

**TWELFTH ARBITRAL APPEAL COURT**

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RESOLUTION

arbitration court of appeal

Saratov

case

№A57-233/2017

13 December 2017

The operative part of the resolution was announced on December 6, 2017. The full text of the resolution was prepared on December 13, 2017.

The twelfth Arbitration Court of Appeal composed of: the presiding judge O.I. Antonova, judges Zhatkina S.A., Nikitina A.Yu.

when keeping the minutes by the secretary of the court session Zinovieva E.A. with the participation:

from the limited liability company "Company" ALS and TEK "- Demidov Ivan Aleksandrovich, by power of attorney dated 05.09.2016, issued for a period until 31.12.2017; Vdovina Marina Nikolaevna, by power of attorney dated July 25, 2017, issued for a period of one year;

- from the closed joint stock company "firm" SMUR "- Olga V. Krapivko, by power of attorney No. 8 dated 01/01/2017, issued for a period until 01/01/2018; Litvinova Natalya Nikolaevna, acting under power of attorney No. 10 dated 05/15/2015, issued for a period of ten years.

- from the joint-stock company "QUANT-TELECOM" - Olga V. Krapivko, by power of attorney No. 38 dated 01.01.2017, issued for a period until 01.01.2018, Litvinova Natalia Nikolaevna, acting under a power of attorney dated 25.08.2015, issued for a period of ten years.

Having considered in open court the appeal of the limited liability company "ALS and TEK" and the appeal of the Joint-stock company "firm" SMUR "against the decision of the Arbitration Court of the Saratov region dated August 31, 2017 in case No. A57-233 / 2017 (judge I.M. Zagranichny),

at the claim of the limited liability company "Company

"ALS and TEK" (Saratov, TIN 6452045336, OGRN 1026402661108)

to the closed joint stock company "firm" SMUR "(Voronezh, INN 3662020332, OGRN 1023601610878)

third party: JSC "QUANT-TELECOM", Voronezh on the reclamation of property,
found:

- 1.1.2 The Limited Liability Company "Company" ALS and TEK ", Saratov, OGRN 1026402661108 applied to the Arbitration Court of the Saratov Region with a statement of claim, specified in accordance with Art. 49 of the APC RF (volume 11 p.p. 57-58), to the Closed Joint Stock Company Firm SMUR, Voronezh, OGRN 1023601610878, third party: JSC QUANT-TELECOM,
- 1.1.3 Voronezh return (reclaim from someone else's illegal possession of JSC "firm
- 1.1.4 "Smur") in favor of LLC "Company" ALS and TEK "4 optical fibers (gray, white, red, black in an unpainted module), received for temporary use by the Closed Joint Stock Company" firm "SMUR", Voronezh under the acceptance certificate - transfer of property for temporary use from 10.10.2012 in accordance with the terms of the contract No. 3 / 12-12 purchase and sale of optical fibers and a share in the right of common shared ownership in a fiber-optic communication line in the Voronezh and Saratov regions, concluded 04.09.2012 between LLC "Company ALS and TEK" and CJSC "firm SMUR" (The second stage - optical fibers in the section from Ershov to Saratov) in the fiber-optic communication line "Saratov-Ozinki": from the optical crossbar to container on the territory of the RTRS "Saratov Regional Broadcasting Center" at the address Saratov region, Ershov, Meliorativnaya st., 32A to the main distribution coupling MRM28 near the settlement of Pushkino, Sovetsky district, Saratov region, from the distribution main coupling MRM28 near the settlement of Pushkino, Sovetsky district Ca ratovskaya region to the optical crossbar in a container on the territory of JSC "Urbakhskiy kombinat khleboproduktov" at the address Saratov region, Sovetskiy district, settlement Pushkino, Zavodskaya str., 1a, from the distribution main coupling MRM28 near the settlement Pushkino, Sovetsky district, Saratov region. to the optical crossover "VOSTOK", Saratov, B. Kazachya st., 6, from the optical cross "VOSTOK", Saratov, B. Kazachya, 6 to the optical crossbar on the territory of JSC "Integral" at the address Saratov, Chernyshevsky st., 153
- 1.1.5 The representatives of the defendant and the third party asked to refuse the claims, on the grounds set out in the response to the claim.
- 1.1.6 Having examined the materials of the case, having heard the representatives of the parties, having checked the arguments set out in the statement of claim, the response to the claim, having examined the written evidence, the court of first instance came to the conclusion that the claims were not subject to satisfaction. Applying the provisions of Article 301 of the Civil Code of the Russian Federation to the legal relations in question, the court of first instance came to the conclusion that the plaintiff did not prove the fact of possession and being in his illegal use of the disputed property, the absence of proper and reliable evidence of the transfer for temporary use of the defendant under the act of acceptance and transfer from 10.10.2012 directly of the property that is currently being claimed, the absence of evidence that the property is in the use of the defendant, the absence of identifying signs of the property,
- 1.1.7
- 1.1.8
- 1.1.9 which excludes the possibility of installing the required optical fibers. At the same time, as indicated by the court, the formal signing of the act of acceptance and transfer, taking into account the specifics of the transmitted optical fibers, and the absence of an acceptance commission established by the agreement, does not confirm the fact of transfer of optical fibers directly named in the act.
- 1.1.10 The panel of judges, having studied the case materials, the arguments of the complaints, after hearing the explanations of the parties, comes to the conclusion that there are grounds for canceling the decision of the first instance court by virtue of the following.
- 1.1.11 As follows from the materials of the case, on September 4, 2012 between the

