

What if your real property in China is sold by an unauthorized person?

Description

It happens not only in China. There seem to be property scam all over the world, click [here](#) and [here](#).

A recent case intrigues me a lot.

Facts: an old Shanghai lady who become an American citizen back in 1990s left her apartment in down town area of Shanghai to her niece for use and care. Recently when she came back to Shanghai, she found that her apartment was now owned by the ex-husband of her niece. Evidences show that the apartment was firstly sold, *prima facie* to a friend of the niece and then sold back to the niece. Upon divorce, the niece gave the apartment to her husband who is now the owner. The first sale must be carried without with forged signature as the Shanghai lady didn't enter China at the time of sale.

Here is a typical case involving unauthorized disposal of others' property, a relatively complex legal issue under Chinese laws. For more discussion in this regard, you can refer to "[Unentitled disposal of assets: what are the legal effects under China laws?](#)" and "[Can I sell your property without your consent?](#)".

This post is however focusing on practical litigation strategy and cause of action in such cases.

There are basically two options for the victim true owner who is deprived of his or her ownership of the property in question.

1. Sue to Annul the Sale Contract and consequently Ask for Restitution

This is the traditional cause of action or legal basis for true owner to take back his or her property.

By this route, the plaintiff will base the lawsuit on Article 52 of China Contract Law which provides to the effect that a contract resulted from collusion in bad faith between the parties thereto and thereby harming the interests of the state, collective or a third party is void and that a contract that is in violation of compulsory laws shall be void. According to China Contract Law, when a contract is annulled by court, the properties acquired thereunder shall be returned (or damages shall be paid if return is not possible), and in light of the case mentioned above, the ownership of the apartment will be ordered to be changed back to original state prior to the sale.

This is exactly what the lawyer representing the plaintiff is doing, namely, plaintiff sued to annul the sale contract with the friend of the niece being the buyer.

However, practically speaking, such route is set to be bumpy and risky.

(1) To prove a contract is concluded as a result of collusion in bad faith between the parties, the plaintiff needs to produce evidences showing "bad faith", a state of mind that is very elusive to prove. In other words, the burden of proof on the party of the plaintiff can be overwhelmingly cumbersome and

onerous indeed.

(2) To argue that the unauthorized sale of the property is in violation of compulsory laws, it has become an almost impossible mission. That a contract of an unauthorized disposal of someone's property is void has been taken for granted for long in Chinese judiciary, a clear tendency of the judiciary in protecting static ownership right. However, This conventional view has been seriously challenged when Chins Supreme Court issued a judicial interpretation on legal issues related to sale contract in May of 2012. Article 3 of this judicial interpretation provides: where a party to the sale contract claims that the contract should be avoided for the reason that at the time of conclusion of the contract the seller does have ownership in the goods or has no power to dispose of the goods, the people's courts shall not support such claims; in case that the seller fails to have the ownership of the goods transferred due to lack of ownership or power to dispose of and thus the buyer requests the seller to assume default liability or request to rescind the contract and claim damages, the people's courts shall support such requests. This has clearly manifested a change of view from top judicial authority in regard of unentitled disposal contract.

What's more, as in the case mentioned above, such route cannot finally solve the whole issue in one lawsuit because the real property has been transferred for a second time for which another contract is in place which is not brought under review by court in this lawsuit (Chinese courts won't review and avoid two different contracts in one lawsuit).

2. Alternate Option to Base Lawsuit on Article 106 of China Property Law

Article 106 of China Property Law provides:

where a piece of real or personal property is transferred to a transferee by a person having no such power, the property owner shall have the right to chase it back; unless otherwise provided by laws, in the following circumstances, the transferee shall nevertheless acquire the ownership in the real or personal property:

- (a) transferee is of good faith at the time of transfer of the property;
- (b) the transfer price is reasonable;
- (c) the real or personal property in question that ought to be registered according to laws has been registered, and those not subject to registration have been delivered to the transferee;

where the transferee acquires the ownership in such real or personal property in accordance with preceding paragraph, previous owner shall have the right to claim damages from the unauthorized disposer.

This provision has established that bona fide acquisition doctrine can now apply to real properties in China. Most discussion on this provision focuses on how the bona fide acquisition rule should apply in practice, ignoring the legal implication of the first sentence of the first paragraph of this Article 106.

Based on the first sentence of the first paragraph of this Article 106, the true owner of the property that has been mistakenly disposed of by another outright has the right to take back the said property so

long as he or she can prove the fact that the disposal of the property is not authorized or consented by him or her. This substantive understanding when translated into procedural law means that the true owner shall be entitled to raise an outright claim to take back the property in question regardless of any other factors. Of course, whether such claim will stand to defense by the defendant is another matter to be considered during the lawsuit.

In the case mentioned above, the old lady can now directly sue the current owner, the ex-husband of her niece instead of going after the friend of her niece.

Now comes into play the bona fide acquisition doctrine that will be surely brought up by the defendant who will argue that he or she is a good faith or bona fide purchaser. By doing this, the defendant shall have the burden of proof to prove he or she is in good faith at the time of transfer of the property. This will effectively shift the burden of proof to prove bona fide from the plaintiff to the defendant.

However, it shall be noted that in practice, who has the burden of proof to prove the state of mind (bad faith or good faith) is divided in practice with many arguing that the plaintiff or the true owner shall have to prove the bad faith of the purchaser in order to win his or her case. Again, in the case of controversy, it is the time to get your lawyer to wade in.

On the other hand, bona fide purchasing in the case of real estate sale by fake owner or impostor is subject to questioning as to whether such a doctrine should apply in this situation at all.

Date Created

November 2014

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