

SIMPLIFIED ACTION PROCEEDING: NEW EXPERIENCE. GENERALIZATION OF COURT PRACTICE: A CASE STUDY OF OBOLONSKYI DISTRICT COURT OF KYIV

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1. INTRODUCTION

Simplified action proceeding is a novelty of the Civil Procedure Code of Ukraine (hereinafter – CPC) in the wording of October 03, 2017. The introduction of such institutions as small cases, the principle of proportionality of legal proceedings, simplified action proceeding, written form of case consideration, cases of negligible complexity, etc., requires a detailed study and generalization of the application practice.

The introduction of simplified action proceedings is a positive step that is in line with the global trends in the regulation of simplified action proceedings and procedures. Its task is a timely consideration of certain categories of civil cases established by law or assigned to such by a court, without the obligatory representation by a lawyer and, if possible, without parties notification on the basis of the materials available in the case.

The question of assigning a case to a small category directly affects the rights of the parties which they can realize in the course of consideration and resolution of the case, participation in the court session, as well as appeals against decisions made by the court and, therefore, is extremely important for the proper realization of the right of persons to justice and the right to be heard by the court.

Kyiv Obolonskyi District Court has generalized the court practice on the topic “*Simplified action proceeding: new experience*” for the period from December 15, 2017 and the first half of 2018. Some of this results we are going to present at this conference and share with other participants some of our reamarks.

According to statistical data for the first half of 2018, 6035 civil cases and materials were handled by judges (including 65 cases arising from labor relations), 3206 cases/materials were received during this period (31 cases), 3164 civil cases (including 27 cases arising from labor relations) and materials were considered.

At the same time, it is not possible to provide statistics on the number of cases considered under the rules of simplified action proceedings, compared to the total number of cases pending to be considered under action procedure, as well as the number of decrees

on transition to consideration of the case under the rules of general proceedings, since Kyiv Obolonskyi District Court does not hold the records, which, in our opinion, is a disadvantage, which in future will not allow a more detailed generalization of the judicial practices.

2. PROBLEMS OF APPLICATION OF CRITERIA FOR DETERMINING CASES TO BE CONSIDERED IN A SIMPLIFIED ACTION PROCEEDING

Changes to the CPC stipulate that civil proceedings shall be conducted in the order of the clerk proceedings, the action proceedings (general or simplified) and separate proceedings. Separate provision is made for special procedures for consideration of applications for recognition of decisions of foreign courts, international commercial arbitrations in Ukraine, etc.

The general proceedings are intended for consideration of cases which due to complexity or other circumstances are inappropriate to be considered in simplified action proceedings.

Simplified action proceeding in accordance with Art. 19 of the CPC of Ukraine is intended for consideration of:

- 1) small cases;
- 2) cases arising from labor relations;
- 3) cases concerning the granting by the court of the permission to temporarily take the child abroad to a parent who lives separately from a child, who does not have an arrears for alimony payment and who has been denied by the other parent the provision of a notarized consent for such departure;
- 4) cases of insignificant complexity and other cases, which priority is a quick resolution of the case.

All these cases, which are considered in simplified proceedings, can be divided into two categories: those that are defined by law and those that are assigned to such by the court.

In particular, according to Part 6 of Art. 19 of the CPC of Ukraine small cases are: cases in which the value of a claim does not exceed one hundred subsistence minimums for able-bodied persons; cases of negligible complexity, which were recognized by the court as small, except for cases which are subject to consideration only under the rules of general proceedings, and cases where the value of the claim exceeds the size of five hundred subsistence minimums for able-bodied persons.

In accordance with Part 4 of Art. 274 of the CPC of Ukraine the following cases cannot be considered in the form of simplified proceeding: cases arising from family relations, except for disputes on the recovery of alimony and the division of property of the spouses; cases regarding inheritance; cases of privatization of the state housing stock; cases regarding the recognition of assets as unsubstantiated and claims of them in accordance with chapter 12 of this section; cases in which the value of the claim exceeds five hundred subsistence minimums for able-bodied persons; other demands combined with claims in the disputes specified in paragraphs 1 to 5 of this section.