plaintiff and the defendant, a contract for the purchase and sale of optical fibers and a share in the right of common shared ownership in a fiber-optic communication line in the Voronezh and Saratov regions No. 3 / 12-12 was concluded, according to which the buyer undertakes pay and take ownership, and the Seller undertakes to transfer the following Property to the ownership of the Buyer after payment:

1.1.1. four OV's of the G.652 standard and 4/72 shares in the right of common share ownership of the sheath, protective and power elements of an optical cable (OC), couplings, crosses in the Borisoglebsk-Rogachevka fiber-optic communication line in the section from the M2A coupling of the ORTPTS in the settlement Tellermanovsky of the Gribovsky district of Voronezh area to the M1 coupling at the automatic telephone exchange of OJSC Rostelecom Borisoglebsk, st. K. Marx, 76 with a total length of 6.8 km.

1.1.12 . four OV of G.652 standard and 4/64 shares in the right of common share ownership of the sheath, protective and power elements of the optical cable (OC), couplings, crosses in the Saratov-Ozinki FOCL with a total length of 345.078 km.

1.1.13. The individualizing signs of the transferred Property, as well as the route of passage of the FOC, the list of OV sections, the contractual price of OV are indicated in the Statement of the transferred property (Appendix No. 1 to this Agreement).

The total length of the OC, which includes the transmitted OM, is 351.878 km.

In Section 2, the parties have agreed on the rights and obligations of the parties.

In Section 3, the parties agreed on the value of the contract, the procedure for settlements and transfer of property for use and ownership.

3.5. The total value of the Property and the Share transferred from the Seller to the Buyer under this agreement is 18,520,211.79 rubles.

3.7. Payments and transfer of the Property first for temporary use, and then the property is made in stages in the following order:

3.7.1. The first payment in the amount of 25 percent of the value of the Property, amounting to RUB 4,630,052.95, shall be made by the Buyer no later than 10 days after receiving the invoice issued by the Seller. The Seller undertakes to issue an invoice within 3 calendar days after signing the Agreement by both Parties.

3.7.2. After the Buyer makes the first payment, the Seller, within 10 calendar days, carries out the procedure for receiving and transferring property for temporary use to the Buyer 4 optical fibers in the Saratov-Ozinki FOCL and the ORTPTS-Borisoglebsk FOCL specified in the Statement of the transferred property for temporary use (Appendix No. 1 to this Agreement) and the Parties sign the Act of acceptance and transfer of property for temporary use (Appendix No. 2 to this Agreement) 4 optical fibers in FOCL Saratov - Ozinki and FOCL ORTPTS - Borisoglebsk.

3.7.3. After the Seller has provided 4 optical fibers and the Parties have signed the Transfer and Acceptance Certificate for 4 optical fibers in the Saratov-Ozinki and ORTPTS-Borisoglebsk fiber optic communication lines for temporary use, the Buyer, within 10 calendar days after signing the specified Transfer and acceptance certificate for temporary use, pays the second payment in the amount of 25 percent of the value of the Property, amounting to 4 630 052.95 rubles. If the second payment is not made within the specified time period, the temporary use of 4 optical fibers in the Saratov-Ozinki FOCL and the ORTPTS-Borisoglebsk FOCL is terminated until the second payment is made.

3.7.4. After the Buyer makes the second payment, the Seller, within 30 calendar days, carries out the procedure for transferring into the ownership of the Buyer 4 optical fibers in the Borisoglebsk-Rogachevka FOCL in the section from the M2A clutch of the ORTPTS settlement of Tsllsrmanovsky, the Gribovsky District of the Voronezh Region, to the M1 ATS of OJSC Rostelecom, Borisoglebsk, st. K. Marx, 76 and 4 optical fibers in the FOCL Saratov-Ozinki on the Ozinki-Ershov Section, specified in the

Statement of the transferred Property into ownership under the I stage (Appendix No. 3 to this Agreement) and the Parties sign the Act of acceptance and transfer of property into ownership under the I stage (Appendix No. 4 to to this Agreement) 4 optical fibers in FOCL Borisoglebsk - Rogachevka in the section from the M2A coupling of the ORTPTS Tellermanovskiy district of the Voronezh region to the MI ATS of OJSC Rostelecom Borisoglebsk, st. K. Marx, 76 and 4 optical fibers in the FOCL Saratov - Ozinki in the Ozinki - Ershov section.

