

**TWELFTH ARBITRAL APPEAL COURT**

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RESOLUTION**arbitration court of appeal**

Saratov
23370/2016

Case №A57-

03 October 2019

The operative part of the resolution was announced on September 26, 2019. The full text of the resolution was prepared on October 03, 2019.

The twelfth Arbitration Court of Appeal composed of: the presiding judge S.V. Nikolsky,

judges Dubrovina O.A., Shalkina V.B.,

while keeping the minutes by the secretary of the court session Maltseva O.A., with the participation in the court session of representatives of the joint-stock company "Quant-Telecom" - Tatarovich I.A., by power of attorney dated 01.01.2019 No. 60, Litvinova N.N., by power of attorney dated 25.08.2015 (for a period of 10 years), company with limited liability "Company" ALS and TEK "- Demidova I.A., by power of attorney dated December 21, 2017 No. 27 (for a period of 2 years), joint stock company firm " SMUR " - Litvinova N.N., by power of attorney dated 05.17.2018 (for a period of 10 years),

Having considered in open court the appeal of the joint-stock company "Kvant-Telecom" against the decision of the Arbitration Court of the Saratov Region dated May 15, 2019 in case No. A57-23370 / 2016 (judge Bolshedvorskaya E.L.), on the claim of the limited liability company " ALS and TEK Company to Joint Stock Company Kvant-Telecom on collection of rent arrears for the period from 13.12.2014 to 18.03.2015 in the amount of 14,400,000 rubles, third parties: PJSC VimpelCom, JSC Firm SMUR "

found:

Joint-stock company "Kvant-Telecom" (hereinafter - JSC "Kvant-Telecom", the plaintiff) applied to the Arbitration Court of the Saratov Region with a claim against the limited liability company "Company" ALS and TEK "(hereinafter - LLC" Company "ALS and TEK" , defendant) to collect 485 857 RUB. unjust enrichment and 16 972 RUB. 08 kopecks interest for using other people's funds for the period from 04/06/2016 to 09/01/2016, continuing their accrual until the date of payment of the principal amount.

The defendant filed a counterclaim for the recovery of 1,800,000 RUB. debt for rent under a lease agreement dated 12.02.2013 No. 21/13 for the period from 01.01.2014 to 12.01.2014 and 486,438 rubles. 50 kopecks interest for using other people's funds.

By the decision of 01/30/2017, upheld by the resolution of the Twelfth Arbitration Court of Appeal of 03/29/2017, the Arbitration Court of the Saratov Region satisfied the initial claim in the amount of 486,857 rubles. unjust enrichment and 35 601 rubles. 63 kopecks interest for the use of other people's funds, counterclaim - in the amount of 1,800,000 rubles. debt and 372,008 rubles. 24 kopecks interest for the use of other people's funds, in the rest of the counterclaim - refused; made offset counterclaims in the order of part 5 of Article 170 of the Arbitration Procedure Code of the Russian Federation, as a result of which he collected from the plaintiff 1 670 202 RUB. 33 kopecks

By a resolution of June 22, 2017, the Arbitration Court of the Volga District canceled these judicial acts, and sent the case for a new trial.

In a new trial, the defendant increased the amount of counterclaims and asked to collect also 31,500,000 rubles. debt for rent for the period from 01.12.2014 to 30.06.2015.

The defendant, prior to making a decision, reduced the amount of counterclaims in terms of debt collection to 16,200,000 rubles. for the period from 01.12.2014 to 18.03.2015

PJSC "VimpelCom" and JSC are involved in the case as third parties who do not declare independent claims regarding the subject of the dispute.

"Firm" SMUR ".

By a decision of 10.04.2018 (taking into account the ruling of 26.04.2018 on correcting a typo), upheld by the resolution of the Twelfth Arbitration Court of Appeal dated 20.09.2018, the Arbitration Court of the Saratov Region dismissed the initial claim, partially satisfied the counterclaim in the amount of 1,800,000 rub. debt for the period from 01/01/2014 to 01/12/2014 and 1,800,000 rubles. debt for the period from 01.12.2014 to 12.12.2014, 372,008 rubles. 24 kopecks interest for the use of other people's funds, in the rest of the counterclaim - he refused.

