



## **TWELFTH ARBITRAL APPEAL COURT**

**410002, Saratov, st. Lermontov, 30, bldg. 2 tel: (8452) 74-90-90, 8-800-200-12-77; fax: (8452) 74-90-91, <http://12aas.arbitr.ru>; e-mail: [info@12aas.arbitr.ru](mailto:info@12aas.arbitr.ru)**

### **RESOLUTION arbitration court of appeal**

**Saratov Case No. A57-233 / 2017  
October 29, 2019**

The operative part of the resolution was announced on October 22, 2019. The full text of the resolution was prepared on October 29, 2019.

The twelfth Arbitration Court of Appeal, composed of: presiding judge S.G. Veryaskina, judges Puzina E.V., Makarikhina L.A., while keeping the minutes by the secretary of the court session Glebova V.K., Having considered in open court the appeal of the joint-stock company firm "SMUR" (394019, Voronezh, Ereemeeva st., 22, TIN 3662020332, OGRN 1023601610878) on the ruling of the Arbitration Court of the Saratov Region dated May 08, 2019 on the refusal to satisfy the application for the termination of enforcement proceedings in case No. A57-233 / 2017 (Judge I.M. Zagranichny) at the claim of the limited liability company "Company ALS and TEK (410012, Saratov, Bolshaya Kazachya St., 8 "D", INN 6452045336, OGRN 1026402661108) to the joint-stock company SMUR (394019, Voronezh, Ereemeeva st., Bld. 22, INN 3662020332, OGRN 1023601610878) on the reclamation of property, third parties: joint-stock company "QUANT-TELECOM" (394019, Voronezh, 22 Ereemeeva st., TIN 3662124236, OGRN 1073667031030), Management Of the Federal Bailiff Service in the Saratov Region (410600, Saratov, Teatralnaya Square, 11), Kirovsky District Department of Bailiffs in Saratov, Office of the Federal Bailiffs Service in the Saratov Region (410054, Saratov, 2nd street Sadovaya, 129), Limited Liability Company "Directorate of Communication Enterprises Under Construction" (410002, Saratov, Chernyshevsky st., 197, INN 6452048979, OGRN 1026402661119), with participation in the court session:

- representatives of the joint-stock company firm "SMUR" - N.N. Litvinova, by power of attorney dated 05/17/2018, I.A. Tarovich, by power of attorney dated 01.01.2019 No. 17

- representative of the joint-stock company "QUANT-TELECOM" - N.N. Litvinova, by proxy dated 08.25.2015,
- representative of the limited liability company "Company" ALS and TEK "- V.N. Vekozin, by power of attorney dated 03.12.2018 No. 35,

without participation in the court session of representatives of other persons participating in

the case, duly notified of the time and place of the court proceedings,

**found:**

Joint-stock company firm "SMUR" (hereinafter - JSC firm "SMUR", the defendant) applied to the Arbitration Court of the Saratov Region with an application to terminate enforcement proceedings No. 74142/18/64042-IP, resumed by the order of the bailiff of the Kirovskiy ROSP in Saratov UFSSP Russia in the Saratov region from 20.11.2018

No. 64042/18/5130552 on the basis of a writ of execution No. FS 016402251, issued on December 29, 2017 by the Arbitration Court of the Saratov Region in case No. A57-233/2017 on the claim of a limited liability company

"Company" ALS and TEK "(hereinafter - LLC" Company "ALS and TEK", plaintiff) to JSC firm "SMUR" on the reclamation of property.

By the definition of the Arbitration Court of the Saratov Region dated 05/08/2019, the application was refused.

JSC firm "SMUR", disagreeing with the pronounced judicial act, appealed to the court with an appeal, in which it asks to cancel the ruling of the court of first instance on the grounds stated in the appeal.

LLC "Company" ALS and TEK "in the manner of Article 262 of the Arbitration Procedure Code of the Russian Federation (hereinafter referred to as the APC RF) submitted a written response to the appeal.

