

Analysis on the Preemptive Right of the Secondary Lessee

Longying Yu

Qingdao University of Science and Technology, Qingdao, China

Abstract

With the development of Socialist market economy and the acceleration of urbanization, more and more people live in cities and towns, but housing prices remain high, making rental housing the best choice for most people. The increasingly prosperous housing rental market has triggered a variety of disputes, including disputes arising in the process of subletting. In this complex and diverse legal relationship of sublease, the current law of our country pays more attention to the protection of the rights and interests of lessor and lessee, such as the lessee has the right of preemption, however, there is no corresponding right to the Sub-lessee in the legal sub-lease relationship. For example, the law of our country does not stipulate that the Sub-lessee who needs the house more urgently has the right of preemption. And whether it is the judicial practice or theoretical circles, the Sub-lessee to give priority to the purchase of the right there is a major controversy. At the same time, in the cases of Sub-lessee's right of preemption concluded by the courts at all levels and all over the country, the results of the decisions are quite different, and there are often different judgments in the same case, which violates the principle of fairness, also seriously damaged the legitimate rights and interests of the Sub-lessee. This paper analyzes and demonstrates the necessity of the right of preemption of the Sub-lessee and the existing problems in China. According to Article Seven hundred and sixteen of the Civil Code, the lessee may, with the consent of the lessor, sublease the leased property to a third party. If the lessee subleases, the lease contract between the lessee and the lessor shall remain valid and shall be a legal sublease; if the lessee subleases without the consent of the lessor, the lessor may terminate the contract and the lease shall be an illegal sublease. The author holds that the Sub-lessee has no right to claim the preemption right from the owner in the illegal sublease relationship. Therefore, the author will discuss the right of preemption of the Sub-lessee on the basis of legal sublease.

Keywords

Sub-lessee; Lessee; Preemptive Right.

1. Introduction

In recent years, China's housing rental industry has developed rapidly with the increase of national support and the introduction of favorable policies. Although entering the 2020 Spring Festival, affected by the epidemic, the market has been seriously impacted, from more than 10,000 sets a year ago to less than 1,000 sets, 5-6 weeks is less than 300 sets, but with the arrival of the resumption of work tide, enterprises gradually began production and operation activities, china's leasing market appears signs of warming up, supply chain increased significantly. Therefore, under the urging of national policy and multiple factors, the rental market will continue to grow in the future. It is estimated that by 2020, the rental market will reach 2.71 trillion yuan, and the total area of rental housing in 2023 will reach 8.382 billion, with a population of 248 million. [16] In 2015, the state started to vigorously support the housing rental market; at the end of 2016, the central government proposed that "Houses are for living"; in 2017, various regions launched intensive property market regulation policies and

vigorously developed the rental market; and in the same year, nine ministries and commissions in Guangzhou and other 12 cities in the pilot, Guangzhou took the lead in playing the “Right to rent and sell”, followed by Shenzhen, Wuhan and more than 50 cities to introduce the development of leasing policies. [26]

In the growing housing rental market, is no longer a static rental, more sublet, sublet and other conditions like mushrooming in the public field of vision. In the past, too much attention was paid to the protection of static property, and the concept of ownership was deeply rooted in people’s mind. The superiority of real right over creditor’s right is also deeply rooted in the heart. In this way, the main leasehold housing is no longer a simple lessor and lessee between the two legal relations, but also to join the Sub-lessee situation. In our country, the current legal provisions are more absolute protection of the interests of the lessor, the lessee has some rights, but the legal protection of the Sub-lessee almost no mention. For the consideration of fairness, social order stability and efficiency, the current legal system is not yet perfect for the housing leasing system, and there are always differences in judicial practice, and there is no clear legal provisions to provide guidance, in the long run, the contradictions in the housing rental market will intensify, and the stability of the market will also face challenges. However, in the legal relationship of housing sublease, the Sub-lessee is the final possession of the housing, use, real investment in decoration and demand the largest. [23] However, in the food chain of housing sublease, the Sub-lessee is the most weak voice, the lowest economic status of the main body, so this paper based on the Sub-lessee’s preemptive right to study has practical and theoretical significance.

2. Raising of Questions

Kangda Company and Mingfeng Company two companies to enter into a written lease contract, agreement by Mingfeng Company to Rent Kangda Company storefront housing, lease period of 5 years. After 2 years after the agreement of Kangda Company, Renhe Company sublets the storefront of Kangda Company for 4 years. Two years later, Mingfeng company was in arrears in paying the rent, and after a three-month reminder period, it still refused to pay. Kangda Company then appealed to the court for the cancellation of the lease contract concluded by Mingfeng Company, request Renhe Company to move out of storefront housing. After investigation, the court made a judgment according to law. Kangda company MINGFENG company between the two companies to terminate the lease contract, Renhe Company also need to move out of the rental housing.