By the decision of the Arbitration Court of the Volga District of December 25, 2018 No. the decision of the Arbitration Court of the Saratov Region dated 10.04.2018. and the Resolution of the Twelfth Arbitration Court of Appeal dated 20.09.2018. regarding the refusal to satisfy the requirements for the counterclaim - canceled, the case in this part was sent for new consideration to the Arbitration Court of the Saratov Region.

By the decision of the Arbitration Court of the Saratov Region dated May 15, 2019 from Kvant-Telecom JSC in favor of ALS and TEK Company LLC, the debt under the lease agreement No. 21/13 dated 02/12/2013 was recovered for the period from December 13, 2014. to 18 March 2015 in the amount of 14 370 967 rubles. 75 kopecks the rest was denied.

A state duty in the amount of 94,808 rubles was collected from JSC Kvant-Telecom to the federal budget.

From LLC "Company ALS and TEK" a state duty in the amount of 192 rubles was collected to the federal budget.

Kvant-Telecom JSC, disagreeing with the judicial act, appealed to the Twelfth Arbitration Court of Appeal with an appeal, in which it asks to cancel the decision and adopt a new judicial act.

LLC "Company ALS and TEK" in the order of Art. 262 of the APC RF submitted a response to the appeal, according to which it asks to leave the decision unchanged, the appeal was dismissed.

JSC Kvant-Telecom has filed a petition for a forensic technical examination.

On the resolution of which I asked to raise the question:

- whether the date of creation of the document corresponds to the letter ref. No. 6312/13 dated 11/22/2013 to the date specified in the document - 11/22/2013?

Having considered the petition for the appointment of an expert examination, the appeal board refused to satisfy the petition, since the date of the letter No. 6312/13 dated November 22, 2013 is not a legally significant circumstance when considering this dispute.

Forensic examinations are carried out by an arbitration court in the cases, in the manner and on the grounds provided for by the Arbitration Procedure Code of the Russian Federation.

By virtue of Part 1 of Article 82 of the Arbitration Procedure Code of the Russian Federation, in order to clarify the issues that arise during the consideration of the case that require special knowledge, the arbitration court shall appoint an expert examination at the request of the person participating in the case, or with the consent of the persons participating in the case. In the event that the appointment of an examination is prescribed by law or provided for by an agreement, or is necessary to verify an application for falsification of the evidence presented, or if an additional or repeated examination is necessary, the arbitration court may appoint an examination on its own initiative.

On the basis of part 2 of article 64, parts 4, 5 of article 71, part 3 of article 86 of the Arbitration Procedure Code of the Russian Federation, expert opinions are one of the evidence in the case and are evaluated along with other evidence. A forensic examination is appointed by the court in cases where questions of law cannot be resolved without assessing the facts, for the establishment of which special knowledge is required, and, therefore, the requirement of one of the parties to appoint a forensic examination does not create the court's obligation to appoint it.

Taking into account the evidence in the case, the factual circumstances of the case, the appellate court concluded that there was no need for an expert examination.

The case in the arbitration court of the appellate instance is considered in accordance with the requirements of Articles 266, 268 of the Arbitration Procedure Code of the Russian Federation (hereinafter referred to as the APC RF).

As follows from the case materials, on February 12, 2013, between ALS and TEK Company LLC (lessor) and Kvant-Telecom CJSC, referred to as Quant-Telecom JSC (lessee), a lease agreement No. 21/13 was concluded, in accordance with the terms of which, the lessor provided the lessee for temporary use: - two optical fibers in a fiber-optic communication line (FOCL) at the RTRS Voronezh ORTPTS section in Tellermanovsky settlement, Gribovsky district, Voronezh region - Saratov, Saratov region, st. B. Kazachya, 6 on the indicated regeneration areas; - points of connection of fixed optical cables from the lessee's equipment to the terminal distribution equipment (crosses) of the lessor at the ends of the section provided by Fiber, and the lessee undertook to accept the fibers and pay the rent for the use of fibers in the amount and terms established by this agreement.