Information about the postponement of the proceedings on the consideration of the appeal is posted on the official website of the arbitration court in the information and telecommunications network "Internet".

Representatives of JSC Firm SMUR, Joint Stock Company KVANT-TELECOM (hereinafter referred to as JSC QUANT-TELECOM) in the court session supported the arguments set out in the appeal.

The representative of LLC "Company" ALS and TEK "in the court session objected to the satisfaction of the requirements of the appeal.

In accordance with part 3 of Article 156 of the Arbitration Procedure Code of the Russian Federation, the court considers the appeal in the absence of representatives of other persons participating in the case, duly notified of the time and place of the court session.

JSC firm "SMUR", when considering the case in the court of appeal, filed a motion to suspend the proceedings on the consideration of the appeal in this case pending consideration of the merits of JSC firm "SMUR" on the revision of the ruling of the Twelfth Arbitration Court of Appeal dated 13.12.2017 in case No. A57- 233/2016 on newly discovered circumstances and the entry into force of the relevant judicial act; before the Arbitration Court of the Volga District issues decisions based on the results of consideration of the cassation appeal of JSC firm "SMUR" against the ruling of the Twelfth Arbitration Court of Appeal dated July 15, 2019 in case No. in case No. A57-12788 / 2018.

The appellate court found no grounds for satisfying the request on the following grounds.

Clause 1 of Part 1 of Article 143 of the Arbitration Procedure Code of the Russian Federation establishes the obligation of the arbitration court to suspend the proceedings in the case if it is impossible to consider the case until the resolution of another case being considered by the arbitration court.

At the same time, by virtue of paragraph 1 of Article 145 of the Arbitration Procedure Code of the Russian Federation, the proceedings on the case are suspended in the case provided for in paragraph 1 of Part 1 of Article 143 of this Code, until the entry into force of the judicial act of the relevant court.

Since in the case under consideration JSC firm "SMUR" announced the suspension of proceedings pending consideration by the relevant instances of cases on which the judicial acts came into legal force, the court of appeal has no grounds to satisfy the petition.

Having examined the materials of the case, having checked the arguments of the appeal, the court of appeal considers that the ruling of the court of first instance cannot be canceled on the following grounds.

As follows from the case materials, by the decision of the Twelfth Arbitration Court of Appeal dated 12/13/2017 in case No. A57-233 / 2016, the decision of the Arbitration Court of the Saratov Region dated 31.08.2017 in case No. A57-233 / 2017 was canceled, the claims of LLC

"The company" ALS and TEK "on the obligation of JSC firm" SMUR "to return the property under the second stage of the contract No. 3 / 12-12 dated 04.09.2012 were satisfied in full.

The court of appeal ruled to oblige the JSC firm "SMUR" to return to the benefit of LLC "Company" ALS and TEK "four optical fibers in the fiber-optic communication line" Saratov-Ozinki "in the part of the second stage - optical fibers in the section from Ershov to Saratov: from an optical crossbar in a container on the territory of the RTRS "Saratov ORTPTS" at the address Saratov region, Ershov, st. Meliorative, 32A to the main distribution coupling MRM28 near the settlement of Pushkino, Sovetsky district, Saratov region, from the distribution main coupling MPM28 near the settlement Pushkino, Sovetsky district, Saratov region. before the optical cross in a container on the territory of the Open Joint Stock Company "Urbakhskiy kombinat khleboproductov" at the address Saratov region, Sovetskiy district, Pushkino, st. Zavodskaya, 1a, from the main distribution coupling MRM28 near the village of Pushkino, Sovetsky district, Saratov region. to optical cross-country "VOSTOK" LLC "Company" ALS and TEK ", Saratov, st. B. Kazachya, 6, from optical crossover "VOSTOK" LLC

"Company" ALS and TEK ", Saratov, st. B. Kazachya, 6 to optical crossroads LLC

"Company" ALS and TEK "on the territory of JSC" Integral "at the address Saratov, st. Chernyshevsky, 153, actually received for temporary use by CJSC firm "SMUR" under the act of acceptance and transfer of property for temporary use dated 10.10.2012 in accordance with the terms of contract No. in a fiber-optic communication line on the territory of the Voronezh and Saratov regions, concluded on 04.09.2012 between LLC "Company ALS and TEK" and CJSC firm SMUR.

