

The Controversial Issue of Liability for Condominium Expenses in Relation to Properties Encumbered with Fiduciary Guarantees and Its Effects on the Brazilian Real Estate Credit Market

Guilherme Andrade Zauli

Department of Diffuse and Collective Rights at the Pontifical Catholic University of São Paulo (PUC-SP), São Paulo, Brazil
Email: guilhermezauli@yahoo.com.br

How to cite this paper: Zauli, G. A. (2023). The Controversial Issue of Liability for Condominium Expenses in Relation to Properties Encumbered with Fiduciary Guarantees and Its Effects on the Brazilian Real Estate Credit Market. *Beijing Law Review*, 14, 1652-1659.
<https://doi.org/10.4236/blr.2023.144090>

Received: September 27, 2023

Accepted: October 30, 2023

Published: November 2, 2023

Copyright © 2023 by author(s) and Scientific Research Publishing Inc. This work is licensed under the Creative Commons Attribution International License (CC BY 4.0).
<http://creativecommons.org/licenses/by/4.0/>



Open Access

Abstract

This article seeks to analyze the reasons and consequences of the recent divergent judgments of the Brazilian Superior Court of Justice regarding the possibility, or lack thereof, of real property encumbered with fiduciary alienation being subject to seizure resulting from the execution of condominium expenses. For the development of this study, the Special Appeal No. 2036289/RS (2022/0344164-7), carried out by the 3rd Chamber, under the rapporteurship of Justice Nancy Andrighi, as well as the Special Appeal No. 2059278/SC, carried out by the 4th Chamber, under the rapporteurship of Justice Raul Araújo, will be analyzed.

Keywords

Fiduciary Alienation, Attachment, Condominium Expenses, Real Property, Legal Certainty

1. Introduction

It is notorious that the civil construction sector plays an extremely important role in the development of any nation, either for its social function by enabling the provision of housing, fostering the economy by the significant amount of materials sold for the development of enterprises, generating jobs, as well as representing a solid investment option.

It so happens that the largest portion of the population does not have the fi-

nancial conditions that make it possible to acquire real estate units without obtaining credit from financial institutions operating in the market (Marin & Mario, 2023).

According to the Brazilian Association of Real Estate Credit and Savings Entities (ABECIP), since the beginning of the ¹historical series of monitoring of this type of credit (Jan/2002) until the present moment, considering the release of values for construction and acquisition of real estate, more than R\$ 1405538000000.00 (one trillion, four hundred and five billion, five hundred and thirty-eight million reais) have been injected into the national market.

As it could not be otherwise, the cost of such credit to final consumers is directly related to the quality of the guarantee offered at the time of its contracting, that is, contracts with better guarantees enable the granting of credit at a lower cost, given the lower risk of the operation.

On the other hand, contracts with not so robust guarantees enable loans with higher costs, since financial institutions analyze, among other factors, the risk of default, cost and time to recover the amounts released.

Among the most common forms of collateral in the Brazilian real estate market, mortgages and fiduciary alienations stand out, which will be the object of analysis in this article.

2. Brief Contextualization of Mortgage and Fiduciary Guarantees in Brazil

Currently, there are two main types of guarantees used in Brazil when dealing with real estate: mortgages and fiduciary alienations of real estate.

Based on the Brazilian legal system, objectively, we can state that the mortgage can be described as “a security right, of a real nature, to ensure the effectiveness of a personal right” (Nery & Junior, 2022).

This modality allows the creditor to register the existence of its credit in the registration of the property subject to the guarantee, conferring publicity in the face of third parties and, consequently, privilege in relation to any new debts that the owner of the property may contract, with the possibility of taking said asset to auction, if there is no payment of the amounts due.

Initially, the mortgage guarantee played an important role in the release of real estate credit, as it assured the creditor of the existence of sufficient equity to answer for the obligation assumed.

However, with the passage of time, several factors contributed to the weakening of the mortgage, among which we can mention the preference of the tax and labor credit to the detriment of the credit granted by the financial institution (even if the latter has been constituted at a previous time), the issuance of a Precedent by the Superior Court of Justice (Precedent 308) providing for the ineffectiveness of the mortgage guarantee carried out by the developer with the financial institution in relation to the purchaser of the real estate unit, as well as

¹Brazilian Association of Real Estate Credit and Savings Entities (ABECIP). Available at: <https://www.abecip.org.br/credito-imobiliario/indicadores/financiamento>. Accessed on 07/05/2023.

the fact that it is necessary to file a lawsuit to enforce the guarantee agreed between the parties, which significantly increases the time and cost for credit recovery.