3.7.5. The third payment in the amount of 50 percent of the value of the Property, amounting to 9,260,105.90 rubles. paid by the Buyer within one calendar year from the date of signing the contract, after making the first and second payments.

3.7.6. After the Buyer makes the third payment (clause 3.7.5.), The Seller, within 30 calendar days, carries out the procedure for the transfer and acceptance of 4 optical fibers in the Saratov-Ozinki fiber-optic link in the Saratov-Ozinki FOCL on the Ershov-Saratov section, specified in the Statement of the transferred Property under II stage (Appendix No. 5 to this Agreement) and the Parties sign the Act of Acceptance and Transfer of Property in Ownership for Stage II (Appendix No. 6 to this Agreement) 4 optical fibers in the Saratov-Ozinki FOCL on the Ershov-Saratov section. If the third payment is not made within the specified period, the temporary use of 4 optical fibers in the FOCL on the Ershov-Saratov section is terminated until the third payment is made. In Section 4 the parties agree on the responsibilities of the parties.

In section 5, the parties agreed on the procedure for resolving disputes.

5.2. If a mutually acceptable solution is not reached within 30 calendar days from the date of sending the claim, the disputed issue is subject to consideration in the Arbitration Court at the location of the plaintiff in accordance with the current legislation of the Russian Federation.

The agreement was signed by the parties and sealed.

By signing this agreement, the parties agreed on all the essential conditions necessary for this type of agreement.

Within the framework of the concluded agreement, after receiving the first payment, the plaintiff in accordance with clause 3.7.2. the contract transferred the property to the defendant in a temporary

use, which is confirmed by the acceptance certificate of 10.10.2012 (volume 1 l.d. 103-105).

In accordance with this act, 4 optical fibers (5 gray, 6 white, 7 red, 8 black in module No. 1 unpainted) were transferred to the Borisoglebsk-Rogachevka fiber-optic link in the section from the M2A clutch ORTPTS settlement Tellermanovskiy, Gribovskiy district of the Voronezh region to the MI ATC clutch OJSC Rostelecom Borisoglebsk, st. K. Marx, 76 and 4 optical fibers (5 gray, 6 white, 7 red, 8 black in module No. 1 unpainted) in the Saratov-Ozinki fiber-optic communication line, in the areas: from the MPM50 distribution main coupling near the village of Stolyary, Ozinsky district, Saratov region to the main distribution coupling RM21 near the Ozinki settlement of the Saratov region, from the main distribution coupling RM21 near the Ozinki settlement of the Saratov region to the optical cross-country in a container on the territory of the Ozinsky elevator at the Saratov region, Ozinki settlement, st. March 8, 38, from the main distribution coupling RM21 near the Ozinki settlement of the Saratov region to the optical crossover in a container on the territory of the RTRS "Saratov ORTPTS" at the address Saratov region, Ershov, Meliorativnaya st., 32A, from the optical crossover to container on

the territory of the RTRS "Saratov ORTPTS" at the address Saratov region, Ershov, Meliorativnaya st., 32A to the main distribution coupling MRM28 near the village of Pushkino, Sovetsky district, Saratov region, from the distribution main coupling MRM28

near the village of Pushkino, Sovetsky district Saratovskaya region to the optical crossbar in a container on the territory of JSC "Urbakhskiy kombinat khleboproduktov" at the address Saratov region, Sovetskiy district, settlement Pushkino, Zavodskaya str., 1a, from the distribution main coupling MRM28 near the settlement Pushkino, Sovetsky district, Saratov region. to optical junction "VOSTOK", Saratov, B. Kazachya str., 6, from optical junction

"VOSTOK", Saratov, B. Kazachya st., 6 to optical cross-country on the territory of JSC

"Integral" at the address Saratov, Chernyshevsky st., 153.

The factual circumstances of the case and the literal interpretation of the terms of the contract indicate that the parties entered into a sale and purchase agreement, with the terms of payment by installments and the phased transfer of property, relations under which are governed by the provisions of Chapter 30 of the Civil Code of the Russian Federation.

In accordance with article 454 of the Civil Code of the Russian Federation, under a sale and purchase agreement, one party (the seller) undertakes to transfer the thing (goods) to the ownership of the other party (the buyer), and the buyer undertakes to accept the goods and pay a certain amount of money (price) for it.