On the basis of the writ of execution No. FS 016402251 dated December 29, 2017, issued by the Arbitration Court of the Saratov Region by order of the Twelfth Arbitration Court of Appeal dated December 13, 2017 in case No. A57- 233/2017, by the bailiff of the Kirovsky ROSP of Saratov, the Federal Bailiff Service Directorate for the Saratov Region, Tumaeva K.S. On May 30, 2018, enforcement proceedings No. 29540/18/64042-IP were initiated

06/22/2018 by the bailiff of the Kirov Regional Department of Public Administration of the City of Saratov of the Federal Bailiff Service of Russia in the Saratov Region Tumaeva K.S. an act on enforcement actions was drawn up, according to which LLC "Company" ALS and TPK ", as a claimant for enforcement proceedings No. 29540/18/64042-IP, received on 22.06.2018, according to a writ of execution, property (4 optical fibers in a fiber-optic communication line on the section "Saratov-Ershov" in FOCL

"Saratov-Ozinki").

07/19/2018 the bailiff-executor of the Kirov Regional Department of Internal Affairs of the city of Saratov of the Federal Bailiff Service of Russia in the Saratov Region issued a resolution on the end of enforcement proceedings No. 29540/18/64042-IP on the basis of paragraph 1 of part 1 of Article 47 of the Federal Law of 02.10.2007 No. On Enforcement Proceedings "(hereinafter referred to as the Law on Enforcement Proceedings), in connection with the actual fulfillment of the requirements contained in the enforcement document.

09/12/2018 between LLC "Company" ALS and TEK "and LLC" DSPTS "concluded

a contract of sale of property No. ALS-DSPS / OB-12092018, according to which LLC "Company "ALS and TEK" transferred into the ownership of LLC "DSPS" according to a judicial act (resolution of the Twelfth Arbitration Court of Appeal dated 12/13/2017 in case No. A57-233 / 2017) property.

On the basis of the agreement dated 01.10.2018 No. 76-18, LLC DSPS transferred the above property for rent to LLC MMTS.

20.11.2018 Basyrova A.E., the senior bailiff of the Kirov Regional Department of the Federal Security Service of the city of Saratov. a resolution was issued to cancel the resolution of 19.07.2018 on the end of enforcement proceedings No. 29540/18/64042-IP with the assignment of registration number No. 74142/18/64042-IP to enforcement proceedings.

12/25/2018 JSC firm "SMUR" applied to the arbitration court with this application to terminate enforcement proceedings in case No. A57-233/2017.

In its application, as well as in the appeal, the company indicates the following. 12/10/2018 Deputy Head of the Department - Senior Bailiff of the Kirov Regional Department of the Federal Security Service of the city of Saratov of the Federal Bailiff Service of Russia for the Saratov Region Muratova A.M. a resolution was issued on the cancellation of measures taken in relation to the debtor and his property, namely the act of performing enforcement actions of 22.06.2018. In connection with the resumption of enforcement proceedings, the bailiff of the Kirovsky District Department of the Department of Public Administration of the city of Saratov sent a simple letter to the debtor and received a notice of enforcement actions 12/10/2018 at the access node at the address: Saratov, st. Bolshaya Kazachya, 6.

On December 10, 2018, an exit to the place of enforcement actions took place at the access node at the address: Saratov, st. Bolshaya Kazachya, 6. During the enforcement actions, it was found that the optical fibers indicated in the executive document could not be identified due to the recoverer's refusal to bailiffs and involved independent specialists to open the optical crossbar for identification, as well as in connection with the fact that that, according to the documents, the disputed optical fibers are owned by DSPS LLC, which is recorded in the act of enforcement actions dated 10.12.2018.