There are two legal relations in this case: lease and sublease, which involve three interested parties: lessor, lessee and Sub-lessee. [Shirley Yeung. Damages for loss of preemption right of lessee -- focus on Article 230 of Contract Law [J]. Research on China’s real estate law, 2016, 14(2).] The key to deal with this case is to determine the legal effect of the two lease contracts and the effect of the sublease contract when the lease contract is terminated. The court held that the existence of a sublease contract presupposes the validity of the lease contract and the lessee’s lawful and normal right to lease the subject matter, including actual possession, use, proceeds and disposition with the lessor’s written consent. And because the lessor and the Sub-lessee are in two separate contracts, there is no corresponding relationship of rights and obligations between them. Once the house lease contract is terminated, the lessor has no obligation to tolerate the Sub-lessee to continue to occupy, use, income housing. The sublease contract lapses with the termination of the lease contract. The court’s decision is not improper only in terms of the relevant provisions of China’s current law, but the lessor Kangda company is because the lessee Mingfeng company owes the rent and does not pay it after being urged to terminate the contract to protect their rights and interests. At this time, Renhe Company, the Sub-lessee, can pay off the rent owed by Mingfeng company on behalf of Renhe Company, and

continue to occupy, use and benefit the house. [Cheng Bijun. A study on the legal issues of the lessee's preemptive right. Guangzhou: Guangdong University of Finance and economics, 2017.43.] In this way, Renhe company's normal sublease interests can be protected, and the right of Kangda Company to collect rent also did not fail. Renhe company may then claim on the subrogation settlement to the lessee or deduct it from the rent paid to the lessee. Through the case analysis there are several issues, in the sub-lease, the lessee's preemptive right because of the Sub-lessee's preemptive right and does not exist? What is the purpose of establishing preemptive right? Is the preemptive right exclusive only to the lessee? Is there a social problem with that? What is the sequence of the preemptive rights of the lessee and the Sub-lessee? The design of the legal system should be improved and revised with the emergence of social problems. Especially, the housing is related to the common people

3. Restrictions on the Right of Preemption of the Sub-lessee

The concept of Sub-lessee appears in the legal relationship of housing sublease. According to Article Seven hundred and nineteen of the Civil Code, Sub-lessee's right to pay off, the existing law has begun to pay attention to the protection of Sub-lessee's rights. Sublease refers to the act of subletting all or part of a leased building to a third party for possession, use or profit. The third party shall pay the rent directly to the tenant. The third person in the legal relationship is the Sub-lessee, while the lessor in the original lease relationship is still the lessor, and the lessee is the lessee of the original lease contract, at the same time, it is also the sublet in the House sublease contract.

According to Article Seven hundred and sixteen of the Civil Code, the lessee may, with the consent of the lessor, sublease the leased property to a third person. If the lessee subleases, the lease contract between the lessee and the lessor shall remain valid; if a third party causes losses to the leased property, the lessee shall compensate for the losses. If the lessee sublets the lease without the consent of the lessor, the lessor may terminate the contract. The premise of this paper is that in the case of legal sublease, illegal sublease does not exist the original lease contract, so there will not be the case of Sub-lessee. Legal sublease involves two contractual relationships. The lessor signs a lease contract with the lessee, and the lessee signs a sublease contract with the Sub-lessee.

Preemption, also called preemptive right, refers to the right of a specific subject to buy or sell property under the same conditions. There are two aspects in its broad sense and narrow sense: The broad sense includes the agreed preemption and the statutory preemption, and the narrow sense only refers to the statutory preemption. The preemption right agreed upon by the parties has the effect of creditor's rights only, which is not controversial in theory. As for the nature of the legal right of preemption, there are "The theory of expectation right", "The theory of formation right and the theory of conditional formation right", "The theory of creditor's right" or "The theory of real right". we believe that these theories differ in their interpretation and are qualitatively not mutually exclusive. If the right of expectation does not conflict with the real right, the right of formation does not negate the effect of the real right. The author adopts the theory of Conditional Right of formation. Under the same conditions, the preemption is expressed only according to the will of one party, which makes the other party have the obligation to transfer ownership to himself. Preemption is a kind of right granted to a specific subject on the basis of a specific basic relationship. Its design aim is to make the legal relationship simple and make full use of it. The preemption has the legal nature, the exclusiveness and certain recourse effect, therefore has the real right effect.

