

# Analysis of the Impossibility of Restitution of Surplus in Real Estate Contracts Secured by Fiduciary Alienation in Case of Negative Auctions and the Negative Effects Arising from Non-Compliance with the Current Rule

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## Abstract

This article seeks to analyze the reasons and consequences of the understanding that has been produced by the 29th Chamber of Private Law of the Court of Justice of the State of São Paulo, using as an object of analysis the judgment produced in the judgment of Civil Appeal 1017164-55.2022.8.26.0562, regarding the restitution of surplus resulting from real estate credit agreements with a guarantee of fiduciary alienation, if the auctions required by Law 9.514/97 remain unsuccessful. In addition to the theoretical aspect of law, the risks and effects of such decisions concerning the market and the population in general will be analyzed.

## Keywords

Fiduciary Alienation, Plenty of It, Fruitless Auctions, Property, Legal Certainty

## 1. Introduction

According to data from ABRAINC (Brazilian Association of Real Estate Developers) in 2022, the civil construction sector was responsible for 2.9% of Brazil's entire GDP, representing an approximate value of 287 billion reais.

In addition to performing an important social function by enabling the provision of housing, this sector also fosters the national economy due to the significant amount of materials sold for the development of enterprises, job creation, and representing a solid investment option.

To ensure the development of the real estate sector, the availability of credit for acquiring real estate is essential for the market to be increasingly attractive and remain heated, with fiduciary alienation as the main form of guarantee available in Brazil<sup>1</sup>.

As it represents how the guarantee provided at the time of granting the credit will eventually be executed, this fact plays a crucial role in the availability and pricing of the credit.

Factors such as the procedure for possible enforcement of the guarantee, i.e., the eventual need to file a lawsuit or the possibility of extrajudicial enforcement of the guarantee, directly interfere with the cost of credit.

The basic rule of the cost of credit, objectively, can be understood as follows: the lower the risks, costs, and time for recovery of the amounts, the lower the interest available to the general population.

However, despite the existence of specific legislation governing the fiduciary guarantee, the Judiciary, using the most varied arguments, has been producing judgments in directions contrary to what the law establishes, creating the feared legal uncertainty.

## **2. Brief Contextualization of Real Estate Guarantees in Brazil**

Currently in Brazil, there are two main types of real estate guarantees used by the market: mortgage and fiduciary alienation.

About the mortgage, according to Carlos Roberto Gonçalves:

“In modern law, a mortgage is generally conceived and regulated as a security interest that consists of subjecting a property, preferably, to the payment of a debt owed by another, without removing it from the owner’s possession. If the solutio does not occur, the creditor may exert it, selling it judicially and having primacy over the proceeds of the auction, in order to collect the entire debt and its accessories.” (Gonçalves, 2017)

Regarding fiduciary alienation, according to Arnaldo Rizzardo:

The most important of the guarantees, and one of the great novelties of the system, consists of the fiduciary sale of the financed property. Article 22, caput, conceptualizes this transfer: “The fiduciary alienation regulated by this Law is the legal transaction by which the debtor, or fiduciary, with the scope of guarantee, contracts the transfer to the creditor, or fiduciary, of the resolvable property of immovable property”. (Rizzardo, 2014)

About mortgage guarantees, certain factors have contributed to their increasingly restricted use due to the increase in the cost of credit due to bureaucracy

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<sup>1</sup>SECOVI (2023). STJ reconhece importância da alienação fiduciária. Available at: <https://secovi.com.br/coluna-20230621>. Accessed on: November 21, 2023.

and risk for the resumption of credit.

We can cite as an example of risks in the recovery of mortgage credit the issue of preference of labor and tax credits, subjection of the guarantee to the eventual judicial reorganization plan, in addition to the issuance of precedent 308 by the Superior Court of Justice, making this type of guarantee ineffective concerning the purchaser of the property with the developer responsible for the delivery of the asset.

Analyzing the above situations, it is possible to identify the fragility of the guarantee to the detriment of uncertain situations, increasing the risk of the operation and, consequently, increasing the cost of credit.

In addition, if necessary, the execution of the guarantee, until the recent enactment of Law No. 14.711, of October 30, 2023 (General Framework for Guarantees), should be mandatorily carried out through the courts, which further increased the cost and term for the recovery of the amounts granted as loans.

Due to these factors, considering the need to institute a new type of guarantee that is more robust and less bureaucratic, through Law 9.514/97, the fiduciary sale of real estate was instituted in the Brazilian legal system.

