo: José Bushatsky editor, 1976, p. 15.

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As Carlos Roberto Gonçalves points out[12], the defaulting contractor has, therefore, in the face of the default of the other party, the alternative of terminating the contract or demanding compliance through specific performance.

However, as a mitigation to the right to terminate the contract, the theory of substantial performance emerges, of North American origin, based on the prohibition of abuse of rights, objective good faith and the social function of contracts.

According to Clóvis do Couto e Silva, the substantial performance "constitutes a performance so close to the final result, that, in view of the conduct of the parties, the right of resolution is excluded, allowing only the request for compensation and/or performance, since the first claim would violate the principle of good faith (objective)".[13]

Jones Figueirêdo Alves points out[14] that the introduction of objective good faith in contracts, as a requirement for validity, conclusion and performance, in an express rule and norm affirmed by article 422 of the New Civil Code, brought with it the delineation of the theory of substantial performance as a requirement and foundation of the principle enshrined in a general clause opened in the contractual relationship, and, due to the observance of this principle, notably applicable to mass contracts, the theory is preponderant, as an impediment to the right to terminate the contract, under the inspiration of the doctrine of Couto e Silva.

As a reflection of its doctrinal and jurisprudential acceptance, Statement number 361, approved at the IV Conference on Civil Law – Federal Justice Council (JDC/CJF), highlights that "substantial performance arises from the general contractual principles, in order to make the social function of the contract and the principle of objective good faith prevail, guiding the application of article 475".

Also, "for the characterization of substantial performance (as recognized by Statement 361 of the IV Conference on Civil Law – CJF), both quantitative and qualitative aspects are taken into account", according to Statement No. 586, VII JDC/CJF. In an example brought by Tartuce[15], there is no point in relevant compliance when there is a clear practice of abuse of right, as in those cases in which the purgation of the default is successive in a short period of time (followed by defaults and purges).

[12] GONÇALVES, Carlos Roberto. Civil law. 12. ed. São Paulo: Saraiva, 2023, p. 812.
[13] The Principle of Good Faith in Brazilian and Portuguese Law *in* Brazilian and Portuguese Civil Law Studies. São Paulo: RT, 1980, p. 56.
[14] Substantial performance as a decisive element for the preservation of the contract, Revista Jurídica Consulex, n. 240, p. 35.
[15] TARTUCE, Flávio. Manual de Direito Civil. 10. ed. São Paulo: Método, 2023, p. 731.

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It should be noted that there is no objective percentage parameter set by the case law, and the substantial performance is analyzed in each specific case, in the qualitative and quantitative aspects.

Therefore, for this theory, if most of the installments are paid, leaving a tiny amount, the creditor will not be able to terminate the contract, but collect the remainder, mitigating article 475 of the CC, which provides for the termination of the contract due to default.

The STJ, in addition to the tiny remaining amount, requires two other requirements[16]. First, that there is a legitimate expectation generated by the behavior of the parties, so as not to protect situations of abuse of rights and violations of good faith, considering, for example, negotiations signed between the parties, tolerance of deadlines, all in order to expect that the contract will be preserved. Secondly, that there is no prejudice to the creditor's rights, prohibiting the application of the theory in a situation of serious violation of rights, such as in the non-payment of maintenance obligations[17].

This theory has been considered by international risk agencies as a cause for the increase in interest rates on long-term obligations, as it hinders the creditor's execution and brings disincentives for the debtor to be punctual in the last installments of the contract, as he will know that he will hardly see it resolved.

Therefore, there is concern that the use of the institute of *substantial performance* cannot be stimulated to the point of inverting the logical-legal order that bases the full and regular compliance with the contract as an expected means of extinguishing obligations, rejecting, in a specific case, its application in default of more than 30% of the debt[18].