There are two purposes of granting the lessee the right of preemption in Law: one is to stabilize the lease relationship so that the lessee does not lose the right of lease due to the transfer of the property right of the leased property, which is the same as the purpose of establishing the rule

of "Sale does not destroy the lease"; Second, in order to promote the use of the maximum, to avoid the tenant into the sea, housing owners and users into one, so that housing utilization to the maximum. [9] Although Mingfeng Company and Renhe Company have preemptive rights, but the two people in the priority order is different. Mingfeng company as a lessee sublet to earn the housing price difference, thus income, his behavior is more to create economic value. Renhe company rent this room is used for their own residence, is to protect their survival needs of a behavior. Speaking from the legal principle, the safeguard human's survival right is first. In addition, in terms of the use efficiency of the promotion, Renhe Company is the actual owner and user of the house, and Renhe has the priority to purchase the house, which increases the use efficiency of the house and avoids wasting the unnecessary social cost.

However, on the issue of which of the lessee and the Sub-lessee has the right of preemption, because there is no clear legal provision, there will always be different judgments in the same case, article 30 of the Beijing Municipal High Court "On the trial of housing lease contract disputes," provides: "How to determine the right to preemption of sublet housing subjects? If the lessee subleases the house with the consent of the lessor, the lessee shall no longer have the right of preemption, and if the Sub-lessee requests to exercise the right of preemption, the lessee shall support the lessee; if the House is subleased without the consent of the lessor, the lessee or the Sub-lessee requests to exercise the right of preemption, no support shall be given.". Article 17 of the Shanghai Municipal High Court's "Guidelines for Handling Urban House leasing contract disputes" stipulates: "If the lessee, on the ground that the right of preemption has been infringed, requests the lessor to undertake the liability for compensation, it shall provide the facts of the actual damages.". Because the right of preemption is a kind of accessory right, uncertain right or opportunity right, which is attached to the house lease relationship, it needs the assistance of relative person to realize, and can not control the right directly, the right of preemption belongs to the category of creditor's rights. [20] Since Shanghai regards the preemptive right as a creditor's right, the creditor's right is relative, and only the lessee of the lessor has the preemptive right, while the lessee of the lessor has no such right. The refutation of these two views is the embodiment of the views of most scholars and social personages. [21]

4. Nature of the Right of Preemption

4.1. From a Legal Perspective

The preemptive right of the lessee is a kind of claim right. The pre-emption right stipulated by law is to require the lessor to have the obligation of inaction. It is that the lessor can not sell the house to the third person when the lessee is willing to buy the house on the same terms as the third person, if the lessor sells the house to a third person despite the objection of the lessee, the lessee may apply to the court to declare the sale contract of the house null and void, forcing the lessor to perform its obligations of omission. But this regulation has a big loophole, when the lessor abides by and the lessee's agreement not to sell the house to the third person, but whether to sell directly to the lessee, and whether the lessee will certainly buy no regulation. The determination of the right of preemption is the first step to solve these problems. When the lessee enjoys the right of preemption, the lessor transfers the ownership to the lessee. The lessee integrates the ownership, the right of possession and the right of use, can reduce a lot of unnecessary social contradictions, stable social order, reduce unnecessary disputes. However, as society pursues more economic benefits, makes the cake bigger and stronger, brings into play the influence of the maximum value of property, and property is transformed from belonging to utilization, the primary function of law is to ensure efficiency, but the lessee has the preemptive right not necessarily to play such an effect, it is clear that the lack of Base to accumulate.

4.2. Legislative Background

The foundation on which the lessee's preemptive right is based no longer exists. In the 1950s, China established the right of preemption of lessee because the real estate resources were rather scarce. In order to solve the basic housing problems of residents and prevent social unrest, the system of preemptive right of lessees has been stipulated. The right granted to the lessee by the law is not only beneficial to the lessee's survival interests or business interests, but also beneficial to the maintenance of social harmony and stability. From the end of the last century to the present, the sale and lease of own-owned houses is more and more active, the way of living and the mode of living are more and more novel, and the lessee is no longer the part who needs the ownership of the house most. In this situation, no matter who the house is sold to, there will be no social instability. And, according to the speculation, in the near future, our country's trading market will almost remain the transaction of the two sides will be strangers, the acquaintance of the social transaction will be out of the stage of history, people now generally demand is fast, fast, steady. Through the change and evolution of the society, we can see that the social conditions of the lessee's right of preemption have changed greatly, of course, the past legislative background can not adapt to the present legislative background, laws that lack a social foundation will change over time.