With the institution of this modality, the asset offered as collateral ceases to be part of the debtor's assets, precariously entering the creditor's assets until the obligation is fully fulfilled.

By itself, such a situation already exempts the risk of the preference of possible tax and labor credits, as well as the effect of any judicial reorganization to the detriment of the debtor, since until the full payment of the debt occurs, the property is not part of its assets.

In addition, by establishing the possibility of extrajudicial enforcement of the guarantee, with the competent Real Estate Registry Office, the procedure for resumption of credit has become less bureaucratic and burdensome.

For these reasons, the fiduciary sale has currently become the main form of real estate guarantee used by the national market, since because it provides greater security, less bureaucracy, and burdensomeness in case of default, it allows the granting of credit at an average cost of 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.<sup>2</sup>

### **3. Legal Uncertainty and Its Consequences Concerning the Determination of Restitution of Surpluses in the Event of Negative Auctions**

As introduced in the topic above, factors such as the procedure, cost, and risk for eventual execution of the guarantee are the basic indicators for pricing the credit made available to the market.

We can interpret the basic rule of the cost of credit, objectively, as follows: the

<sup>2</sup>BANCO CENTRAL DO BRASIL. Taxa de Juros. Available at: <https://www.bcb.gov.br/estatisticas/txjuros>. Accessed on: September 19, 2023.

lower the risks, costs, and time to recover the amounts, the lower the interest available to the general population.

However, despite the existence of specific legislation governing the fiduciary guarantee, the Judiciary, using the most varied arguments, has been producing judgments in directions contrary to what the law establishes, creating the feared legal uncertainty.

As will be possible to observe below with the analysis of the case object of this comment, even though the law expressly provides for the exoneration of the creditor regarding the restitution of any amounts to the debtor if the two auctions required by law remain unsuccessful, the Court of Appeals of São Paulo, in judging civil appeal No. 1017164-55.2022.8.26.0562<sup>3</sup>, Arguing that such a rule was not “equitable”, it was decided not to apply the law, condemning the requested financial institution to the disbursement of amounts, an unpredictable and immeasurable situation at the time of credit pricing.

However, before we get into the subject itself, the lessons of Marcos Borges about the fiduciary guarantee are valid:

“In the fiduciary sale as collateral, the creditor will be the holder of the resolvable ownership of a movable or immovable non-fungible thing, transferred to him by the debtor, with the scope of guarantee. The concept of resolvable property, in turn, is extracted from article 1,361 caput, of the Civil Code, in which it is stated: “The resolvable property of a non-fungible movable thing that the debtor, with the scope of guarantee, transfers to the creditor is considered fiduciary”.

Hence when the property is resolved by the implementation of the condition or by the advent of the term, the real rights granted in its pendency are also understood to be resolved, and the owner, in whose favor the resolution is effected, can claim the thing from the power of the one who possesses or holds it.

It is, therefore, a property that is in force until the condition is implemented or before the advent of a certain term. In the fiduciary sale as collateral, for example, the property assigned to the fiduciary creditor is resolved when there is discharge of the debt by the fiduciary debtor. The resolvable property is also extinguished when, due to the default of the obligation, the property is consolidated in the name of the creditor for the purpose of enforcing the guarantee.” (Borges, 2023)

Considering the split of the property (resolvable/full) because of the fiduciary guarantee, the same occurs about the possession of the asset object of such contract, with the debtor exercising direct possession of the asset, while the creditor remains the indirect possession, a situation which, according to the French jurist Pothier<sup>4</sup>, can also be analyzed from the concepts of perfect and imperfect domains.

<sup>3</sup>TJSP; *Apelação Cível 1017164-55.2022.8.26.0562*; Relator (a): Neto Barbosa Ferreira; Órgão Julgador: 29ª Câmara de Direito Privado; Foro de Santos - 10ª Vara Cível; Data do Julgamento: 19/12/2022; Data de Registro: 19/12/2022

<sup>4</sup>POTHIER, Robert Joseph, *Traité du droit de domaine de la propriété*, in *Oeuvres de Pothier, contenant les traités du droit français*, apud BARRIÈRE, François, *La réception du trust au travers de la fiducie*. Paris: LITEC, 2004, p. 315.

The first is characterized by the acquisition of the fullness of the rights of use and enjoyment by the purchaser (direct possession), while the second is related to the resolvable property existing in favor of that of the creditor institution (indirect possession). If there is and persists in the state of default, the law provides for the possibility of extrajudicial enforcement of the guarantee, which must be carried out before the Real Estate Registry Office in which the property offered as collateral is registered.