That is, the property, which should be seized from the debtor and transferred to the claimant within the framework of the enforcement proceedings, is not with the debtor, but according to the documents it has already passed into the ownership of a third party - LLC DSPS.

According to the information provided by LLC "Company" ALS and TEK "in the materials of court case No. A57-16161 / 2018, the optical fibers that are the subject of execution were alienated by the claimant to LLC " Directorate of communications enterprises under construction "(LLC" DSPS ") under a purchase agreement - sale of property No. ALS-DSPS / OV-12092018 dated 12.09.2018. Moreover, in clause 6.1.8. the specified agreement states that optical fibers on the date of transfer will be the property of the seller, will be free from any rights and claims on the part of third parties, including not encumbered with collateral, will not be under arrest and prohibition and will not be the subject of a lease agreement, financial lease (leasing) or other use, concluded with third parties, are not limited in civil circulation and can be freely alienated by any means provided for by the current legislation of the Russian Federation.

Thus, according to the applicant, at present the debtor - JSC firm "SMUR" cannot execute the court decision and transfer to the recoverer - LLC

"The company" ALS and TEK "is the property that was not returned by the debtor to the claimant, but, nevertheless, was sold by the claimant to a third party - LLC "DSPS".

The court of first instance, refusing to satisfy the stated requirements, proceeded from the fact that the fact of real loss of the possibility of executing the judicial act was not confirmed, since, based on the explanations of LLC "Company ALS and TEK", the disputed property was received by the claimant as part of the enforcement production and subsequently alienated to a third party - LLC DSPS under the terms of the sale and purchase agreement No. ALS-DSPS / OB-12092018 dated 09/12/2018 and the transfer and acceptance act dated 09/12/2018, which was established, inter alia, which entered into force by the decision of the Arbitration Court of the Saratov Region dated 25.01.2019 in case No. A57-28371 / 2018. In addition, the court of first instance established that there was no evidence of the transfer of all property by the debtor in accordance with the legally binding judicial act to the claimant. The appellate court came to the following conclusions.

Part 1 of Article 318 of the Arbitration Procedure Code of the Russian Federation stipulates that judicial acts of arbitration courts are enforced after their entry into legal force, with the exception of cases of immediate execution, in the manner prescribed by this Code and other federal laws governing enforcement proceedings.

From the moment of entry into legal force, a judicial act becomes binding on state authorities, local authorities, other bodies, organizations, officials and citizens and is subject to execution throughout the territory of the Russian Federation (Part 1 of Article 16 APC RF). From that moment on, the court decision has a sign of enforceability (part 1 of Article 182 of the Arbitration Procedure Code of the Russian Federation) and can be brought to compulsory execution by the claimant.

In accordance with Part 1 of Article 327 of the Arbitration Procedure Code of the Russian Federation, an arbitration court, upon an application by a claimant, a debtor, or a bailiff - an executor may suspend or terminate enforcement proceedings initiated by a bailiff - an executor on the basis of a writ of execution issued by an arbitration court in cases stipulated by the federal law on enforcement production.

An exhaustive list of grounds for termination of enforcement proceedings is contained in Article 43 of the Law on Enforcement Proceedings.

In accordance with part 1 of Article 43 of the Law on Enforcement Proceedings, enforcement proceedings shall be terminated by a court in the following cases:

- 1) death of a claimant-citizen (debtor-citizen), declaration of him as deceased or recognition as missing, if the requirements or obligations established by a judicial act, an act of another body or official cannot pass to the legal successor and cannot be implemented by the trustee appointed by the guardianship authority and guardianship;
- 2) the loss of the possibility of executing an enforcement document obliging the debtor to perform certain actions (refrain from performing certain actions);
- 3) the recoverer's refusal to receive the thing seized from the debtor during the execution of the court order containing the requirement to transfer it to the recoverer;
- 4) in other cases when federal law provides for the termination of enforcement proceedings.