4.3. By Law

Article Seven hundred and twenty-eight of the Civil Code provides that if the lessor fails to notify the lessee or in any other case prevents the lessee from exercising its right of first refusal to purchase, the lessee may request the lessor to assume the liability for compensation. However, the effectiveness of the lessor's contract with the third party for the sale of housing is not affected. According to regulations, after the lessor assumes the liability for compensation for the former act, the ownership of the subject matter of the contract is restored to the state prior to the conclusion of the contract, the house is still owned by the lessor, the lessor can still conclude the contract with the third party, and the lessor enjoys the complete real right. According to the principle of freedom of contracting, the court can not force the lessor to sell the house to the lessee. At the same time, based on the relativity of debt, only the lessor as the defendant, and the lessor signed the sale contract with the third party in the litigation is the third party without the right of independent claim. Therefore, the lessee requests confirmation that the contract for the sale of the lessor's house to a third party is null and void and that the lessee is able to purchase the house on the same terms and conditions as the third party, such contracts for the sale and purchase of rental housing now have no legal basis.

There are two purposes of granting the lessee the right of preemption in Law: one is to stabilize the lease relationship so that the lessee does not lose the right of lease due to the transfer of the property right of the leased property, which is the same as the purpose of establishing the rule of "Sale does not destroy the lease"; Second, in order to promote the use of the maximum, to avoid the tenant into the sea, housing owners and users into one, so that housing utilization to the maximum. Although Mingfeng Company and Renhe Company have preemptive rights, but the two people in the priority order is different. Mingfeng company as a lessee sublet to earn the housing price difference, thus income, his behavior is more to create economic value. Renhe company rent this room is used for their own residence, is to protect their survival needs of a behavior. Speaking from the legal principle, the safeguard human's survival right is first. In addition, in terms of the use efficiency of the promotion, Renhe Company is the actual owner and user of the house, and Renhe has the priority to purchase the house, which increases the use efficiency of the house and avoids wasting the unnecessary social cost. [1]

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5. The Benefits of Protecting the Interests of the Sub-lessee

5.1. Conducive to the Long-term Development of the Tenancy Relationship

The leasehold right of the Sub-lessee originates from the leasehold rightfully obtained by the lessee from the lessor. As the leasehold right of the lessee is weaker than the lessor’s ownership of the house, in the event of a dispute, the lessee’s interests are protected by the relevant laws, while the Sub-lessee, as the real owner, user and beneficiary of the House, has to bear the most direct adverse consequences while facing the most risks. If the interests of the Sub-lessee are not protected, the housing sublease market will inevitably be adversely affected, and the interests of the lessee will also be affected, which will eventually hinder the long-term development of the lease relationship, it is disadvantageous to the construction of socialist modernization and the overall construction of harmonious society. [3] With the development of economy, the housing sublease market is becoming more and more popular. The housing sublease is not only related to the lessor and lessee, the legal concept of the Sub-lessee also permeates more into daily life.

However, it is obvious in our country’s law that the interests of the lessor are very important, and the lessee also has certain rights, but the rights of the Sub-lessee are very much absent, which leads to the Sub-lessee being aware of the sub-lease, the anticipation of the risk will be higher, reluctant to accept, but also lead to the rental market a lot of instability. In the 21st century, in the face of the housing rental tide, our logistical support can not fall, to solve the anxiety and doubt of the vast majority of people, to promote the vitality of the entire market and economic growth. [11] In fact, the court in the judgment, may indeed know the weak Sub-lessee helpless and legitimate, but the heart adhere to the “Law as the yardstick” principle is often reminded to adhere to the provisions of the law. [12] However, the law itself has the characteristics of lag, should be gradually improved with the changing society, but also in the face of these problems, we will think of the focus of change. [13] After all, the Base decided that the base and superstructure, in the process of economic development, there will be a corresponding legal system.

5.2. Protecting the Weak and Pursuing Substantive Fairness

Based on the legal idea that the real right is superior to the creditor’s right, the lessee owns the ownership of the house, the Sub-lessee only has the right to use the house, and the Sub-lessee’s right after subletting is even weaker. [14] From the economic strength point of view, the lessee because the rental housing has a certain economic strength, the lessee also get a certain cash

value after subletting, but the Sub-lessee just want to have his use value. From the perspective of access to information, although the state promotes a registration system for rental housing, it is not an effective requirement for rental housing, so it is not the same as confirming the ownership of the housing, can Not accurately determine the ownership of the housing and rental situation, coupled with widespread middlemen in bad faith, fraud or their own failure to perform on time and the agreement of the lessor led to the lease contract breach, termination, after their own collection of rent, walk away, the last to stay injured or sub-tenant.