The leased property was transferred by the lessor to the lessee under the transfer and acceptance certificate dated 12.02.2013.

According to clauses 2.1 - 2.2 of the agreement, a lump sum payment for leasing fibers is 40,000 rubles, including VAT (18%) - 7,200 rubles, the monthly rent under this agreement is 4,500,000 rubles, including VAT (18 %) - 686 440 rubles 62 kopecks.

In accordance with section 3 of the agreement, it comes into force from the moment it is signed by both parties and is valid until 12.01.2014 inclusive. If none of the parties announced its termination 30 days before the date of completion of this agreement, then the validity of this agreement is automatically extended for every subsequent 11 calendar months.

The lessee's failure to fulfill his obligations to pay rent was the basis for the appeal of LLC "Company" ALS and TEK "to the arbitration court of the Voronezh region for its collection in court.

The decisions of the Arbitration Court of the Voronezh Region with JSC "Quant-Telecom" in favor of LLC "Company" ALS and TEK "on the basis of a lease agreement

entered into legal force

dated 12.02.2013 N 21/13 the following were collected:

- in case N A14-7412 / 2015 - interest for the use of other people's funds for the period from 06/27/2014 to 12/29/2014 in the amount of 473,389 rubles, state duty in the amount of 12 468 rubles;
- in case N A14-49 / 2015 - arrears of rent payments for the periods from 01/13/2014 to 01/31/2014, from 02/01/2014 to 11/30/2014 in the amount of 47,213,443 rubles 37 kopecks, a forfeit in the amount of 336,060 rubles and state duty costs in the amount of 200,000 rubles;
- in case N A14-4846 / 2014 - rent arrears for the period from 01.10.2013 to 31.12.2013 in the amount of 11 350 000 rubles, a penalty for the period from 02.10.2013 to 26.06.2014 in the amount of 270,070 rubles.

LLC "Company" ALS and TEK ", indicating the presence on the side of the lessee of rent arrears for the period from 01.01.2014 to 12.01.2014 in the amount of 1,800,000 rubles, as well as for the period from 01.12.2014 to 18.03.2015 in the amount 16,200,000 rubles filed a counterclaim in the framework of this case.

- By the decision of the court in the present case dated 10.04.2018 (taking into account the ruling of 26.04.2018 on correcting the typo), upheld by the decision of the Twelfth Arbitration Court of Appeal dated 20.09.2018, the counterclaim was partially satisfied in the amount of 1,800,000 rubles. debt for the period from 01/01/2014 to 01/12/2014 and 1,800,000 rubles. debt for the period from 01.12.2014 to 12.12.2014, 372,008 rubles. 24 kopecks interest for the use of other people's funds, the rest of the counterclaim was denied.
- Canceling the decision of the Arbitration Court of the Saratov Region dated 10.04.2018. and the ruling of the Twelfth Arbitration Court of Appeal dated 20.09.2018. regarding the refusal to satisfy the claims on the counterclaim for the collection of rent for the period from 12/13/2014 to 03/18/2015, the court of cassation indicated the absence of proper evidence of termination of the lease in the manner provided for by the contract: notifications 30 days before its termination contract, agreement of the parties on its termination, unilateral withdrawal from the contract, as well as on the fact that the conclusion of the courts of first and appeal instances on the bad faith of ALS and TEK LLC in case of refusal on formal grounds to take actions aimed at exercising by the plaintiff the right to return the leased property is not justified.
 - Upon a new examination, the arbitration court concluded that the counterclaims were partially satisfied.
 - The Judicial Collegium of the Court of Appeal agrees with the conclusion of the Arbitration Court of the Saratov Region, based on the following.
 - By virtue of Articles 309, 310 of the Civil Code of the Russian Federation, obligations must be fulfilled properly in accordance with the terms of the obligation and the requirements of the law, unilateral refusal to fulfill obligations is not allowed.
 - In accordance with Article 606 of the Civil Code of the Russian Federation, under a lease (property lease) agreement, the lessor (landlord) undertakes to provide the lessee (tenant) with property for a fee for temporary possession and use or for temporary use.
 - According to part 1 of article 614 of the Civil Code of the Russian Federation, the tenant is obliged to pay timely payment for the use of the property (rent). The procedure, conditions and terms for making the rent are determined by the lease agreement.
 - According to Art. 407 of the Civil Code of the Russian Federation, the obligation is terminated in whole or in part on the grounds provided for by this Code, other laws, other legal acts or an agreement. In this case, the termination of an obligation at the request of one of the parties is allowed only in cases provided for by law or contract.
 - By virtue of paragraph 1 of Article 408 of the Civil Code of the Russian Federation, obligations are terminated by proper execution.
 - According to the legal position of the Presidium of the Supreme Arbitration Court of the