Once the enforcement procedure has been initiated, the Registration Officer will proceed with the personal summons of the debtor so that within fifteen (15) days he or she can discharge the outstanding balance, under penalty of consolidation of full ownership in favor of the creditor<sup>5</sup>.

In the event of non-payment of the balance within the legal deadline, the Real Estate Registry Officer will issue the certificate of lapse of time, enabling the transfer of full ownership to the fiduciary creditor, who in turn is obliged to hold two public auctions aiming at the sale of the asset and settlement of the outstanding balance.

The first auction will be based on the appraisal value of the property stipulated at the time of the contract, while the second must take place at the value of the debt, added to the other expenses for execution, respecting the minimum value of 50% of the appraised value of the property.

In these two auctions required by law, if there is a sale of the property, the proceeds of the sale will be directed to settle the outstanding balance, and any surplus must be returned to the former debtor.

However, if the mandatory auctions are unsuccessful, the law expressly provides that the creditor will enjoy the free availability of the asset, without the obligation to return any surplus values<sup>6</sup>.

Such provision seeks to put an end to the previously existing relationship between the parties, preventing the legal transaction from extending for an indefinite period, since it is not possible to predict the date or the conditions under which the executed property will eventually be sold.

However, analyzing the terms of the judgment rendered in the judgment of civil appeal 1017164-55.2022.8.26.0562, it appears that the Court of Appeals of São Paulo did not even consider the terms of the sale of the property carried out by the defendant financial institution at a time after the mandatory auctions, to determine any surplus (which would still constitute an affront to the legislation in force).

<sup>5</sup>Art. 26. § 1, Law 9.514/97. For the purposes of the provisions of this article, the debtor and, if applicable, the third party settlor, at the request of the trustee, by the competent real estate registry officer, to satisfy, within fifteen (15) days, the installment due and those due up to the date of payment, the conventional interest, the penalties and other contractual charges, legal charges, including taxes, condominium contributions attributable to the property, and collection and summons costs.

<sup>6</sup>Art. 27, § 5, Law 9.514/97. If in the second auction there is no bid that meets the minimum reference for auction established in § 2, the fiduciary will be invested in the free availability of the property and exonerated from the obligation referred to in § 4 of this article. (Text given by Law No. 14,711 of 2023)

According to the terms of the decision rendered, the Bank was ordered to repay the difference between the value of the second auction and the value of the balance of the debt, let's see:

“It remained undisputed that the property was appraised, for the purposes of the 2nd. auction, for the amount of R\$ 2352800.01. Thus, it is the amount of R\$ 2352800.01 that should be considered as the price of the property for the purposes of adjudication, thus not being successful what was alleged by the appellant regarding the value for which the property was later sold to a third party, in a subsequent auction, which took place after its effective award. That said, it remains to verify the updated amount of the debt for March/2022, which, according to the appellant, would be R\$ 2203371.44, which, by the way, remained uncontroversial, since it was not specifically challenged by the appellants in the appellate court.”

Let's see what is stated in paragraph 3 of article 26-A of Law 9514/97, responsible for establishing the pricing parameters for the second mandatory auction:

“Article 26-A. The procedures for collection, purgation of arrears, consolidation of fiduciary property and auction arising from financing for the acquisition or construction of the debtor's residential property, except for the operations of the consortium system referred to in Law No. 11,795, of October 8, 2008, are subject to the special rules established in this article.

(...)

§ 3 In the second auction, the highest bid offered will be accepted as long as it is equal to or greater than the full amount of the debt guaranteed by the oldest fiduciary sale in force on the property, expenses, including notary fees, insurance premiums, legal charges, including taxes, and condominium contributions. (Included by Law No. 14,711, of 2023)”

With the simple reading of the rule above, it is possible to verify that for the second auction the amount of the debt must be considered, added to the expenses for execution and any existing debts on the guarantor property.

That said, when we analyze the decision rendered, there is the most absolute incongruity of result, as it determines that the restitution in favor of the debtor must be constituted by subtracting the amount stipulated for the second auction (which must observe the updated amount of the debt) and the updated value of the debt, that is, incorrect settlement of the judgment the final balance must be zero!