The generalization made it clear that the court appoints civil cases for consideration under simplified procedure in such cases as collection of arrears under a loan agreement; debt collection under a credit agreement; collecting alimony; reduction of alimony; increase of alimony; recognition of a person as a such who has lost the right to use a housing facility; compensation for damage caused by a road accident; reimbursement of expenses related to studying at a higher educational institution; determining the procedure for using an apart-

ment that is in common partial ownership; recognition of the contract as invalid; marriage annulment; cases of the collection of average earnings during the delay of payment of wages making an employee redundant; cases on eviction and removal from the registration; etc.

At the same time, the generalization showed cases when, during studying the lawsuit and resolving the issue of opening a case and appointing a hearing in the simplified or general procedure, the problems arose concerning the fact that the CPC of Ukraine clearly stipulates that such cases should be considered under simplified proceedings, however, taking into account certain features (in particular, taking into account the provisions of Articles 11 and 3 of Article 274 of the CPC of Ukraine), in the opinion of the court they should be appointed for consideration under general proceedings.

Thus, in the opinion of the court, labor disputes are to be considered under general action procedure, in particular, a civil case in the lawsuit of F. to Kyiv City Employment Center on the recognition as unlawful and the cancellation of orders for bringing to disciplinary liability and the order of dismissal, renewal at work and the recovery of average earnings during forced unemployment. The claims are motivated by the fact that during September 2018 the defendant had declared two reprimands to the plaintiff, which she considered illegal. By order of the Director of Kyiv City Employment Center dated September 11, 2018, the plaintiff is dismissed from the post of deputy director of Obolonskyi District Branch of Kyiv City Employment Center. The said order is considered unlawful by the plaintiff. In the court's opinion, it is not reasonable to consider the dispute under the rules of simplified lawsuit, as in this case, it is necessary to conduct preparatory proceedings for clarification, in particular, for the final determination of the subject of the dispute and the nature of the litigious legal relationships, claims and the composition of the participants of the case.

Also, the CPC of Ukraine determines that disputes regarding the payment of alimony should be considered under simplified procedure. Also, according to Part 1 of Art. 161 of the CPC of Ukraine, a court may issue a court order if a claim is filed for a claim for the payment of maintenance for a single child - one quarter, for two children - one third, for three and more children - half the earnings (income) of the alimony payer, but not more than ten subsistence minimums for a child of the appropriate age for each child, if this requirement is not related to the establishment or contest of paternity (motherhood) and the need to involve other interested persons; or if a claim for child support has been claimed in a solid monetary amount of 50 per cent of the subsistence minimum for a child of the appropriate age, if this requirement is not related to the establishment or contest of paternity (maternity) and the need to involve other interested persons.

A person has the right to apply to the court with the requirements specified in section one of this article, in clerk or in a simplified proceeding on his or her choice.

Obolonskyi district court of Kyiv appoints for consideration under general procedure some disputes about the recovery of alimony, where claims are different from those specified in Part 1 of Art. 161 of the CPC of Ukraine.

One more vivid example which can illustrate this problem are the cases of appointment of alimony.

For example, the plaintiff appealed to a court on September 12, 2018, in a suit in which she asks to charge the defendant alimony in favor of her maintenance, in the amount of $\frac{1}{4}$ of all types of his earnings on a monthly basis, starting with the collection from the day the claim was filed and until 03.07.2021. Her claims are motivated by the fact that she was in the registered marriage with the defendant until 04.07.2018. They have two children from the marriage. The son, RG, born in 2012, is suffering from autism and is a disabled person. The plaintiff is con-

stantly with her son, cares for him and has the right to be detained from her former husband. The court, having considered the materials of this statement of claim, came to the conclusion that opening of general proceedings in this case is required and appointed a preparatory trial, taking into account the circumstances of the case and its significance for the plaintiff.