Russian Federation, set out in paragraph 38 of the Information letter dated January 11, 2002 N 66 "Review of the practice of resolving disputes related to rent", the termination of the lease agreement does not in itself entail the termination of the obligation to pay rent, it will be terminated by proper performance by the lessee of the obligation to return the property to the lessor.

- In accordance with Article 655 of the Civil Code of the Russian Federation, the proper evidence of the return of the leased property is the act of acceptance and transfer, signed in the prescribed manner by the parties to the lease agreement.
- As the plaintiff points out in the counterclaim, the defendant did not properly fulfill its obligations to pay for the leased property, as a result of which he had arrears in rent for the disputed period, which served as the basis for the plaintiff's appeal to the arbitration court with this counterclaim.
- Opposing the satisfaction of counterclaims, Kvant-Telecom JSC indicates the following:
 - 22.11.2013 ZAO Kvant-Telecom sent the plaintiff a registered letter with notification and a list of attachments No. 6312/13 about the refusal to renew and
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- termination of the lease agreement dated 12.02.2013 No. 21/13. The actual actions of Kvant-Telecom CJSC indicated an unwillingness to prolong the controversial agreement.
 - 02/05/2014 the defendant sent a notice to the plaintiff to terminate the contract for the provision of a complex of resources to ensure the functioning of technological equipment from 09/10/2012.
 - 08.10.2014 the defendant to the plaintiff re-sent the act of return of property under the controversial agreement.

However, by the effective decision of the Arbitration Court of the Voronezh Region dated April 19, 2016 in case No. A14-49 / 2015 from the joint-stock company Kvant-Telecom in favor of a limited liability company

ALS and TEK recovered a pledge under the lease agreement dated 12.02.2013 No. 21/13 for the period from 13.10.2014 to 30.11.2014 in the amount of 47,213,443.37 rubles; penalty in the amount

RUB 336,060

During the consideration of this case, the court demanded a scanned copy of this ref. From the materials of case No. A14- 4846/2014. N 6312/13 of 11/22/2013, according to the content of which it was announced the termination of the lease agreement N 21/13 of 02/12/2013 from 01/13/2014 without information about the direction and attachment of acts of return of the leased property.

In this connection, the court came to the correct conclusion that since the original letter ref. 6312/13 of 11/22/2013 by the defendant was not presented, copies of this letter are not identical, the evidence provided is not reliable confirmation of the lessee's application to terminate the lease relationship and the direction of the acts of return of the transferred property in accordance with the terms of contract N 21/13 of 02/12/2013.

It should also be noted that the applicant of the appeal submitted to the court of appeal the original letter No. 6312/13 dated 22.11.2013, which was reviewed at the hearing. The court of appeal also reviewed the arbitration case No. A14-49 / 2015, which was requested from the Arbitration Court of the Voronezh Region, which also contains the original letter No. 6312/13 of November 22, 2013.

When examining these letters, the court found that they are not identical and have different signatures.

In addition, by the judicial acts that entered into legal force in the case No. A12-49 / 2015 letter No. 6312/13 dated 22.11.2013 was recognized as unreliable evidence.