According to the meaning of this provision, the termination of enforcement proceedings is allowed if objective and unavoidable circumstances arise at the stage of enforcement proceedings that make it impossible to further enforce the requirements of the enforcement document.

In paragraph 35 of the Resolution of the Plenum of the Supreme Court of the Russian Federation dated 03.24.2016 No. 7

"On the application by the courts of certain provisions of the Civil Code of the Russian Federation on liability for violation of obligations" contains clarifications that the basis for termination of enforcement proceedings on the demand for compulsion to fulfill an obligation in kind is the objective impossibility of fulfilling such an obligation in kind, for example, the death of an individual a certain thing to be transferred to the creditor.

Thus, in order to terminate the enforcement proceedings, the fact of the occurrence of a real

loss of the possibility of executing the enforcement document and the impossibility of its execution by any means must be established. The loss of the possibility of executing a court order must be objective in nature, caused by extraordinary and compelling circumstances.

The loss of the possibility of executing a writ of execution is understood as the complete impossibility of its execution (for example, due to the destruction of individually defined property to be transferred to the claimant).

According to clause 1 of Article 416 of the Civil Code of the Russian Federation (hereinafter - the Civil Code of the Russian Federation), the obligation is terminated by the impossibility of performance if it is caused by a circumstance for which none of the parties is responsible. At the same time, by virtue of part 1 of Article 65 of the Arbitration Procedure Code of the Russian Federation, the obligation to prove the circumstances that served as the basis for applying to the court with an application to terminate the enforcement proceedings lies with the applicant.

As mentioned above, Article 43 of the Law on Enforcement Proceedings contains an exhaustive list of grounds for terminating enforcement proceedings and there is no reason indicated by the debtor, namely, the property is owned by a third party - LLC DSPS.

In accordance with article 212 of the Civil Code of the Russian Federation, property can be owned by citizens and legal entities, as well as the Russian Federation, constituent entities of the Russian Federation, municipalities. The rights of possession, use and disposal of their property of all owners are subject to judicial protection in the same way.

According to Article 55 of the Constitution of the Russian Federation and paragraph 2 of Article 1 of the Civil Code of the Russian Federation, civil rights can be limited only on the basis of federal law and only to the extent necessary in order to protect the foundations of the constitutional order, morality, health, rights and legitimate interests of others, ensuring the country's defense and state security.

Termination of enforcement proceedings on the grounds specified in the application does not correspond to the objectives of the proceedings in arbitration courts, does not ensure the principle of enforceability of judicial acts, violates the rights and legitimate interests of ALS and TEK Company LLC, and also directly affects the rights and obligations of the new property owner - LLC ДСПС ".

In such circumstances, the court of first instance rightfully refused to satisfy the application to terminate the enforcement proceedings.

According to the explanations contained in paragraph 35 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 11/17/2015 No. 50 "On the application of legislation by courts when considering certain issues arising in the course of enforcement proceedings", the end of enforcement proceedings (including consolidated ones) in connection with the actual execution by the debtor or one of the joint and several debtors of the claims contained in the executive document is made if the bailiff-executor has data confirming the fact of execution. The actual performance may be recognized as the fulfillment of the obligation to transfer directly to the recoverer of funds in a specific amount or other specific property, or the commission in favor of the recoverer of specific actions or refraining from performing these actions.

Thus, the fulfillment of the obligation to the claimant within the framework of the enforcement proceedings entails the end of the enforcement proceedings in connection with the actual fulfillment of the requirements contained in the enforcement document.

When considering an appeal by the court, it was established that when considering case No. A57-29166 / 2018, the court of appeal established that the act of performing enforcement actions of 06/22/2018 became the completion of the execution of the resolution of the Twelfth Arbitration Court of Appeal in case No. A57-233 / 2017 of 13.12. 2017, as the basis for the end of enforcement proceedings and gave the recoverer the opportunity to dispose of his property, conclude a sale and purchase deal with LLC DSPS and transfer the disputed

optical fibers to the ownership and ownership of LLC DSPS by the act of acceptance.