Given this scenario, the increase in the cost of mortgage credit was inevitable, and it is no longer viable, especially for consumers with lower purchasing power.

In order to promote the resumption of the real estate sector, a new type of guarantee was instituted, that is, the Fiduciary Alienation, popularly known as real estate financing.

This type of guarantee basically works as follows: the consumer obtains the credit for the acquisition of the good and, automatically, transfers the ownership of the property to the name of the financial institution responsible for releasing the amounts until there is full payment of the obligation, at which time there is an immediate return of full ownership to the consumer's assets.

In other words, unlike the mortgage guarantee, as it is not part of the debtor's assets, any debt of the debtor's responsibility would not reach the real estate object of the guarantee related to the real estate financing, regardless of its nature (even if tax or labor).

In order to provide greater security to the credit transaction guaranteed by the Fiduciary Sale, the legislator expressly provided for the debtor's responsibility for the payment of taxes and any condominium contributions levied on the property, while the credit agreement is in force, and the latter must act in compliance with the principle of good faith required in commercial relations in order to avoid the imposition of the obligation of supervision by the creditor.

On the subject, Francisco Loureiro teaches:

“The sole paragraph of article 1368-B of the CC states that the fiduciary creditor is only liable for the expenses generated by the thing after its immission in possession, after the full ownership has been consolidated. Such a rule must be interpreted and compatible with the interests of the creditors of expenses generated by the thing secured. There is no doubt that the primary debtor of the expenses generated by the thing is the fiduciary debtor, holder of the right in rem of acquisition, of direct possession and of the faculties to use (*jus utendi*) and to enjoy (*jus fruendi*) the property. In this capacity, it is responsible with all its assets for the settlement of debts and must reimburse any and all expenses eventually paid by the fiduciary creditor. (...) This, however, does not mean that the creditors of the expenses generated by the thing secured itself are left unprotected. The credit originates from the very preservation of the thing given as collateral, in such a way that the fiduciary creditor, by consolidating full ownership and alienating the thing to third parties, would unduly benefit from the effort and resources invested by third parties, in a typical case of unjust enrichment” (Loureiro, 2016: p. 339).

The requirement of such conduct can be seen as a fundamental pillar in any legal system, not only in Brazil. For example, with regard to Italian law, the

present situation could be analyzed from the perspective of article 1358 of the Civil Code², imposing on the debtor of the *obligation propter rem* the duty to act in good faith, *pendente conconstione*, as Trabucchi argues.³

It must be considered that the purpose of the law cannot be interpreted in the sense of privileging or protecting a certain party (whether the creditor or the debtor in the relationship), but rather the institution of credit made available to the population in general, making strict compliance with the terms provided for in the law and contractually agreed upon, strictly speaking, requiring the good faith of both parties for the duration of the contract.

In prestige to the credit secured by the fiduciary sale, with regard to its enforcement, due to the fact that the property given as collateral is inserted in the assets of the financial institution responsible for granting the credit, in case of default, the enforcement procedure takes place directly with the Real Estate Registry Office, with no need to file a lawsuit, considerably reducing the time and cost of the operation.

These facts made it possible to make available a type of credit capable of serving practically the entire population, given that, due to the robustness and peculiarities already described above, it enables the practice of interest rates much lower than the other modalities existing in the market.

To better illustrate, according to the information contained on the Central Bank's website, currently the interest rates on real estate financing are between 8.70% and 12.41% per year, while the average of contracts secured by mortgage vary between 12 (twelve) and 27 (twenty-seven) percent per year.⁴

Therefore, it is evident that the lower the risk and the shorter the time to recover the amounts, the lower the cost of credit made available to the population.

3. Analysis and Comments on the Judgments Rendered in Special Appeal No. 2036289/RS (2022/0344164-7), and Special Appeal No. 2059278/SC, by the Superior Court of Justice

As discussed in the previous topic, in spite of the existence of an express provision in the current legal system regarding the liability of the fiduciary debtor for the payment of condominium expenses, recently the Superior Court of Justice issued an understanding contrary to the legal text, as well as to the jurisprudence that was already settled.

Considering the legal provision in the sense that the fiduciary debtor is the party responsible for any condominium expenses and taxes levied on the prop-

²Art. 1358 Codice Civile Italiano: Colui che si e' obbligato o che ha alienato un diritto sotto condizione sospensiva, ovvero lo ha acquistato sotto condizione risolutiva, deve, in pendenza della condizione, comportarsi secondo buona fede per conservare integre le ragioni dell'altra parte." (Trans. Free: the one who has obliged, or who has alienated a right under a condition precedent, or who has acquired it under a resolutive condition, must, if the condition is still pending, behave in good faith to preserve the interests of the other party intact.)