In conclusion, the theory of substantial performance, by introducing a more flexible approach in the application of article 475 of the Civil Code, reflects an effort to balance the right to contractual termination with the preservation of the social function of the contract and objective good faith. Recognizing that the termination of the contract may, in some cases, lead to an abuse of rights or violate the principle of good faith, the theory allows the defaulting party to seek only compensation or partial compliance, rather than total

[16] STJ. 4th Panel. Special Appeal 1581505/SC, Judge Antonio Carlos Ferreira, judged on 08/18/2016.
[17] Proceeding in secrecy of justice, but its conclusion was disclosed in: STJ. Substantial performance: the preponderance of the social function of the contract and the principle of objective good faith. Available at: https://www.stj.jus.br/sites/portalp/Paginas/Comunicacao/Noticias/24042022-Adimplemento-substancial-a-preponderancia-da-funcao-social-do-contrato-e-do-principio-da-boa-fe-objetiva.aspx. Accessed on: 11 ago. 2024.
[18] STJ - REsp: 1581505 SC 2015/0288713-7, Rapporteur: Justice ANTONIO CARLOS FERREIRA, Judgment Date: 08/18/2016, T4 - FOURTH PANEL, Publication Date: DJe 09/28/2016.

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termination, when the default is of small amount or when the legitimate expectation generated by the actions of the parties suggests the maintenance of the contract.

The growing acceptance of this theory, both in doctrine and jurisprudence, and its consideration by international risk agencies, highlight its relevance in modern contractual dynamics. However, it is essential that its application is carefully evaluated to avoid injustices and ensure that the social function of the contract and the rights of creditors are adequately protected.

SEARCH AND SEIZURE: PROCEDURE

The procedure for extrajudicial search and seizure of vehicles is regulated by article 8-B et seq. of Decree-Law 911/69, having been introduced by the Guarantees Law (Law 14,711/23).

As a presupposition, an express provision is required in the contract in a highlighted clause, indicating the possibility of its extrajudicial search and seizure and clarifying, in a satisfactory manner, its procedure.

In addition, it is an alternative to the judicial route. Either the extrajudicial route or the judicial route in search and seizure is chosen. However, the creditor is assured the option of the judicial procedure to collect the debt or the remaining balance in the event of total or partial frustration of the extrajudicial procedure.

The registry office of the debtor's domicile or the location of the asset where the contract was entered into is competent. In the case of motor vehicles, the creditor is allowed, alternatively, to promote extrajudicial execution procedures before the DETRAN, which may delegate their processing to specialized companies (article 8-E).

In its rite, the delay will result from the simple expiration of the deadline for payment and may be proven by registered letter with acknowledgment of receipt, and it is not required that the signature on said notice be that of the addressee himself.

Once the constitution in default is proven, which occurs by letter with acknowledgment of receipt sent by the creditor to the debtor with the collection, there will be a second notification.

The notification in the extrajudicial search and seizure procedure is the responsibility of the deeds and documents registry officer, preferably by electronic means, to be sent to the electronic address indicated in the contract by the fiduciary debtor.

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Failure to confirm receipt of the electronic notification within three (3) business days from receipt, will result in the postal notification, with acknowledgment of receipt, by the deeds and documents registry officer, at the address indicated in the contract by the fiduciary debtor, and it is not required that the signature on the acknowledgment of receipt be that of the addressee himself, as long as the address is the one indicated in the registration.

If the debt is overdue and not paid, the deeds and documents registry officer, at the request of the fiduciary creditor accompanied by proof of default (first summons), will notify the fiduciary debtor, who may adopt three behaviors.

Your first option is to voluntarily pay the debt within twenty (20) days, under penalty of consolidation of ownership.

It should be noted that, in this first option, the payment by the debtor is of the delinquent installments, not of the totality/entirety of the contract value. So, for example, if a vehicle of 500 thousand reais is financed, there is a default of an installment of 10 thousand reais, the debtor will pay only 10 thousand reais within 20 business days. On the other hand, after the period of 20 business days, the debt must be paid in full for the repossession of the asset.