In accordance with part 1 of Article 486 of the Civil Code of the Russian Federation, the buyer is obliged to pay for the goods immediately before or after the seller transfers the goods to him, unless otherwise provided by the Civil Code of the Russian Federation, other law, other legal acts or the contract of sale and does not follow from the essence of the obligation ...

According to Art. 491 of the Civil Code of the Russian Federation in cases where the sale and purchase agreement stipulates that the seller retains the ownership of the goods transferred to the buyer until payment for the goods or other circumstances occur, the buyer is not entitled to alienate the goods or dispose of them in any other way until the transfer of ownership to him. is not provided for by law or contract or does not follow from the purpose and properties of the goods.

In cases where, within the period stipulated by the contract, the transferred goods will not be paid for or other circumstances do not occur in which the ownership right passes to the buyer, the seller has the right to demand from the buyer to return the goods to him, unless otherwise provided by the contract.

According to part 1 of article 223 of the Civil Code of the Russian Federation, the right of ownership of the acquirer of the thing under the contract arises from the moment of its transfer, unless otherwise provided by law or contract.

According to the terms of contract No. 3 / 12-12 dated 04.09.2012, the transfer of property to the ownership of the Buyer is carried out after the actual payment of the latter. In this case, the actual transfer of property to the Buyer is made within 10 calendar days after the buyer makes the first payment, and is with the buyer on the terms of temporary use until payment, in part 1 of stage - until the second payment, in part 2 of stage (disputed property) - until the date third payment.

By virtue of the provisions 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, other legal acts, and in the absence of such conditions and requirements, in accordance with the customs of business or other usually imposed requirements. Unilateral refusal to fulfill an obligation and unilateral change of its conditions are not allowed, except in cases provided by law. The creditor has the right to demand that the debtor fulfill his obligation (Article 307 of the Civil Code of the Russian Federation).

In accordance with clause 3.7.6. of the purchase and sale agreement, if the third

payment is not made within the specified period, the right to temporary use of the property is terminated until the moment of payment

According to clause 4.4 of agreement No. 3 / 12-12 of 04.09.2012, in case of violation of the terms of payment for the Property through the fault of the buyer for more than 90 calendar days, the Seller has the right to unilaterally out of court to refuse to execute this agreement, or to reclaim the unpaid amounts in court ...

Based on the terms of the contract (clause 3.7.5), the term for making the third payment expired on 04.09.2013.

In violation of the terms of the agreement, ZAO Firma Smur did not pay the third payment under the agreement. The case materials do not contain evidence to the contrary.

In accordance with clause 4.4. of the purchase and sale agreement LLC "ALS and TEK Company" unilaterally terminated the agreement No. 3 / 12-12 dated 04.09.2012 in the part of the property subject to transfer into ownership under the second stage of the purchase and sale agreement (letter ref. No. 841 dated 05/27/2014, vol. 1 l.d. 168). At the date of cancellation of the contract, the delay in payment was more than 8 months. The receipt of this letter by the defendant is confirmed by the materials of the case (letter ref. No. 970 dated June 17, 2014, volume 1 l.d. 174-175). At the same time, as follows from the letter ref. No. 970 dated June 17, 2014, the defendant accepted the plaintiff's proposal to terminate the contract in terms of the obligations for the acceptance and transfer of property into ownership at stage 2.

By virtue of part 3 of Article 450 of the Civil Code of the Russian Federation, in the event of a unilateral refusal to fulfill the contract in whole or in part, when such refusal is allowed by law or by agreement of the parties, the contract is considered accordingly terminated or amended.

Thus, at present, the contract regarding the property for the second

stage of the contract in the fiber-optic communication line Saratov-Ozinki on the Saratov-Ershov section is terminated.

The defendant's argument about the suspension of the 3rd payment due to the presence of an unfulfilled obligation on the part of the plaintiff is rejected by the judicial board.

According to part 1 of Article 328 of the Civil Code of the Russian Federation, the fulfillment of an obligation by one of the parties, which, in accordance with the agreement, is conditioned by the fulfillment of its obligations by the other party, is recognized as counter.

At the same time, according to the terms of the agreement (clause 3.7.5), the term for payment of the third payment is due to the expiration of one calendar year from the date of signing the agreement, that is, until 04.09.2013. In this case, the third payment is made after the first and second payments are made, which, as established materials of the case were paid by the defendant in the period from October 04, 2012 to December 28, 2012.

The above letter from LLC "Company ALS and TEK" ref. No. 841 of 05/27/2014, also contained a requirement for the return of property in accordance with Appendix No. 5 to the contract (property transferred into ownership under the second stage of the contract), transferred for temporary use and not paid by the defendant within the period specified in the contract.

Until now, the disputed property (stage 2 of the agreement) has not been returned to the plaintiff, which served as the basis for the appeal of LLC Company ALS and TEK to the court with this statement of claim.