³Trabucchi Alberto (1989). *Istituzioni di diritto civile*, Padova: Cedam, 1989, p. 527.

⁴Available at: <https://www.bcb.gov.br/estatisticas/txjuros>. Accessed September 19, 2023.

erty⁵, the jurisprudence had been consolidated in the sense that in the event of a certain execution aimed at satisfying condominium debts, it would only be possible to seize under the debtor's acquisition rights, There is no possibility of attachment of the property subject to the guarantee due to an express legal provision changing the nature of the *propter rem liability* for the person of the debtor.

Several were judged in this sense, with the transcription of part of the menu issued on the occasion of the judgment of REsp No. 2036289/RS (2022/0344164-7), by the 3rd Panel of the Superior Court of Justice of the rapporteurship of Minister Nancy Andrichi:

“Although article 1345 of the CC/2002 attributes, as a general rule, the ambulatory character (or *propter rem*) to the condominium debt, this rule was expressly excepted, in the case of property sold fiduciarily, by arts. 27, § 8, of Law No. 9514/1997 and 1368-B, sole paragraph, of CC/2002, which attribute the responsibility for the payment of condominium expenses to the fiduciary debtor, while in direct possession of the property.”⁶

However, without any legislative innovation in order to justify the change in the already settled understanding, when analyzing REsp No. 2059278/SC dealing exactly with the possibility of attachment of the property subject to the guarantee, the 4th Panel of the Superior Court of Justice concludes that it is possible to seize the asset, and the existence of a fiduciary guarantee is irrelevant.

By majority vote, the Justices who are part of the aforementioned Panel understood that because it represents an essential expense for the maintenance of the condominium, due to its *propter rem nature*, any debt of condominium tax would have the power to reach the asset given as collateral, even considering the express terms of Law 9.514/97.

Important is the transcription of part of the winning vote:

“The nature *propter rem* overrides the right of the fiduciary creditor himself, given that it is not fair to place on the shoulders of the other co-owners the obligation to bear the apportionment of those expenses, considering that, on the one hand, the fiduciary debtor feels comfortable not paying, because he knows that the apartment could not—in this thesis presented so far by the em. Rapporteur—to be subject to no constriction; And, on the other hand, the fiduciary creditor feels reassured as well, because, receiving the money corresponding to the loan he has made, he will not be disturbed in his right of ownership, despite the existence of condominium debts that hover without a definition of payment.”⁷

However, the same issue had already been analyzed by the 3rd Panel of the Superior Court of Justice, prevailing an absolutely opposite understanding:

⁵Article 27, § 8, of Law 9.514/97.

⁶REsp n. 2.036.289/RS, rapporteur Justice Nancy Andrichi, Third Panel, judged on 4/18/2023, DJe of 4/20/2023 (*Superior Court of Justice (3. Class)*).

⁷REsp n. 2.059.278/SC, rapporteur Minister Marco Buzzi, rapporteur for the judgment Minister Raul Araújo, Fourth Panel, judged on 5/23/2023, DJe of 9/12/2023 (*Superior Court of Justice (4. Class)*).

“7. Although article 1345 of the CC/2002 attributes, as a general rule, the ambulatory character (or *propter rem*) to the condominium debt, this rule was expressly excepted, in the case of property sold in a fiduciary manner, by arts. 27, § 8, of Law No. 9514/1997 and 1368-B, sole paragraph, of CC/2002, which attribute the responsibility for the payment of condominium expenses to the fiduciary debtor, while in direct possession of the property. Previous.

8. In Brazilian law, to affirm that a certain subject is responsible for the payment of a debt means, in the procedural context, that its assets can be used to satisfy the substantial right of the creditor, pursuant to article 789 of the CPC/2015.

9. By providing that the responsibility for condominium expenses lies with the fiduciary debtor, the rule establishes, as a consequence, that its assets will be used to satisfy said credit, not including, therefore, the property sold in trust, which is part of the assets of the fiduciary creditor.

10. Thus, it is not possible to seize the property sold in trust in execution of condominium expenses for which the debtor is responsible, in accordance with arts. 27, § 8, of Law No. 9,514/1997 and 1,368-B, sole paragraph, of CC/2002, since the asset is not part of its assets, but of the fiduciary creditor, admitting, however, the attachment of the real right of acquisition derived from the fiduciary alienation, in accordance with arts. 1.368-B, caput, of CC/2002, *c/c* article 835, XII, of the CPC/2015.”⁸

By rendering a decision contrary to the position previously established, it can be said that the Superior Court of Justice, an organ of the Judiciary responsible for standardizing the jurisprudential understanding of the interpretation of federal law⁹, not only contributed to the increase of legal uncertainty in relation to the fiduciary guarantee, but also violates its constitutional attributions.