It is worth noting that the present result was obtained due to deliberate non-compliance with the specific rule on the matter, based on this fact by the alleged lack of equity in the current legal text, according to the following excerpt from the ruling:

“In other words, because of the provisions of paragraph 5, article 27, of Law No. 9514/97, transcribed above, after the auction of the asset was frustrated in the designated auctions, the debt of the fiduciary debtors, now appellants, to the fiduciary creditor, now appealed, was considered extinguished. Nevertheless, the

appellants are right about the perception of any remaining credit balance, calculated between the value of the debt updated and the price at which the property was awarded.” (...) “It does not seem equitable to impose on the fiduciary debtor the loss of the entire amount paid, if the asset is subsequently awarded.”

On the trial by equity, Tercio Sampaio Ferraz Jr.:

“The solution of disputes by equity is that which is obtained by the harmonious consideration of the concrete circumstances, which may result in an adjustment of the norm to the specificity of the situation so that the solution is fair” (Ferraz Jr., 1994)

However, in Brazil, as established in the sole paragraph of [article 140 of the Code of Civil Procedure](#), this type of trial is only allowed in the cases expressly provided for by law<sup>7</sup>, which is not the case in the present situation.

To understand the opposite would mean enabling the departure from the current legislation as a result of subjective factors that would have greater relevance than the law itself, completely making it impossible to build the legal certainty necessary for the development of the country.

In this sense, it is also the understanding of José Severo Caballero, former minister of the Argentine Supreme Court:

“In the present era, the emergence of the social and democratic State of law, which upholds freedom, justice, equity and other moral and political aspirations as the highest values of the legal system, cannot in mass society dispense with the law as the only instrument for achieving the realization of these values. However, legal certainty requires that, in terms of equity, they must be taken into account at the time of legislative creation, but in a subordinate manner in the judicial act in which they can only operate as moderators or as complements in the interpretation of the law”. (Caballero, 2008)

Also, on the impossibility of a trial by equity *contra legem*, we have the lesson of Jorge A. Rojas:

“Since then, a task has been set up by a court (whether single-member or collegiate), which will have to carry out a certain task, very specific by the way, which is none other than to settle the conflict that the parties submitted to its decision, through an award, through which they must put into effect the will of the law. or in some cases, by mitigating that will in an equitable manner, which does not mean that they do it *contra legem*, but in accordance with equity, or as it is also usually called, according to their best knowledge and understanding, or with a known truth and good faith, or with any of those formulas that in the same sense aim to mark a form of action of the court that does not subject it exclusively to the letter of the law, rather, it gives you greater leeway through your sound discretion”. (Rojas, 2008)

As transcribed above, for the aforementioned jurist, when deciding a certain case, the judge must enforce the will of the law, and in some cases may even

<sup>7</sup>Art. 140. O juiz não se exime de decidir sob a alegação de lacuna ou obscuridade do ordenamento jurídico. Parágrafo único. O juiz só decidirá por equidade nos casos previstos em lei.

equitably mitigate the application of the legislation, but never producing a judgment *contra legem*.

Finally, specifically in relation to the impossibility of using the trial by equity in Brazil in hypotheses not provided for by law, here is the lesson of Fábio Ulhoa Coelho:

“The trial by equity, in Brazilian law, is only allowed to the judge in cases delimited by law (CPC, art. 140, sole paragraph). That is, except in some situations, the judge can only add to the grounds of his sentence arguments that seek to demonstrate that the law is being applied. No matter how much the legal norm is made more flexible (through methods and types of interpretation, the identification and integration of gaps, the overcoming of antinomies, etc.), the judge must ordinarily argue that he is applying it. He should not base his decision on arguments that reveal or suggest that positive law is not being applied, except in cases where the law itself authorizes judgment by equity.” (Coelho, 2022)

Proceeding with the analysis of the decision in question, it can be seen that the judging court also bases its decision on the fact that it is necessary to interpret the rule according to the concrete situation, and it is not possible to simply apply the positive rule, let's see:

“In fact, as Maria Helena Diniz well teaches (Law of Introduction to the Brazilian Civil Code, Interpreted, Saraiva, ed. 1994, pgs. 141/142), “the magistrate, at all times, when applying a rule to the case *sub judice*, interprets it, researching its meaning. This is so, because the letter of the norm remains, but its meaning adapts to the changes that evolution and progress operate in social life. To interpret is, therefore, (...) to extract from the norm all that it contains, revealing its appropriate meaning for real life.”

The illustrious author adds that one of the functions of interpretation is to “temper the scope of the normative precept, to make it correspond to real and current needs of a social nature” (op.cit. - pg. 142).