According to the clarifications contained in paragraph 3 of the resolution of the Plenum of the Supreme Court of the Russian Federation and the Plenum of the Supreme Arbitration Court of the Russian Federation dated 04/29/2010 No. 10/22 "On some issues

arising in the resolution of disputes related to the protection of property rights and other property rights" in accordance with Article 148 of the Code of Civil Procedure of the Russian Federation or Article 133 of the Arbitration Procedure Code of the Russian Federation, at the stage of preparing the case for trial, the court must determine from which legal relationship the dispute arose, and what legal norms are to be applied when resolving the case.

Within the meaning of Article 6, Part 1 of Article 168, Part 4 of Article 170 of the Arbitration Procedural Code of the Russian Federation, the arbitration court is not bound by the legal qualification of the disputed relations proposed by the parties, and must consider the claimed claim on the merits, proceeding from the actual legal relationship, while determining which laws and other normative legal acts should be applied in the case.

As indicated in paragraph 34 of the above resolution of the Plenum of the Supreme Court of the Russian Federation and the Plenum of the Supreme Arbitration Court of the Russian Federation dated 04/29/2010 No. 10/22, a dispute on the return of property arising from contractual relations or relations related to the application of the consequences of the invalidity of the transaction shall be resolved in accordance with with the legislation governing this relationship.

Clause 65 of the said resolution clarifies that by virtue of clause 4 of Article 453 of the Civil Code of the Russian Federation, the parties are not entitled to demand the return of what they have performed under the obligation until the moment of amendment or termination of the contract, unless otherwise established by law or by agreement of the parties. At the same time, according to Article 1103 of the Civil Code of the Russian Federation, the provisions on unjust enrichment are to be applied to the claims of one party in the obligation to the other to return the fulfilled in connection with this obligation. Therefore, in case of termination of the contract, the seller who has not received payment for it has the right to demand a return

property transferred to the buyer on the basis of Articles 1102, 1104 of the Civil Code of the Russian Federation.

By virtue of Article 1102 of the Civil Code of the Russian Federation, a person who, without grounds established by law, other legal acts or a transaction, has acquired or saved property (acquirer) at the expense of another person (victim), is obliged to return the latter to the latter unjustifiably acquired or saved property (unjust enrichment), except in cases provided for in Article 1109 of this Code.

According to part 2 of Article 489 of the Civil Code of the Russian Federation, when the buyer does not make the next payment for the goods sold in installments and transferred to him within the period established by the contract, the seller has the right, unless otherwise provided by the contract, to refuse to execute the contract and demand the return of the sold goods, except in cases where the amount of payments received from the buyer exceeds half the price of the item.

According to Article 491 of the Civil Code of the Russian Federation, in cases where the transferred goods are not paid for within the time period stipulated by the contract or other circumstances do not occur in which the ownership is transferred to the buyer, the seller has the right to demand that the buyer return the goods to him, unless otherwise provided by the contract.

As already mentioned, the plaintiff declared a demand for the return of the property received for temporary use by the SMUR firm under the acceptance certificate dated 10.10.2012 in accordance with the terms of contract No. 3 / 12-12 for the purchase and sale of optical fibers and shares in the right of common share ownership in a fiber-optic communication line on the territory of the Voronezh and Saratov regions from 04.09.2012 on the second stage - optical fibers in the section from Ershov to Saratov in the fiber-optic

communication line "Saratov-Ozinki », Due to the defendant's failure to pay the third payment and the plaintiff's refusal from the contract regarding the second stage property.

Payment for property under the second stage was made in the amount of 2,144,158.0 rubles, that is, 16.4% of the value of the property agreed by the parties under the second stage of the contract (13,071,083.78 rubles)

The sale and purchase agreement regarding the property for the second stage was terminated due to the unilateral cancellation of the agreement by LLC Company ALS and TEK (Seller).

In such circumstances, the plaintiff's claim for the return of the property transferred under the contract of sale and purchase under the second stage of the contract should be recognized as legitimate.

The defendant's argument about the absence of identifying signs of the property (optical fibers), the claim for the return of which has been declared, is rejected by the judicial board.

As established by the materials of the case on 10.10.2012, the General Director of CJSC firm "SMUR" signed an act of acceptance of the transfer of property for use in fiber-optic communication lines, including the second stage of the contract on the Saratov-Ershov section.

From this act of acceptance and transfer it follows that at the time of its signing the property is in working condition, the buyer has no claims.

Clause 5 of Appendix No. 7 of the Agreement dated 04.09.2012 states that the parties sign the Act of acceptance and transfer of the Property for use (Appendix No. 2 to the Agreement) only if the characteristics of the OB

comply with the terms of the Agreement, technical requirements of the Buyer, legislation, executive documentation and other mandatory requirements.