In another case, the decision of Obolonskyi district court of Kyiv opened a general lawsuit and appointed a preparatory trial in a civil case on the claim of V. to B. on the collection of arrears on alimony, taking into account inflationary losses, penalties and alimony for maintenance during the period of adulthood, where the claimant appealed to the court with a suit on 05.09.2018, in which she asks to recover the arrears on alimony from the defendant, taking into account inflationary losses, penalties and alimony on the maintenance during the period of adulthood in the amount of 719289.13 UAH. Her claim is motivated by the fact that the decision of Obolonskyi district court of Kyiv dated May 13, 2005 approved to recover from the defendant in support of the plaintiff the alimony for the maintenance of two children in the amount of 1/3 of all types of his earnings. The decision was not executed and as of September 3, 2018, arrears have been created. In addition, she asks to collect the alimony for the maintenance of an adult daughter for the period from 13.10.2016 to 30.06.2017 in connection with the education of the latter. The motive for the court to make such a decision was the price of a claim that exceeded one hundred subsistence minimums for able-bodied persons.

The CPC of Ukraine states that disputes concerning the division of property of spouses should be considered under the rules of simplified proceedings. However, it is impossible to agree with such a legislative position. Since, if the price of a claim exceeds one hundred subsistence minimums for able-bodied persons, then the court cannot recognize such a case as small.

In particular, in the case of the suit S.O. to S.A. on the recognition of immovable property and money resources as personal property. The claims are motivated by the fact that the plaintiff had been registered in the marriage with the defendant since 1980. The plaintiff purchased an apartment, worth 1193400.00 UAH, with the funds belonging to her personally. She asks to acknowledge the right of private personal property to the apartment № 84 in the building №42-a on Heroiv Dnipra Street in Kyiv for the plaintiff S.O. Also, she asks to acknowledge the right of private personal property to money resources in the amount of 9046,04 USD and 180,000.00 UAH. The court, in this case, came to the conclusion that it requires to be considered in accordance with the rules of general proceedings because the value of the claim exceeds one hundred subsistence minimums for able-bodied persons.

Proceeding from the fact that the simplified action proceeding is intended to deal with the simplest cases, in proportion to the requirements claimed, the priority of the written form, as well as in the absence of mandatory representation, it is necessary to clearly define in the law which cases can be considered in simplified proceedings. Taking into account the above, in our opinion, the court practice should develop clear, transparent, understandable criteria for assigning particular categories of cases to small ones, and accordingly, to consider these cases under simplified procedure.

3. FEATURES OF THE SIMPLIFIED ACTION PROCEEDING IN CIVIL PROCEEDINGS

One of the peculiarities of consideration of cases in simplified proceedings is that the court examines cases in the form of simplified proceedings within a reasonable time, but not more than sixty days from the date of opening of proceedings in the case.

Also, the peculiarities of consideration of cases in simplified proceedings are, in particular: the consideration of the case on the merits under simplified procedure begins with the opening of the first court session or thirty days from the day the proceedings are opened, unless a court hearing is held; preparatory meeting in case of simplified proceedings is not conducted; the first court hearing in the case shall be held not later than thirty days from the date of opening of the proceeding; no litigation is conducted (Article 279 of the CPC of Ukraine).

According to the current CPC, there is no mandatory representation of the participants in the case by a lawyer in the simplified proceedings (Part 2 of Article 60 of the CPC of Ukraine). Also, as seen from the provisions of Art. 279 of the CPC of Ukraine, consideration of the case under simplified procedure may take place without notice to the parties, meaning the priority is given to the written proceedings in the case, which is a novelty of the CPC of 2017.

An important feature of simplified proceedings is also that, according to Part 3 of Art. 389 of the CPC of Ukraine, court decisions in small cases are not subject to appeal in cassation. There are exceptions only when: a) the cassation appeal concerns a right that is fundamental to the formation of a single law enforcement practice; b) the person submitting the cassation appeal, in accordance with this Code, is not able to refute the circumstances established by the contested court decision in the course of consideration of another case; c) the case represents a significant public interest or is of exceptional importance to the party who filed the appeal; d) the court of first instance has classified the case as a small one by mistake (this is the reason for the mandatory cancellation of the decision and referral of the case for a new consideration - item 7 part 1 article 411 of the CPC).