Once the debt is paid, the fiduciary sale contract will be convalesced.

Your second option is to present, if applicable, documents proving that the charge is totally or partially undue. In this case, the officer will evaluate the documents presented and, in the event that he finds the debtor's right, he must refrain from proceeding with the procedure.

As for these documents, the cognition of the registrar of deeds and documents is not exhaustive and does not admit evidentiary delay, only pre-constituted documentary evidence. It is a summary cognition, in which the plausibility of the allegation that the debt is undue and the existence of defects are verified.

As a parameter for this qualification of the registrar of titles and documents, we suggest the analogous application of the qualification used in the challenges of the rites of rectification and extrajudicial adverse possession before the real estate registrar (Items 136.19 and 420.2, Chapter XX, Service Standards of the General Internal Affairs Office of Justice of São Paulo). In these, the challenge already examined and refuted in the same or similar cases by the Permanent Court of Justice or by the General Internal Affairs Office of Justice is considered unfounded; to which the interested party limits himself to saying that

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the rectification will cause progress in his property without indicating, in a plausible way, where and in what way this will occur; the one that does not contain an exposition, even brief, of the reasons for the disagreement expressed; the one that ventilates matter absolutely foreign to rectification or adverse possession.

In the event that the debtor alleges that the collection is partially undue, it will be up to him to declare the amount he deems correct and pay it within 20 business days, in the absence of controversy as to the amount partially due.

At this point, if there is an undue collection by the fiduciary creditor, it should be noted that, under the terms of article 8-D, the latter will incur a severe fine in favor of the debtor, corresponding to 50% of the amount originally financed, updated, as well as will be liable for losses and damages. As an example, in a vehicle financing of 500 thousand reais, if there is improper use of the extrajudicial search and seizure rite, the creditor bank will pay a fine of 250 thousand reais, updated, as well as losses and damages.

The severe fine acts as a balancer of the speed and effectiveness of the procedure, so that, on the one hand, the fiduciary creditor will quickly obtain the financed asset, but, on the other hand, he must be sure that the collection is due, as he will be severely penalized otherwise.

The third behavior of the fiduciary debtor is to remain inert, not paying the debt or presenting documents proving its illegality, or if these are rejected, in which case the rite will continue.

In this case, the officer will record the consolidation of the fiduciary property or, in the case of assets whose fiduciary sale has been registered only in another body, as is the case of the DETRAN in the fiduciary sale of vehicles, the officer will communicate it to him for the proper registration.

It should be remembered that the registration of the fiduciary sale of vehicles, for effectiveness before third parties, occurs in the vehicle's registration certificate, before the DETRAN, by virtue of article 129-B of the Brazilian Traffic Code, as well as, under the terms of Precedent 92 of the STJ, "A third party in good faith cannot enforce the fiduciary alienation not noted in the motor vehicle registration certificate.". On the other hand, the transfer of ownership or the constitution of a fiduciary alienation over the financed vehicle occurs with tradition (*traditio*), as it is movable property, under the terms of article 1226 of the Civil Code.

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With the consolidation of ownership in favor of the fiduciary creditor, the enforcement phase will proceed.

As a consequence of inertia, DL 911/69, in its article 8-B, §11 and §12, provides that it is the debtor's duty, within the same period of 20 business days and with due knowledge of the registry office of deeds and documents, to voluntarily deliver or make available the thing to the creditor for extrajudicial sale in accordance with article 8-C of the Decree-Law. under penalty of being subject to a fine of 5% (five percent) of the amount of the debt, respecting the debtor's right to a written receipt from the creditor. The total amount of the debt may include the amounts of emoluments, postal expenses and expenses with the removal of the object in the event that the debtor has made it available instead of having delivered it voluntarily.

If the asset has not been delivered or made available voluntarily within the legal period, the creditor may request the deeds and documents registry officer for an extrajudicial search and seizure, with presentation of the updated value of the debt and the spreadsheet with the evolution of the debt.