Furthermore, it is necessary to bring up, because it is pertinent, a lesson by Cândido R. Dinamarco (*A Instrumentalidade do Processo* - São Paulo - 1986 - pp. 163 and 197), according to which one cannot “presuppose the process as an end in itself, without questioning its function before the substantial legal order”, adding that “a great significant milestone was the energetic affirmation of the process as an ethical and not merely a technical instrument”, conflict of interest resolution. That said, it must be agreed that in the analysis of the subject matter of this lawsuit, there is no way to disregard the possibility of encountering the existence of illicit enrichment in cases where the value of the award of the asset exceeds the amount of the debt of the fiduciary debtor.”

According to the lesson of the illustrious professor Maria Helena Diniz cited in the excerpt of the judgment above, the interpretation of the norms is essential for the legal text to remain updated and adapted to the changes that evolution and progress operate in social life, which is in no way discussed.

However, about the case in question, it had not been demonstrated, or even cited,

which social factor had eventually changed to enable the literal non-application of the rule.

The argument of alleged illicit enrichment of the creditor due to the legal permission, considering the obligation to refund amounts in case of negative auctions exonerated, already produced the same effects from the moment of its entry into force until the present day, and there is, therefore, no factor of social evolution that justifies the non-application of the law.

The decision is also based on the argument of the necessary interpretation of the legislator's will, let's see:

“As emphasized by the C. STJ, during the judgment of REsp No. 249.026/PR, in which Justice JOSÉ DELGADO (DJ 26.06.2000) was rapporteur, “one cannot rigidly cling to the cold letter of the law, but rather consider it with temperaments, because of the intention of the legislator.”

Therefore, and considering not only the “real and current needs of a social nature”, but also the true *raison d'être* of the process (“an ethical and not merely a technical instrument”, for the solution of conflicts of interest), the deepening of the study and reflection on the subject and, consequently, the change of understanding, is rigorous.”

Despite the citation about the need to interpret the intention of the legislator at the time of application of the law, when we analyze the legal text, we reach an opposite conclusion.

The text of the law, by exonerating the creditor from the obligation to repay amounts if the auctions remain unsuccessful, is objective and clear and does not contain evidence of subjectivity capable of justifying any interpretation.

Therefore, under the illusory cloak of the necessary normative interpretation, what is seen is the direct interference of the Judiciary in legislative matters, leaving judicial activism characterized.

In this sense, the work of Georges Abboud reads:

“Activism is any judicial decision that is based on personal convictions, the interpreter's sense of justice to the detriment of the prevailing legality, legality here understood as the legitimacy of the legal system, and not as mere strict positivism or subsumption of the fact to the normative text.

In short, activism, in Brazilian terms, should be considered the judicial pronouncement that replaces the prevailing legality with convictions. Hence our criticism of judicial discretion, since it is through it that, currently, the use of the judge's personal convictions instead of normative sources is legitimized.” (Abboud, 2014)

Corroborating the legislator's lack of intention regarding the eventual restitution of amounts in favor of the debtor after the unsuccessful auctions have been held, it should be noted that very recently the law responsible for regulating the fiduciary guarantee of real estate has undergone significant reform because of the enactment of the Legal Framework for Guarantees, provided for in Law No. 14,711 enacted on October 30, 2023.

However, even though the new legislation promotes reforms, including in the text of § 5 of article 27 of Law 9514/97, the provision for exemption from the responsibility for restitution of values in case of negative auctions remained completely unchanged.

Thus, the total absence of intention on the part of the legislator to stipulate a right to the contrary is fully confirmed.

#### 4. Conclusion

Having analyzed these issues, according to José Luiz Ragazzi, it is essential to consider that the availability of credits in the market reaches far beyond the actors involved in any lawsuit, producing impacts on the entire community to the extent that the relationships of trust and predictability expected by the market, in general, are compromised as a result of the legal uncertainty produced by a decision that fails to apply the legislation in force<sup>8</sup>.

Therefore, considering the Brazilian reality, translated into a housing deficit of 5.8 million dwellings found in the last survey carried out by the Ministry of Regional Development, we have that the stimulation of insecurity related to the main type of guarantee concerning real estate credits did not contribute to the provision of an equitable right to the community, since when facing losses resulting from judicial decisions contrary to the text of the law. The cost of credit will certainly be impacted, mainly affecting the poorest part of the population (Brasil).

#### Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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