At the moment, the disputed property received by the claimant - LLC

"The company" ALS and TEK "under the act of implementation of enforcement actions dated 06.22.2018, is owned by LLC DSPS and is used by it for its intended purpose, which is confirmed by the decision of the Arbitration Court of the Saratov Region dated 25.01.2019 in case No. A57- that entered into force. 28371/2018.

The ruling of the Arbitration Court of the Volga Region dated 20.03.2019 in case No. A57-233 / 2017 also concludes that the property (4 optical fibers in fiber-optic equipment, awarded by the decision of the Twelfth Arbitration Court of Appeal dated 13.12.2017 in case No. A57-233 / 2017) communication lines on the Saratov-Ershov section of the Saratov-Ozinki fiber optic link) was alienated by the ALS and TEK Company in favor of a third party - DSPS LLC under the sale and purchase agreement No. ALS-DSPS / OV dated 12.09.2018 -12092018.

The decision of the Twelfth Arbitration Court of Appeal dated 13.08.2019 in case No. A57-28364 / 2018, which entered into legal force, canceled the decision of the Arbitration Court of the Saratov Region dated 12.03.2019 and adopted a new judicial act recognizing as illegal and canceling the decision of the senior bailiff of the Kirov Regional Department of the Russian Union of Industrialists and Entrepreneurs in Saratov Federal Bailiff Service of Russia in the Saratov Region Basyrova A.E. of 20.11.2018 on the cancellation of the decree of 19.07.2018 on the end of enforcement proceedings No. 29540/18/64042-IP.

Moreover, at the present time, on the basis of the abovementioned judicial acts of the court of appeal, the Kirov ROSP of the city of Saratov, the Federal Bailiff Service of Russia in the Saratov Region has re-terminated the controversial enforcement proceedings, which also testifies to the impossibility of its termination at the moment.

The applicant of the appeal did not provide justification for the possibility of terminating the enforcement proceedings, which was actually completed, about which the corresponding decision of the bailiff was issued.

Arguments of JSC firm SMUR "that the decision No. A57-233 / 2017 has not actually been implemented, since some of the optical fibers, in particular from the optical crossbar" VOSTOK "LLC" Company "ALS and TEK", Saratov, st. B. Kazachya, 6, before the optical crossover of LLC "Company" ALS and TEK "on the territory of OJSC

"Integral" at the address Saratov, st. Chernyshevsky, 153, do not appear in the documents of enforcement proceedings and no enforcement measures were taken against them, were the subject of investigation by the court of appeal when considering case No. A57-29166 / 2018 and are not subject to re-evaluation.

Moreover, the applicant's arguments about the incomplete execution of the judicial act also refute his arguments about the existence of grounds for terminating the disputed

enforcement proceedings and satisfaction of the company's application in the framework of the case under consideration.

Based on the foregoing, the appellate instance considers that a lawful and well-grounded determination has been adopted in the case, and there are no grounds for canceling it. The conclusions of the court in this case are based on the established circumstances and the evidence available in the case with the correct application of the rules of substantive and procedural law. The arguments set out in the appeal cannot serve as grounds for canceling the adopted definition.

Guided by Articles 268-272 of the Arbitration Procedure Code of the Russian Federation, the Arbitration Court of Appeal

DECIDED:

the ruling of the Arbitration Court of the Saratov Region dated May 8, 2019 in case No. A57-233 / 2017 shall be left unchanged, the appeal - dismissed.

The ruling of the arbitration court of the appellate instance comes into legal force from the date of its adoption and can be appealed to the Arbitration Court of the Volga District within one month from the date of making the ruling in full through the arbitration court of first instance.

Presiding S.G. Veryaskina

Judges E.V. Puzina

L.A. Makarikhina