The ruling of the Nineteenth Arbitration Court of Appeal dated 04.08.2016 in case

No. A14-49 / 2015 states the following: "the defendant in the initial claim, objecting to the claim, referred to the termination of contract No. 21/13 from 13.01.2014. In confirmation of this circumstance, they were presented with: a copy of the letter of Kvant-Telecom JSC signed by the General Director N 6312/13 dated November 22, 2013 addressed to ALS and TEK Company LLC with acts of return of property to the lessor dated January 13, 2014, a duplicate of this letter, originals and copies of the postal receipt dated 22.11.2013, the inventory of the attachment of the Federal Postal Service dated 22.11.2013.

According to the content of the letter ref. N 6312/13 of November 22, 2013, the defendant announced the termination of agreement N 21/13 of 02/12/2013 from 01/13/2014, asked to sign an act of return of property under agreement N 21/13 of 02/12/2013 from the use of the tenant and return 1 copy of the act to the tenant.

As follows from the letter of the UFPS of the Voronezh region - branch of the FSUE "Russian Post" OSB Voronezh post office 9052 / R 03.12.2014 the postage was returned on 28.12.2013 after the expiration of the storage period to the sender's address and delivered on 10.01.2014, 394019 Voronezh.

During the consideration of the case, the defendant informed the court about the loss of the original of this letter.

To the appeal of Kvant-Telecom CJSC against the decision of the Arbitration Court of the Voronezh Region dated 09/05/2014 in case No. A14- 4846/2014, the defendant attached a letter ref. N 6312/13 dated 22.11.2013.

The court demanded from the materials of the named case a scanned copy of this document, according to the content of the letter from ZAO Kvant-Telecom ref. N 6312/13 of November 22, 2013 announced the termination of the lease agreement N 21/13 of 02/12/2013 from 01/13/2014 without information about the direction and attachment of acts of return of the leased property.

Since the original letter No. 6312/13 of 11/22/2013 was not submitted by the respondent, the copies of this letter are not identical, the evidence presented is not reliable confirmation of the lessee's statement about the termination of the lease relationship and the direction of the acts of return of the transferred property in accordance with the terms of the contract No. 21/13 of 02/12/2013 . "

In addition, Kvant-Telecom JSC stated during the consideration of case No. A14-49/2015 that letter No. 6312/13 dated November 22, 2013 was not received by the addressee in Saratov and was returned by mail to the post office of Kvant-Telecom JSC. "In Voronezh.

In accordance with Article 64 of the Arbitration Procedural Code of the Russian Federation, evidence in a case is information about facts obtained in accordance with this Code and other federal laws, on the basis of which the arbitration court establishes the presence or absence of circumstances justifying the claims and objections of the persons participating in the case, and also other circumstances that are important for the correct consideration of the case. Written and material evidence, explanations of the persons participating in the case, expert opinions, testimony of witnesses, audio and video recordings, other documents and materials are allowed as evidence. The use of evidence obtained in violation of federal law is not allowed.

The court in the framework of case No. A14-49 / 2015 also assessed the letter ref. N 4312/14 dated 24.10.2014, in which the defendant informed about a notification previously sent to the plaintiff about the refusal to prolong the lease agreement N 21/13 dated 12.02.2013. and directed acts of return of property; letter ref. N 4145/14 dated 08.10.2014, according to which two copies of the act dated 13.01.2014 signed by Kvant-Telecom CJSC were sent to the address of ALS and TEK Company LLC. return of property under contract N 21/13 dated 12.02.2013.

As noted by the court, the plaintiff's response to the letter ref. 1169/14 dated 20.01.2014 on the admission of employees of CJSC Kvant-Telecom to facilities for the purpose of switching technological equipment to optical fibers owned by CJSC

firm SMUR cannot serve as indisputable proof that the tenant was deprived of the opportunity to use leased communication lines ...

At the same time, the controversial agreement No. 21/13 of 02/12/2013 was recognized by the court in the framework of the case No. A14-49 / 2015 in force from 10/13/2014. until 30.11.2014

As indicated above, in accordance with section 3 of the agreement, it comes into force from the moment it is signed by both parties and is valid until 12.01.2014. inclusive. If none of the parties announced its termination 30 days before the date of completion of this agreement, then the validity of this agreement is automatically extended for every subsequent 11 calendar months.