Afterwards, as a way to enable the extrajudicial search and seizure, the officer will adopt executive measures. Thus, it will launch, in the case of vehicles, a restriction on the circulation and transfer of the asset in the Renavam system and will communicate, if applicable, to the competent registration bodies for registration of the unavailability of the asset and extrajudicial search and seizure.

It will also launch the extrajudicial search and seizure in the Electronic System of Public Records (Serp) and issue a certificate of extrajudicial search and seizure of the property.

With these measures, the vehicle will be seized when stopped at a *checkpoint* or its circulation on public roads is verified and cannot be sold voluntarily.

With this, the creditor, by himself or by third party representatives, may carry out diligences to locate the assets, including companies specialized in locating assets.

Once the asset is seized by the extrajudicial service officer, the creditor may promote its direct sale, regardless of auction.

Once the asset is sold, for the removal of the restrictions, the creditor must communicate it to the notary officer of the registry of titles and documents, who will cancel the entries and communications and communicate the registration body (DETRAN) for the proper registration.

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After its seizure, within a period of five (5) business days, if the fiduciary debtor wishes to repossess the asset, he will have this right through the payment of the full amount of the outstanding debt, according to the amounts presented by the fiduciary creditor in his request, in which case the consolidation of ownership will be canceled and full possession of the asset will be restored. In the entirety of the debt, the creditor may include the amounts with emoluments and expenses, taxes and other charges agreed upon in the contract.

The STJ, interpreting the expression "integrality of the debt", considers that it covers not only the delinquent portion, but the remaining totality of the debt, that is, the total remaining amount of the contract[19].

Furthermore, it should be noted that the fiduciary creditor will only be required by tax or administrative charges linked to the asset from the acquisition of full possession, which will occur with the seizure of the asset or its voluntary delivery. This is the moment of immission in possession, a criterion that avoids the debtor's illicit enrichment and the excessive burden on the creditor, who could not yet use the asset, although it is formally registered in his name.

ALLEGATION OF SUBSTANTIAL COMPLIANCE WITH THE EXTRAJUDICIAL SEARCH AND SEIZURE

First, before entering into the discussion about the possibility or not of alleging substantial performance in the search and seizure of a vehicle, it should be noted that the search and seizure procedure has great peculiarity when compared to other similar ones, such as the extrajudicial foreclosure of the mortgage and the consolidation of ownership in the fiduciary sale of real estate.

In these other proceedings, no challenge is allowed in the extrajudicial way. In this sense, item 249.1 of Chapter XX of the NSCGJSP provides that the summons and consolidation procedure does not admit challenge in the extrajudicial way, and the registrar, in such a case, is prohibited from interrupting or suspending the procedure without a judicial order. The same is applicable to the extrajudicial execution of the mortgage, due to the subsidiary application of the fiduciary alienation rite (article 9, paragraph 1 of Law 14,711/2023).

[19] STJ. 2nd Section. REsp 1.418.593-MS, Rel. Min. Luis Felipe Salomão, judged on 5/14/2014 (repetitive appeal) (Info 540).

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On the other hand, in the extrajudicial search and seizure of a vehicle, the debtor, within 20 days of the summons, instead of paying the debt (Article 8-B, §2 and §3 of DL 911/69), may present, if applicable, documents proving that the collection is totally or partially undue. In this case, the officer will evaluate the documents presented and, in the event that he finds the debtor's right, he must refrain from proceeding with the procedure, resulting in the need to file the search and seizure through the courts.

Regarding the allegation of substantial performance in the judicial search and seizure of a vehicle, there is an important precedent of the STJ, in which it was understood that the theory of substantial performance does not apply to fiduciary sale contracts in guarantee governed by Decree-Law 911/69[20]. In the specific case analyzed by the STJ, the debtor paid 91.66% of the installments of vehicle financing, guaranteed by fiduciary alienation.