Also, in accordance with item 7, part 3 of Art. 376 of the CPC of Ukraine, if the court considered under simplified procedure a case that was subject to review in accordance with the rules of the general proceedings, it was considered a violation of the rules of procedural law and is a compulsory basis for the annulment of the court decision of the court of first instance and the adoption of a new decision.

In view of this, the question of choosing a procedure for reviewing a case in a simplified or general proceedings is extremely important.

The court decides on the consideration of the case under simplified procedure in the decision on opening of proceedings. In particular, following the results of consideration of the relevant petition of the plaintiff, the court, taking into account the specific circumstances of the case, may: 1) satisfy the petition and determine the term for the defendant to submit an application with objections regarding the consideration of the case under simplified procedure; or 2) refuse to satisfy the petition and to consider the case according to the rules of the general proceedings.

If the court comes to a conclusion on the consideration of the case under simplified procedure, on the basis of the results of consideration of the petition of the plaintiff, it indicates this in the decision to open the proceedings.

If the defendant within the defined by the court term submits a statement of objections against the consideration of the case under simplified procedure, the court, depending on the reasonableness of the objections of the defendant, decides to: 1) leave the defendant's application without satisfaction; 2) consider the case according to the rules of the general proceedings and replace of the meeting for consideration of the case on the merits with the preparatory meeting.

If the defendant fails to file such objections within the term established by the court, he/she has the right to initiate the transition to the consideration of the case ac-

ording to the rules of the general proceedings only if he proves that he/she missed the term for valid reasons.

If the court has decided to consider the case under simplified procedure, but made the subsequent decision to consider the case according to the rules of the general proceedings, the consideration of the case begins with the stage of opening the proceedings. In such a case, the return to the case under the rules of simplified proceedings is not allowed.

The court may refuse to satisfy a party's request to hear a case in a court session with the notification of the parties for the simultaneous existence of the following conditions: 1) the subject of the claim is the collection of a monetary amount not exceeding the size of one hundred subsistence minimums for able-bodied persons; 2) the nature of the litigious legal relationship and the subject of evidence in the case do not require the holding of a court session with the notification of the parties for full and complete establishment of the circumstances of the case.

According to Art. 193 of the CPC of Ukraine in case of filing a counterclaim in a case considered under the rules of simplified proceedings, the court decides on the transition to the consideration of the case by the rules of general proceedings.

In our opinion, it is worth paying attention to such a procedural moment when the court makes its decision to consider the case in a simplified procedure without notifying the parties, and then concludes that it is necessary to appoint a case for consideration under simplified procedure with the call of the parties to the case. As a general rule, according to Part 5 of Art. 279 of the CPC of Ukraine, the court examines the case in the form of simplified proceedings without informing the parties on the materials available in the case, in the absence of a contrary petition of either party. At the request of one of the parties or on its own initiative, the court proceedings are conducted in a court session with the notification (summoning) of the parties.

Thus, having considered the materials of the claim statement of V.S. to V.M. about the increase in alimony, the court gave the ruling on January 29, 2018, which opened the proceedings and appointed the case for consideration under simplified procedure without notifying the parties. The plaintiff appealed to the court with a claim in which she requested to change the amount of alimony charged from the plaintiff in favor of the defendant for the maintenance of her daughter, V.Y., on January 6, 2004, having increased their size to 1/3 of all kinds of earnings (income) but not less than 50% of the subsistence minimum for a child of the corresponding age on a monthly basis, starting from the day the decision is made and the child is fully admitted. The claims are motivated by the fact that on June 9, 2009, the decision of the Borodyanka district court of Kyiv region ordered to collect from the defendant in favor of the plaintiff for the maintenance of V.Y. maintenance in the amount of 1/3 of all types of earnings, but not less than 30% of the subsistence minimum for a child of the corresponding age on a monthly basis. The minimum subsistence allowance per child cannot be less than 50% of the subsistence minimum for a child of the appropriate age. After examining the materials submitted to the court, the court concluded that it was necessary to appoint a case for consideration under simplified procedure with the summons of the parties in the case, as decided by the resolution dated April 13, 2018, since the defendant did not receive a ruling to open a simplified proceeding and did not send a reference to claim accordingly.