From the point of view of the housing dependence, because the sub-tenant urgent to find a place to live, the housing for him is a place to shelter from the wind and rain, the degree of dependence on the housing is very high, there are even a lot of rental because of the children's school problems, specifically in a district rental housing, not rent may also face the children's education problems. [20] If the housing rental contradictions and disputes, the last life of the most affected is the Sub-lessee. Consistent with the principle of "Sale does not destroy the lease", the right of preemption of the Sub-lessee also considers the right of the weak. Fairness is the first value orientation pursued by law, and there is more substantial fairness besides formal fairness. From the concept of maintaining social justice and fairness, the legal protection of the interests of the Sub-lessee is very meaningful and necessary.

6. The Benefits of a Sub-lessee Having a Preemptive Right

6.1. Functions Designed by the System Itself

The original intention of preemption is to protect the interests of the actual possessor. When the ownership of property and the right to use property are in conflict, the preemptive right chooses to protect the interests of the user of property. In the legal relationship of housing sublease, the secondary lessee as the actual use of housing occupier, should be protected by the right of first refusal.

6.2. From the Concept of Possession

"The actual possessor always has the upper hand in the lawsuit", this ancient sentence, although did not fall in the text, but in practice has confirmed time and time again. It affirms the Prior Rights of the possessor. In the case of sublease, the Sub-lessee is the direct possessor of the house, the lessee is the indirect possessor of the house, and the lessee has the right of preemption in the legal relationship of the lease, the right of preemption shall also be enjoyed by the Sub-lessee who is the direct possessor of the house.

6.3. From the Lessor's Own Behavior

The basis of legal sublease is that the lessee sublets with the consent of the lessor. The lessor buys and sells the house under the condition that the actual possessor of the house is clear. The duty of notice is not an additional burden for the lessor. So the Sub-lessee has the right of preemption for the lessor is to let the sale of the House more a bidding opportunity, the sale of the House also more a layer of security.

6.4. Freedom and Efficiency in Private Law

Since the Sub-lessee has a high degree of dependence on the housing and a high degree of demand, the housing owned by the Sub-lessee has played its greatest value and will not be sublet or grouped many times, increasing the difficulty of market supervision over the housing leasing, or resource allocation plays the biggest biggest value, causes the entire leasing market free, the high speed development.

6.5. Legal Concepts and Values of Fairness and Justice

This paper discusses that the secondary lessee is weaker than the lessee in terms of economic status, information collection and other places, and starting from the premise of protecting the weak, the rights of the secondary lessee should be taken into account in the course of house leasing, it's also a matter of substantive fairness. [5]

On the priority of the right of preemption, there are three situations, the first one is that there are no several priorities, the second one is the priority of the right of preemption of the Sub-lessee, and the third one is the priority of the right of preemption of the lessee. [6] Except that it is clearly stipulated by law that within 15 days after the lessor's performance of the notification obligation, the joint owner of the house, the lessee's close relatives (including the spouse, parents, children, brothers and sisters, grandparents, grandchildren, grandchildren) and the lessee have not explicitly requested to exercise the right of preemption, and the third party in good faith after the registration procedures for the purchase, the lessee has no preemptive right, of course, at this time the lessee also do not enjoy the preemptive right. However, in the case of partial subletting, if the part and the whole can be separated, and the part of the house rented by the Sub-lessee accounts for more than half of the total house, then the right of preemption of the Sub-lessee takes precedence, if the part and the whole can not be divided, the Sub-lessee part of the rental housing accounted for less than half of the proportion of the whole housing, then the Sub-lessee part of the sub-lease does not have the right of first refusal. [7]

As for the right of preemption of Sub-lessee, it is not stipulated in the current law of our country, and it is seldom involved in theory and practice. However, it is necessary to pay attention to and protect the rights of the Sub-lessee in legislation. [8] The author holds that the preemption right of the Sub-lessee should be endowed with some effect of the right of formation. In order to balance the interests of lessor and Sub-lessee, the exercise of preemption right should be provided with procedural guarantee and period regulation. After the gradual improvement of the system, the rental market in the formal road to go more and more smoothly.

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