As follows from the conclusions set out in the decision of the Arbitration Court of the Voronezh Region of 04/19/2016 in case No. A14-49/2015, which entered into legal force, as well as the materials of this case, the disputed agreement was extended for 11 months after the end of the second period.

According to the legal position set out in clause 13 of the information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation dated January 11, 2002 No. 66, early release of the leased premises (until the termination of the lease agreement in accordance with the established procedure) is not grounds for terminating the tenant's obligation to pay rent.

At the same time, the very obligation of the lessee to return the property to the lessor arises when the lease relations are terminated on the grounds provided for by legislation and the lease agreement, including as a result of the termination of the agreement by agreement of the parties or in cases of unilateral cancellation of the agreement, when such a cancellation is provided for by law and the lease agreement ...

By the controversial agreement dated 12.02.2013, the lease of two optical fibers in a fiber-optic communication line (FOCL) with a total length of 694.870 km, the term of the agreement is stipulated until 12.01.2014 from the moment of its signing (clause 3.1 of the agreement).

If none of the parties announced its termination 30 days before the date of completion of the contract, then the contract is automatically extended for every subsequent 11 calendar months (clause 3.2 of the contract).

In addition, the contract can be terminated by mutual agreement of the parties (clause 3.3 of the contract), as well as - unilaterally at the request of either party with written notification of the other party 45 days before the expected date of termination (clause 3.4 of the contract).

Consequently, the controversial agreement provides for the renewal of the terms of the agreement for each subsequent 11 months in the absence of 30 days before its termination of applications (notifications) of the parties about its termination.

The Court notes that the case file does not contain adequate evidence of termination of the lease during the period in dispute.

The court also notes that between the parties during the disputed period there was an agreement on the provision of a complex of resources to ensure the functioning of technological equipment dated 09/10/2012, an agreement dated 24.05.2011 No. 37-X4732 / 11 for the provision of a complex to ensure the functioning of technological equipment (decision of the Arbitration Court Voronezh region dated 04.19.2016 in case No. A14-49 / 2015).

In addition, the court takes into account that, in accordance with paragraph 1.1 of the disputed lease agreement, the lessor undertook to provide connection points for station optical cables from the lessee's equipment to the terminal distribution equipment (crosses) of the lessor at the ends of the section of the provided "fibers".

Since the object of the lease is an optical fiber with special technical characteristics, and when receiving and transmitting optical fibers, it is necessary to measure the optical fiber with an optical reflectometer for compliance with the technical parameters (resolution of the Twelfth Arbitration Court of Appeal dated 13.12.2017 on case No. A57-233 / 2017), the court recognizes as justified the arguments of LLC "ALS and TEK" about the commission return of the leased property.

In such circumstances, the court came to the correct conclusion that the term of the disputed lease agreement was extended for 11 months from 13.12.2014, in connection with which, the counterclaims of the limited liability company "ALS and TEK" to recover from the joint stock society

"QUANT-TELECOM" arrears under the lease agreement No. 21/13 dated February 12, 2013 for rent for the period from December 13, 2014 to March 18, 2015 are subject to satisfaction in the amount of 14,370,967 rubles. 75 kopecks

Thus, the appellate court concludes that the contested decision was made by the court on the basis of a full study of the factual circumstances of the case and the correct application of the law, and therefore, there are no grounds for its cancellation.

Guided by Articles 268-271 of the Arbitration Procedure Code of the Russian Federation, the Arbitration Court of Appeal

sentenced:

the decision of the Arbitration Court of the Saratov Region dated May 15, 2019 in the case

No A57-23370 / 2016 shall be left unchanged, the appeal - dismissed.

The Financial and Economic Department of the Twelfth Arbitration Court of Appeal to transfer from the deposit account of the court to the account of Kvant-Telecom Joint Stock Company the funds paid for the examination in the amount of 30,000 rubles, received under payment order No. 6931 dated 09.24.2019.

The decision 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 two months from the date of making the decision in full through the arbitration court of first instance.

Presiding C.The. Nikolsky

Judges O.A. Dubrovin

V.B. Shalkin