We understand that the same grounds listed in the precedents of the STJ, which prevented its application in the judicial route, apply in the extrajudicial route, which is more restricted, with limited cognition.

As grounds for this understanding, it should be noted that article 1,368-A of the Civil Code provides that the other types of fiduciary property or fiduciary ownership are subject to the specific discipline of the respective special laws, and the provisions of the Code are only applied to what is not incompatible with the special legislation.

In this sense, the subsidiary incidence of the Civil Code, notably of the general rules, in relation to the ownership/fiduciary ownership of assets regulated by special laws is exceptional, and only seems possible in the case where the specific rule has gaps and the solution offered by the general law does not contradict the specificities of the institute regulated by the special law.

Although good faith and the social function of contracts are rules of public order, there is, therefore, no full and unrestricted application of the theory of substantial performance, which is based, as we have seen, on objective good faith, in view of the specialty of Decree-Law 911/69, with a mitigated scope of application of these principles in the search and seizure.

Also, it is incongruous to make it impossible to use the search and seizure action in the event that the default is of little amount, since Decree-Law 911/69 expressly conditions

[20] STJ. 2nd Section. REsp 1622555-MG, Rel. Min. Marco Buzzi, Rel. for judgment Min. Marco Aurélio Bellizze, judged on 2/22/2017 (Info 599).

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the possibility of the asset remaining with the fiduciary debtor to the payment of the "full debt", an expression found in article 3, paragraph 2 (judicial route) and article 8-C, §9 (extrajudicial search and seizure), both of DL 911/69.

The STJ, interpreting this expression, considers that it covers not only the delinquent portion, but the remaining totality of the debt, the total remaining amount of the contract[21].

In another important argument, preventing the creditor from using the search and seizure action due to substantial performance (provided for by law and guaranteed by the fiduciary guarantee) and forcing him to resort to another, clearly less efficient judicial route, demonstrates a mismatch with the procedural system.

It is inappropriate to extinguish or block the correctly proposed search and seizure action, so that the creditor, who should benefit from the fiduciary guarantee (and who, in the event of default, would have the status of owner of the asset), is obliged to initiate an enforcement or collection action. This alternative would only allow the creditor to try to access the debtor's assets through judicial constriction, which, respecting the legal order, could fall on the same asset – if the debtor has not disposed of it by then.

Furthermore, the theory of substantial performance has as its main objective to prevent the creditor from terminating the contractual relationship due to default of a small portion of the obligation, in the judicial route of contractual termination.

On the other hand, the fiduciary creditor, when he promotes a search and seizure action, does not intend to extinguish the contractual relationship. It uses the search and seizure action with the immediate purpose of complying with the terms of the contract, insofar as it uses the adjusted fiduciary guarantee to compel the fiduciary debtor to comply with the missing obligations, contractually assumed (and now, by him, considered negligible).

The consolidation of fiduciary property in the hands of the creditor arises as a consequence of the fiduciary debtor's refusal to fulfill its contractual duty, and not as the main objective of the action. It is important to note that, even in these cases, the termination of the contract occurs by the fulfillment of the obligation, even if compulsorily, through the agreed fiduciary guarantee.

Also, it is unreasonable to suppose that contractual good faith is on the side of the defaulting fiduciary debtor. The latter fails to pay installments that he considers to be tiny,

[21] STJ. 2nd Section. REsp 1.418.593-MS, Rel. Min. Luis Felipe Salomão, judged on 5/14/2014 (repetitive appeal) (Info 540).

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but certainly of considerable expression, from the point of view of creditors, who, as a rule, in view of the unilateral nature of the loan, already fully comply with their obligation with the availability of the money and acquisition of the asset. Objective good faith does not protect the debtor who, summoned to honor his contractual duty, fails to do so, in violation of the previous agreements and the knowledge of the burdensome legal consequences arising from the fiduciary property.