At the same time, the absence in the case file of notifying the seller to the buyer, as well as the protocol of the working commission on the acceptance of the disputed property, as indicated in Appendix No. 7 to the contract dated 09/04/2012, does not refute the fact that the plaintiff transferred the property and accepted it by the defendant ...

The signing on 10.10.2012 by the defendant of the act without objection means that at the time of transfer, there were no defects in the transferred property. Otherwise, as follows from clause 6 of Appendix No. 7, if the optical fibers do not meet the technical requirements of this agreement and / or the requirements of the current legislation, as well as if other shortcomings are found (including in the attached Executive documentation), the parties reflect them in the protocol working commission in the form of a list of imperfections, comments.

At the same time, as established by the materials of the case, after the transfer of property under the act of 10.10.2012, the contract continued to be executed by the defendant in terms of payment until 28.12.2012, and on 21.11.2012, the defendant signed an act of acceptance of the transfer of property into ownership by Stage 1 (volume 1 l.d. 107-108).

In addition, the case file contains a unilateral act of return of property from temporary use (volume 1 l.d. 176-178) dated June 17, 2014, signed unilaterally by the general director of CJSC firm

"SMUR" and which was sent to the plaintiff in response to the refusal of the contract declared by the latter in the letter ref. 841 dated 05/27/2014, from which it follows that at the time of the disconnection of the optical fibers by the Seller on 01/20/2014, the property was in working condition .

The foregoing testifies to the absence of disagreements and uncertainties among the parties regarding the subject of the Agreement in the process of its execution.

At the same time, the signing of the acceptance certificate on 10.10.2012 before the

date of receipt of permits for the construction of fiber-optic communication lines, namely: - construction permit No. RU 64538305-71, issued by the Administration of the Engels municipal district on 12.09.2013; - Permission to put the facility into operation No. RU 64538305-31, issued by the Administration of the Engels Municipal District on 12/20/2013; - Building permit No. RU 645130000-02 issued by the Administration of the Ershovsky municipal district of the Saratov region on 05/10/2012 and extended due to the need to complete construction work until 05/31/2013 does not indicate the absence of the disputed property.

As of the date of the actual transfer of the disputed property, in 2012, the FOCL itself already existed, and as a result there were also disputed optical fibers.

As follows from the letter of the Ministry of Construction and Housing and Communal Services of the Saratov Region dated 05/29/2017. (v. 9 case sheet 20) FOCL "Saratov-Ershov" was actually built by the Claimant before 26.04.2012.

In addition, the defendant does not dispute the very fact of the transmission of optical fibers, indicating in its explanations (ref. No. 3344/17 of 11/27/2017) that the specificity of the transferred property is that the optical fibers are in the ground, their transmission was carried out by connecting active equipment to optical outlets that go out of the optical distribution frame located in the telecommunication cabinet in the office of LLC "Company ALS and TEK". In this case, to see which optical fibers were included, do not

seemed possible with the closed cover of the optical distribution frame. Further, the defendant indicates exactly how the actual acceptance of the property subject to alienation took place. In this case, the transponder indicates that the optical fibers inside the frame are stacked in a cassette, in the center of which the fibers are welded with a pigtail (yellow thin cable), which already leaves the cassette and reaches the optical socket, which passes through the wall of the optical frame. From the outer side of the optical distribution frame, a patch cord (connecting cord) is connected to the socket, one end of which is inserted into the optical socket, the other is connected to the active equipment.

Thus, as the defendant points out, the actual transfer of property consisted in the fact that LLC "Company ALS and TEK" connected the equipment of CJSC "QUANT-TELECOM" to the disputed fibers using patch cords through an optical socket of an optical crossbar.

At the same time, as the plaintiff points out, and is not disputed by the defendant and the third person, so far the disputed 4 fibers are connected by means of patch cords to telecommunications equipment located in the plaintiff's access nodes.

The materials of the case also established that until 06.02.2013 the disputed property (four optical fibers of the G.652 standard) was operated by a third person in accordance with the lease agreement No. 23-A4732 / 12 concluded on 23.11.2012 with CJSC SMUR valid from 11/23/2012 to 11/22/2015 (volume 4 l.d. 75-81).

At the same time, the technological equipment of the third party was placed in the access points of the plaintiff on the basis of a non-cash agreement on the provision of a complex of resources dated 09/10/2012, the subject of which was the provision of a complex of resources to ensure the functioning of the Customer's technological equipment intended for the provision of telecommunication services from Saratov in two directions, including: Saratov - Pushkino - Ershov - Ozinsky district, Stolyary village. In this direction, the Contractor provided the Customer with places at the following addresses: Access node at the address: Saratov, Bolshaya Kazachya st., 6; Container on the territory of JSC "Urbakhskiy kombinat khleboproduktov" at the address: Saratov region, Sovetskiy district, Pushkino village, Zavodskaya st., 1 A - The container on the territory of the RTRS "Saratov ORTPTS" at the address: Saratov region, Ershov, Meliorativnaya st., 32A.