We currently have in Brazil the validity of specific legislation expressly providing for the impossibility of the asset offered as a fiduciary guarantee to be liable for any condominium expenses and at the same time there are judgments of the Court responsible for unifying the interpretation and application of the legislation throughout the country, in opposite directions.

4. Conclusion

In line with the arguments presented, differently from the reasoning contained in the judgment of REsp No. 2,059,278/SC¹⁰, it is understood that the inclusion

⁸REsp n. 2.036.289/RS, rapporteur Justice Nancy Andrihgi, Third Panel, judged on 4/18/2023, DJe of 4/20/2023.

⁹Article 105, III, paragraph “c” of the Federal Constitution.

¹⁰“The best solution is really to integrate all the parties in the execution so that the appropriate solution can then be found, which depends on the recognition of the owner’s duty, before the condominium, to settle that debt so as not to see the property being auctioned off in the execution and, thus, subrogate himself as a creditor and make the regressive collection with the condominium, who is a fiduciary debtor.” (REsp n. 2.059.278/SC, rapporteur Minister Marco Buzzi, rapporteur for the judgment of Minister Raul Araújo, Fourth Panel, judged on 5/23/2023, DJe of 9/12/2023)

of fiduciary creditors in foreclosures dealing with possible condominium expenses goes against the less bureaucratic nature provided for in Law 9514/97, since the fact that it is not necessary to go to court to enforce the guarantee. It is an essential factor to enable credit at a lower cost to the general population.

This understanding represents a dangerous precedent, as it transfers to financial institutions holding real estate credit the obligation to monitor the payment of condominium expenses by the residents of the properties given as collateral, under penalty of losing part or perhaps even all of the guarantees provided at the time of release of the amounts.

The recent decision handed down by the Superior Court of Justice gives prestige to condominiums, guaranteeing them sufficient liquidity to maintain their activities. On the other hand, however, it harms the community as a whole.

In the same way that the issuance of Precedent 308 by the Superior Court of Justice contributed to the weakening of the mortgage guarantee, the dangerous understanding recently produced in relation to the Fiduciary Alienation causes serious legal uncertainty, impacting the cost of credit in view of the Judiciary's signaling in the sense of making the robustness of the guarantee provided more flexible.

In addition, if there is a need to monitor the payment of condominium fees by financial institutions, aiming at preserving the agreed guarantees, new rates may certainly be included in all new financing contracts, burdening consumers in general, even those who are up to date with their obligations.

As stated by the Minister of the Federal Supreme Court, Luiz Fux, while participating in the seminar on Legal Security, Economic Development and Adequate Methods of Conflict Resolution, in São Paulo: "A country that does not offer legal certainty, that does not offer predictability, that does not have a system of precedents, is a country that drives away large investors. The case-law must be complete, consistent and stable. It can't be a lottery."¹¹

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

References

- Brazil. *Superior Court of Justice (3. Class)*. REsp n. 2.036.289/RS, rapporteur Justice Nancy Andrichi, Third Panel, judged on 4/18/2023, DJe of 4/20/2023.
- Brazil. *Superior Court of Justice (4. Class)*. REsp n. 2.059.278/SC, rapporteur Minister Marco Buzzi, rapporteur for the judgment of Minister Raul Araújo, Fourth Panel, judged on 5/23/2023, DJe of 9/12/2023.
- Loureiro, F. E. (2016). *Commented Civil Code: Doctrine and Jurisprudence* (p. 1,339). Coordinator: Cezar Peluso. 10th ed, Manole.

¹¹Available at:

<https://www.conjur.com.br/2022-mar-29/fux-seguranca-juridica-desenvolver-economia>. Accessed on 20/09/2023.

Marin, J. R., & Mario, J. (2023). *Affordable Housing in Brazil: A Luxury for the Few, Ex-ame Magazine*.

Nery, R., & Junior, N. (2022). Chapter XIX. Collateral Rights in rem. In: Nery, R., & Junior, N. (Eds.), *Civil Law Institutions: Patrimonial, Real and Registry Rights*. Editora Revista dos Tribunais.

<https://www.jusbrasil.com.br/doutrina/instituicoes-de-direito-civildireitos-patrimoniais-reais-e-registrarios/1620615954>

Trabucchi, A. (1989). *Istituzioni di diritto civile*. Cedam