Furthermore, from a consequentialist perspective, the application of the theory of substantial performance to prevent the use of the search and seizure action may prove to be an incentive to default on the last contractual installments, discouraging the creditor from satisfying his credit by other, less effective judicial means. In this way, the external effectiveness of the social function of contracts, which protects the useful and safe performance of obligations, is violated[22].

Furthermore, fiduciary property, conceived by the legislator to provide legal certainty to credit concessions and consequent reduction of interest rates and facilitation of bank loans, essential to the development of the national economy, would be excessively affected by the distorted application of the theory of substantial performance, which would offend its character of super-guarantee[23].

In addition, the application of the theory of substantial performance in this case would imply a limitation to the attribute of recovering the thing by its owner (article 1,228 of the Civil Code), inherent to real rights.

As we have seen, in the case of a well-founded challenge, the officer must refrain from proceeding with the extrajudicial search and seizure procedure. Consequently, the creditor will only have the option of judicial remedy for enforcement.

However, substantial performance is a matter that could not even be considered in the judicial process, given its inapplicability in the judicial search and seizure rite.

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[22] Cf. AZEVEDO, Antônio Junqueira de. Principles of the new contract law and market deregulation – Right of exclusivity in contractual supply relationships – Social function of the contract and Aquilian liability of the third party that contributes to contractual default (Opinion). Revista dos Tribunais, n. 750, year 87. São Paulo: RT, abr.1998.

[23] Cf. Fernando Noronha: "We have proposed that the hypotheses in which a creditor, in order to ensure payment by the debtor, assume ownership of the very thing that relates to the debt, in order to be able to claim the restitution of that thing, thus being exempt from the obligation to compete with any other credits, be called super guarantees, including holders of labor and work accident claims. These hypotheses, which traditional law did not know, constitute new forms of protection of the interests of creditors, being much more powerful than the real guarantees themselves and even than preferential credit privileges." (NORONHA, Fernando. Fiduciary sale as collateral and financial leasing as super-collateral of obligations. In: TEPEDINO, Gustavo; FACHIN, Luiz Edson. Contracts in kind: asset allocation and guarantee. São Paulo: Ed. Revista dos Tribunais, 2011, p. 740).

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Therefore, the conduct of the registrar who refrained from proceeding with the procedure in the face of the allegation of substantial performance in the extrajudicial route would be innocuous, since the allegation would be rejected in the judicial route itself.

Thus, in the face of an allegation of substantial default by the debtor in the extrajudicial search and seizure of a vehicle procedure, the most correct conduct of the deeds and documents registration officer is its rejection, in a reasoned note, continuing the procedure.

If, perhaps, the extrajudicial collection is considered materially undue, the responsibility will fall on the creditor, who will pay a fine equivalent to fifty percent of the amount originally financed, duly updated, in favor of the debtor himself, as governed by the aforementioned article 8-D of DL 911/1969.

CONCLUSION

At the outset, we point out that the procedure for extrajudicial execution of vehicle financing contracts is constitutional, since it is an alternative means of conflict resolution, which does not prevent access to the jurisdictional route. In addition, the procedure safeguards the due process of law, emanating a deferred and postponed adversarial procedure. It fulfills its scope, which is agility in credit recovery.

Furthermore, we consider that the procedure consolidates an older process of extrajudicialization of the execution, which went through the pledge, with Law 492/1937, and the mortgage, with Decree-Law 70/1966. The latter was submitted to the scrutiny of the Federal Supreme Court and had its constitutionality endorsed. The reasons applied by the Court on that occasion are compatible with the procedure under study. We therefore intervene for its constitutionality.

The search and seizure procedure has a great peculiarity when compared to other similar ones, as it admits challenge in the extrajudicial way itself. In order to delimit which defensive allegations can be considered unfounded by the registering officer, we suggest the analogous application of the qualification used in the challenges to the rites of rectification and extrajudicial adverse possession before the real estate registrar.