The fact that the disputed property was used for its intended purpose is also

confirmed by the fact that on February 6, 2013, KVANT-TELECOM JSC applied with an application (case file 103 volume 2) to the plaintiff with a request to provide access for emergency recovery work in connection with communication break on 06.02.2013 at 8-24 at B. Kazachya st., 6 Saratov.

The argument of the defendant and the third party about the absence of actual relations between them on the lease of the disputed property, the failure to make rent payments does not refute the very fact of the existence of the disputed property and its use at least until 06.02.2013 (date of shutdown of equipment of JSC "QUANT-TELECOM")

Pointing to the absence of property transferred under the act of 10.10.2012, the defendant's arguments essentially boil down to the inconsistency of the color and numbering of the fibers and the module specified in the act.

At the same time, the numbering of fibers adopted by the plaintiff for the purpose of their identification, in the opinion of the judicial board, does not exclude the possibility of identifying the transferred property (taking into account its specifics) and is not

an obstacle for the defendant to fulfill the obligation to return the property - 4 optical fibers actually received from the plaintiff within the framework of the execution of the contract dated 04.09.

It should be noted that the case materials do not contain evidence indicating the absence of optical fiber in the Saratov-Ozinki FOCL belonging to the plaintiff, including in the Saratov-Ershov section of the optical fiber, corresponding to the parameters specified in the contract and the act of 10.10.2012 - OV standard G.652.

Reconstruction of FOCL with partial replacement of the cable, as indicated by the transponder, did not lead to a change in the type and parameters of optical fibers.

The reverse has not been proven by the defendant.

At the same time, the plaintiff stipulates the obligatory return of the disputed property (optical fibers) under the act of acceptance of the transfer precisely by the specifics of the property. As the plaintiff points out, the value of optical fibers is determined by their optical characteristics, namely the ability to transmit light over long distances. Excessive power supply to an optical fiber damages the fiber core, as a result of which the optical fiber loses its ability to transmit light pulses (information).

That is why the obligation to regularly check optical fibers when servicing optical fibers is established by industry guidelines and is separately indicated in paragraph 4 of Appendix No. 7 to contract No. 3 / 12-12 of 04.09.2012, according to which the requirements for acceptance tests of OV / FOCL

- in accordance with RD45.190-2001 "Elementary cable section of fiber-optic transmission line. Typical acceptance test program".

In this case, the procedure for registration of reception and transmission of optical fibers is determined in detail by the parties in Appendix No. 7 to the contract.

Thus, the act of receiving and transmitting optical fibers is not a formality, since when returning optical fibers, it is necessary to measure the optical fiber with an optical reflectometer for compliance with the technical parameters with the signing of the act of receiving the transmission.

Considering that the contract does not provide for the form of the return (transfer of OV) act, the return of the property should take place in the same way as its receipt, with the same verification of the property, with the signing of similar documents, the act of acceptance and transfer.

In addition, given the specifics of the disputed property, when the parties sign the deed of transfer, the presumption that the actual transfer of property has taken place comes into force.

At the same time, the fact that the plaintiff has the technical ability to turn off the

FOCL, as well as the very fact of turning off the FOCL is not a determining factor for considering the stated requirements, does not affect the actual transmission of optical fibers. The subject of Agreement No. 3-12 / 12 is the optical fibers themselves, and not signal transmission over them or ensuring their operation. In accordance with the terms of the Agreement No. 3-12 / 12 on the act of acceptance and transfer of 10.10.2012. the defendant obtained possession and use of the fibers, and the claim is for their return.

The expert opinion dated 02.12.2015, made by AVK-Expert LLC, accepted by the court of first instance as one of the evidence in the case, does not refute the fact of the presence of the disputed property.

According to this conclusion, the issue of compliance of the constructed fiber-optic line "Saratov-Ershov" with the requirements of contract No. 4 dated April 18, 2011, concluded between CJSC RetnNet and LLC "ALS and TEK Company" on investment in the construction of a line-cable communication facility, was investigated.

At the same time, within the framework of the consideration of the case A57-18378 / 2013, the court, refusing to satisfy the claim of RetnNet CJSC on the obligation of Als and Tek Company LLC to fulfill the investment agreement and transfer the property in kind, came to the conclusion that the built and commissioned Company Als and Tek "in operation, the FOCL line was not the subject of contract No. 4 dated 18.04.2011.

At the same time, the court's conclusions were based on the aforementioned expert opinion of AVK-Expert LLC, which, among other things, found that the route of the actually existing line did not correspond to the terms of contract No. 4 dated April 18, 2011.