The court decision of January 15, 2018 opened the proceedings and appointed a case on the claim of G. to the Limited Liability Company "P", T., L., third person: Private Joint-Stock Company "Y." ("European Insurance Union"), on compensation for damage caused

by a road accident to a simplified procedure without notifying the parties. The plaintiff appealed to the court in a suit in which she asks to recover from the defendants the pecuniary damage suffered by the plaintiff's property in the amount of 38863.94 UAH, expenses for conducting an examination regarding the assessment of the amount of material damage in the amount of 890.00 UAH, the cost of legal aid of 5000.00 UAH, as well as 640.00 UAH which is the cost of payment of court fees. The requirements are motivated by the fact that on April 10, 2017 an accident happened involving the car "Volkswagen" d.n. AA5872OR belonging to the defendant T. and the car "Mitsubishi" d.n. AM1111AM that belonged to the plaintiff at the time of an accident. As a result of an accident, the property of the claimant was damaged, the amount of damage is confirmed by the conclusion of the automobile product examination. After examining the materials submitted to the court, the court reached the conclusion that it is necessary to appoint a case for consideration in the form of a simplified procedure with the summons of the parties in the case based on the submitted references and responses to the references, which was decided on the corresponding court order dated April 13, 2018.

In the course of this generalization, several more cases were opened, the consideration of which was initiated under the rules of simplified proceedings, after which a decision was passed on the transition to the consideration by the rules of the general proceedings. In particular, simplified proceedings in the civil case on the claim of B.T. to B.S. for the recovery of alimony (case number 756/3133/18, proceedings number 2/756/3365/18) was opened by the decision of Obolonskyi district court of Kyiv dated 21.03.2018. The plaintiff appealed to the court with a claim, in which she asked to collect alimony from the defendant in favor of the plaintiff for the maintenance of a daughter in the amount of 1/3 of all kinds of earnings, justifying the claims by voluntarily failing to arrange for the child's maintenance. However, in the future, the court, by its ruling of May 23, 2018, on the grounds for the full and comprehensive consideration of the case on merits, in order to fully clarify all the circumstances, the objective and proper assessment of the evidence, concluded that the said civil case is subject to review in the order of general proceedings. Thus, by the decision of Obolonskyi district court of Kyiv on September 18, 2018, the suit is satisfied, alimony is taken from Bezsmertnyi Serhiy Oleksandrovykh in favor of Bezsmertna Tetiana Mykolaivna for the maintenance of the daughter in the amount of 1/3 part of all types of earnings (income) per month, but not less 50% of the subsistence minimum for a child of the corresponding age, starting from 07.03.2018 and until the child reaches the age of majority.

In addition, the decision of Obolonskyi district court of Kyiv of June 14, 2018 appointed a case to the general action procedure of civil proceedings in a suit of the Public Joint-Stock Company Commercial Bank "PrivatBank" to T. on debt collection under a loan agreement, with reference to the decision of Obolonskyi District Court of Kyiv dated 02.02.2018 in a civil case in a suit of the Public Joint Stock Company Commercial Bank "PrivatBank" to T. on the collection of debt under a loan agreement by which simplified action proceedings is opened. Due to the nature of the litigious legal relationship, the court opened a discussion on the possibility of transition to the order of general proceedings for consideration of the case, taking into account the opinion of the defendant's representative, the court decided to consider the said civil case under general procedure. By the decision of Obolonskyi district court of Kyiv on August 14, 2018, the satisfaction of the claims of Joint Stock Company Commercial Bank "PrivatBank" to T. on collection of debts was refused.