Thus, the challenge is considered unfounded: (1) already examined and refuted in the same or similar cases by the Permanent Court of Justice or by the General Internal Affairs Office of Justice; (2) that the interested party merely says that the enforcement will cause damage without plausibly indicating where and how this will occur; (3) the one that

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does not contain an exposition, even brief, of the reasons for the disagreement expressed; and (4) the one that ventilates matter absolutely foreign to the execution.

In the evidence of its peculiarities, it should be noted that the procedure of Decree-Law 911/1969 is its own system, whose isolation is based on the general text of the Civil Code. Thus, article 1,368-A asserts that the other types of fiduciary property are subject to the specific discipline of the respective special laws, only applying the provisions of the Code to what is not incompatible with the special legislation.

Further, we establish that objective good faith is the meta-legal basis of substantial performance, endorsed by the prohibition on abuse of rights and by the social function of contracts. Firm on these premises, we understand that the alleged application of the theory of substantial performance as an argument intended to make the use of extrajudicial search and seizure unfeasible distorts, on the one hand, the procedure of the special norm, and on the other hand, the very purpose of the theory[24].

After all, substantial performance consists of obtaining a profit so close to the contracted one, that the obligatory sign remains immaculate. We recall that, as a rule, the creditor of a defaulted obligation may demand the termination of the contract or its full performance (Civil Code, article 475). However, by applying the theory of substantial performance, the creditor can no longer demand the termination of the contract, and it is only up to him to seek its full compliance.

In the extrajudicial search and seizure procedure, the creditor seeks, as a priority, the payment of the installments whose default has been proven. Only if the claim for performance is frustrated, the guarantee is executed, terminating the contract. Thus, the application of substantial performance, preventing the termination of the contract, would render the security interest ineffective. It would offend the character of super-guarantee, as well as of real right, of the fiduciary alienation, a consequence that does not deserve to be upheld.

The orientation favorable to the performance – and not to the termination of the contract – is evidenced even after the seizure of the asset. The procedure grants the debtor a period of 5 (five) business days to make the payment of the full outstanding debt, repossessing the asset. In this regard, we recall that the STJ interprets the expression

[24] In this sense, the winning vote of Justice Marco Aurélio Bellizze *in* STJ. 2nd Section. REsp 1622555-MG, Rel. Min. Marco Buzzi, Rel. for judgment Min. Marco Aurélio Bellizze, judged on 2/22/2017 (Info 599).

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"integrality of the debt" as the total remaining amount of the contract, not just the amount in arrears.

In addition, the existence of an express provision in the contract, in a highlighted clause, denotes that the possibility of extrajudicial prosecution of the credit is part of the synallagmatic arrangement. To make the extrajudicial search and seizure procedure impossible, in view of the partial breach of the contract, would hurt the negotiations entered into between the parties, contrary to objective good faith and the case law of the STJ on substantial performance.

In addition, there is an important precedent of the STJ, ruling out the application of the theory of substantial performance to fiduciary sale contracts in guarantee governed by Decree-Law 911/69, in the judicial process. The understanding applies, even more, to the extrajudicial route, in which the cognition of the registrar of titles and documents only admits pre-constituted documentary evidence. Therefore, it could not be based on the allegation of substantial performance, whose protection would require evidentiary delay and broader cognition.

Furthermore, the Decree-Law complements the precautions, sanctioning the undue collection of the creditor with a fine equivalent to fifty percent of the amount originally financed, duly updated, in favor of the debtor (article 8-D of DL 911/1969). The severe fine acts as a balancer of the speed and effectiveness of the procedure, so that, on the one hand, the fiduciary creditor will quickly obtain the financed asset, but, on the other hand, he must be sure that the collection is due, as he will be severely penalized otherwise.

Finally, the external effectiveness of the social function of contracts protects the useful and safe performance of obligations, which must be safeguarded, within the logic of maximum effectiveness, typical of the extrajudicial search and seizure procedure of fiduciary alienation in vehicles.

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