The defendant's argument about the actual discrepancy between the cable brand specified in the contract and in the act of 10.10.2012 does not indicate the absence of the disputed property - OV of the G.652 standard and does not release the defendant from the obligation to return the actually received 4 optical fibers of the G.652 standard, which in fact, they were the subject of the transfer. At the same time, as already mentioned, the case materials do not contain evidence of the absence of optical fibers of this standard in the FOCL belonging to the plaintiff.

The defendant's argument about the expiration of the limitation period, which, in the latter's opinion, should be calculated from the date of expiration of the period for making the third payment, namely from 04.09.2012, the judicial board is rejected.

Violation of the deadline for making payments does not automatically lead to the termination of the contract and, as a consequence, the obligation of the parties to return what was performed under the contract.

According to clause 3.7.6 of the agreement, if the third payment is not made on time (clause 3.7.5 of the agreement), the temporary use of 4 optical fibers in the FOCL on the Ershov-Saratov section is terminated until the third payment.

Under the terms of clause 4.4 of the agreement, in case of violation of the terms of payment for the property through the fault of the Buyer for more than 90 calendar days, the Seller has the right to either withdraw from the agreement or reclaim the unpaid amounts in court.

As established by the materials of the case, the defendant announced the cancellation of the contract in part of the second stage by a letter dated May 23, 2014, ref. No. 04.09.2012 The plaintiff filed a claim on 10.01.2017, that is, within a 3-year limitation period.

In addition, it should be noted that despite the absence of the third payment, the use of the property transferred for temporary use according to the defendant's data ceased from January 20, 2014, as indicated in the unilaterally signed act on the return of property from temporary use (volume 1 p. d. 172-174).

The defendant's argument about the plaintiff's abuse of rights and the need to apply the

provisions of Article 10 of the Civil Code of the Russian Federation is rejected by the judicial board. The grounds for the application of Article 10 of the Civil Code of the Russian Federation have not been established by the judicial board.

When entering the operative part of the decision into the AIS base

The proceedings in the second paragraph after the words "Obligate Joint Stock Company "Firm" SMUR ", Voronezh return to the benefit of the limited liability company" Company "ALS and TEK" missing the word "four".

A misprint is subject to correction in accordance with the rules of Article 179 of the Arbitration Procedure Code of the Russian Federation.

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 of August 31, 2017 in case No. A57-233 / 2017 shall be canceled.

To oblige the Joint Stock Company Firm SMUR, Voronezh, to return to the benefit of the Limited Liability Company ALS and TEK Company four optical fibers in the Saratov-Ozinki fiber-optic communication line in 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 of the Saratov region, Ershov, Meliorativnaya street, 32A to the main distribution coupling MRM28 near the settlement of Pushkino, Sovetsky district, Saratov region. , from the main distribution coupling MRM28 near the village of Pushkino, Sovetsky District, Saratov Region. to the optical crossbar in a container on the territory of the Urbakhskiy Kombinat Khleboproduktov Open Joint Stock Company at the address Saratov region, Sovetskiy district, Pushkino, Zavodskaya st., 1a, from the main distribution coupling MRM28 near Pushkino, Sovetsky district, Saratov region. to the optical crossover "VOSTOK" of the Limited Liability Company "Company" ALS and TEK ", Saratov, B. Kazachya st., 6, from the optical crossover" VOSTOK "of the Limited Liability Company" Company "ALS and TEK", St. Saratov, B. Kazachya str., 6 to the optical cross of the Limited Liability Company

"Company" ALS and TEK "on the territory of the Open Joint Stock Company

"Integral" at the address Saratov, Chernyshevskogo str., 153, actually received for temporary use by the Closed Joint Stock Company "Firm SMUR", Voronezh under the act of acceptance and transfer of property for temporary use dated 10.10.2012 in accordance with by the terms of agreement No. 3 / 12-12 for the purchase and sale of optical fibers and a share in the right of common share ownership in a fiber-optic communication line in the Voronezh and Saratov regions, concluded on 04.09.2012 between the Limited Liability Company

"Company ALS and TEK" and Closed Joint Stock Company "Firm SMUR".

In satisfying the appeal of the Joint Stock Company "firm "SMUR" to refuse.

Collect from the Joint Stock Company "firm" SMUR "(Voronezh, INN 3662020332, OGRN 1023601610878) in favor of the Limited Liability Company" Company "ALS and TEK" (Saratov, INN 6452045336, OGRN 1026402661108) legal expenses for the payment of state fees on the claim and appeal in the amount of 9000 rubles.

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

Povolzhsky district within two months from the date of issuance of the decision in

full through the arbitration court of first instance.

Presiding O.AND. Antonova

Judges S.A. Zhatkina

A.Yu. Nikitin