Also, in other civil case the statement of the defendant Y. on the consideration of the case in the general proceedings was satisfied. The court decided in general action proceed-

ings in a civil case under the lawsuit of the Union of the co-owners of the multi-apartment house “Kvazar-10” to Y. on the collection of arrears for housing and communal services, with reference to the fact that by the decision of Obolonskyi district court of Kyiv of 01.02.2018 simplified action proceeding was opened in the civil case, however, on February 16, 2018, a statement from the defendant was received through the court office with objections against the consideration of the case in the form of simplified proceedings, since the consideration of the case under simplified procedure may be detrimental to the rights and interests of the defendant, and the reasons given in the statement of claim are ungrounded because they consist of incomplete clarifications of all circumstances, biased evaluation of the information that is available to the plaintiff and are made in the absence of appropriate and admissible evidence on the basis of which it is possible to come to unambiguous conclusion about implicit responsibility of the defendant. At present, the court decision in this case is not resolved.

By the decision of Obolonskyi district court of Kyiv of 02.12.2018 it was decided to accept the claim for consideration and open a simplified proceeding on the claim of JSCB “Privat Bank” to B. on collection of debt under a loan agreement. However, on April 13, 2018, the defendant submitted a statement of objections to the consideration of the case in court in the form of a simplified proceedings and requested that the case be considered on the merits under general procedure. In her statement, the defendant referred to the fact that she had doubts about a number of documents provided by the plaintiff, so she asks the court to examine the originals in the court session. Thus, by the decision of Obolonskyi District Court of Kyiv dated May 4, 2018, a suit on the claim of JSCB “Privat Bank” to B. on the collection of arrears under a loan agreement was appointed to be considered under general procedure, and by the decision of 10.07.2018 the claims of JSCB “PrivatBank” were partially satisfied, reducing the amount of fines.

Also, it is worth to pay attention to the proceedings on the lawsuit of O.O. to O.A. on the recovery of alimony, where by the decision of Obolonskyi District Court of Kyiv dated 21.03.2018 in a civil case on a claim of O.O. to O.A. on the recovery of alimony simplified action proceeding was opened. The plaintiff appealed to the court in a suit, in which she asks to recover alimony from the defendant in favor of the plaintiff for the maintenance of her son O.A.O., born on December 19, 2007, in the amount of 1/4 of all kinds of earnings (income), but not less than 50% of the subsistence minimums for a child of the corresponding age on a monthly basis, as well as for the maintenance of the daughter O.V., born on July 5, 2005, in the amount of 1/4 of all kinds of earnings (income), but not less than 50% of the subsistence minimum for a child of the corresponding age on a monthly basis starting collection from the day of filing the claim to the day when the children reach the age of majority. The demands are motivated by the fact that the children live with the plaintiff and are on her maintenance. The defendant does not provide assistance in the maintenance of children. Taking into account the circumstances of the case and the claims, the court considered that for the full and comprehensive consideration of the case on merits, in order to fully clarify all the circumstances, the objective and proper assessment of the evidence, the indicated civil case is subject to consideration under general proceedings. An out-of-court decision on the case satisfied the demands of the claim.

Taking into account the above, in our opinion, the court practice should develop an established procedure for determining in which cases the court can move from simplified proceedings to general proceedings, if the proceedings are open before the new edition of

the CPC of Ukraine comes into force, but the parties wish to consider it in an order of simplified proceedings etc.

During the generalization, it was established that the judges of Kyiv Obolonskyi District Court for the period from December 15, 2017 and the first half of 2018 did not experience the problems and typical mistakes that usually arise during the consideration of civil cases under simplified procedure.

However, in our opinion, it is worthwhile to wait for the practice of courts of appeal and cassation to consider civil cases in the order of simplified and general proceedings to develop a clear practice of assigning cases to small ones and those that should be considered under the rules of simplified proceedings.