

주택임대차보호법상 임차인의 대항력에 관한 개선 방안

Improvements about the Opposing Power of Tenant on the Housing Lease Protection Act

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요약

우리나라 주택임대차보호법은 민법의 특별법으로 국민의 주거생활의 안정을 보장하기 위하여 1981년 3월 5일 법률 제3379호로 제정된 이후 지금까지 15차례의 개정을 통하여 유래를 찾아볼 수 없을 정도로 무주택영세민의 권익보호에 앞장서 왔다. 그러나 급히 서둘러 만든 입법이어서 법조문 제3조 제1항 “주택임차인이 임차주택을 인도받고 주민등록까지 마치면 그 다음날부터 그 주택의 소유자가 제3자로 변경되더라도 그 제3자에 대하여 임차권을 가지고서 대항할 수 있다”는 대항력 부분에 있어서 시행 당초부터 무주택영세민의 보호취지에 역행한다는 문제점이 노출되었던 것이 사실이다. 또한 이 조항이 오히려 사회적 약자들의 주거문제를 더욱 심각하게 만들었고, 국가는 이에 대한 대책이나 보호방법을 현실에 맞추어 개정하지 못한 이유로 지금까지 다양한 문제들이 제기되어 주택임대차와 관련된 분쟁들이 많이 발생되고 있다. 따라서 본 논문에서는 임차인의 주거안정을 위하여 주택임대차보호법의 대항력에 대한 문제점을 도출하고, 외국입법례를 통하여 주택임차인들에게 현실적으로 주거안정에 기여할 수 있는 개선방안을 제시하고자 한다.

■ 중심어 : | 주택임대차보호법 | 대항력 | 확정일자 | 주민등록 | 임차인 |

Abstract

The Korean Housing Lease Act is special law of Civil Code and was enacted from March 5, 1981 as Law No. 3379 to guarantee the stability of residential life. And until January 6, 2015 there were 15 times revisions to protect the right of homeless people. However, it is true that many problems are exposed from enforcement. Because the processing without sufficient review of legislation. and it was enacted very quickly, so, at the part of opposing power that the Article 3 Paragraph 1 “if the housing tenant was delivered rental housing and finish the resident registration, from the day after even if the owner of the house was changed as third party tenant can resist with lease right”. In addition, this provision made housing problems of the socially disadvantaged more seriously and the country did not made any way to protect this problems so many issues have been raised and a lot of disputes relating to Housing Lease. Therefore, in this paper derives a problem about opposing power of the Housing Lease Act for tenants of residential stability, and through the foreign legislation case, it propose the improvement to contribute to the residential stability realistically.

■ keyword : | Housing Lease Protection Act | Opposing Power | Fixed Date | Resident Registration | Tenant |

I. Introduction

1. Significance

According to the statistics by topic of National Statistical Office Korea 2013, the housing supply rate seems 116.7% nationally[1]. Meantime thanks to the increasing supply of housing construction by government the housing shortage problem has been greatly improved, realistically, considering many multi-housing owners who have more than two houses, cozy and comfortable residential stability of the homeless poor people is bound to be a social problem.

The Housing Lease Act enacted by recognizing the special legal status of socially disadvantaged and in order to ensure the stability of the tenant's right to life and living life which enacted in March 5, 1981 (Law No. 3379). After that, as needed in the course of law enforcement it revised 15 times until January 16, 2015 reasonably to fit the reality and it has reached today. However, sought the protection of different angles on housing tenants by a number of new or amendment provisions in the several amendments, the amendment was too poor to protect, so, the damage of the homeless poor are still continuing. Especially among them, due to uncertain interpretation, there is a problem that the insufficient part of the tenant protection in the Article 3 Paragraph 1, and it pointed out that unable to keep up with the legislative intent of Housing Lease Protection Act, So, through the modify and supplement as the dimension for society not civil as soon as possible, it deemed to protect the residential living of homeless poor people actively.

Thus, in this paper, through the foreign legislation case, we analyzed and compared opposing power of Article 3 Paragraph 1 from the viewpoint of protection of the Homeless poor, after then, finding the point of problems and present a reasonable

improvement for residential stability of housing tenants.

2. Preceding studies

Yoon-Jik Gwak[2] said that According to the Housing Lease Protection Act Article 3 Paragraph 1, even though "delivery and resident registration" are equipped, its effect is not occurs immediately, occurs from "next day". Therefore, even if tenant moved into the housing in the morning and finish the resident registration, if the mortgage and etc. were set up to its housing, opposing power is not occurs to the person who acquired the real right. So, eventually the tenant cannot be protected. Thus, they point out as "The next day" which provisions of this Act must be deleted.

Hak-Dong Kim·Jeung-Han Kim[3] pointed out that the renewal contract for scheduling verifications which paid increased deposit is starting that day and not occur retroactively. And if returning the deposit is delayed, the unlike the lease right registration owner, the tenant who has the fixed date has no claims for auction.

Sun Heo[4] pointed out that Housing Lease Protection Act Article 3 paragraph 1 means "the lease, even if it has no registration, when the tenant finish the delivery housing and resident registration, its effect occurs from next day to third party. In this case, the resident registration is deemed when finish the moving-in report" thus, the opposing power to third party occurs from midnight. Thus, the interpretation of judicial precedent[5] is put the first who finish the registration to protect unsuspected damage that even if the third party confirm the no tenant who finish delivery housing, resident registration and complete the registration. But tenant finish the delivery and resident registration.

II. Foreign legislation case about opposing power

1. Germany

Unlike the case of Korea, the lease in Germany, only houses of transference is the requirement for setting up against third party for counteraction the housing lease relationship as a bond relationship which signed between the landlord and the tenant. And in the Article 571, Article 580 the assignee of the lease target substance stand in a position to substitute the previous landlord about rights and obligations arising from the lease relationship during existence of his ownership[6]. Especially, the important thing here is if the transferee does not fulfill its obligations under the tenancy relationship, what happens will come to previous landlord. In case of Korea, the return debt of lease deposits as being included to debt on the lease relationship and deals uniformly not distinguished from other debts, In the case of Germany, however, return debt of lease deposits and other debts are defined by the separate provisions.

2. England

Unlike Korea, in the England, the opposing power problem of tenant is enough with only agreement between the parties, and the moving occupies or transference is requirements. However agreed about the more than three years duration must be followed by specialty[7]. Therefore, in the case of more than 3 years, must receive the specialty which similar with certificate of a fixed date, compared to Korea, specialty is same as the fixed date however, practically it acts requisites for counteraction as a resident registration so considering that the disclosure is not easy to third party, some disputes are exist.

In the England, the tenant must occupy the house

after expiration of the right of lease, the right of lease must exist within the range of the application of law, and the tenants must use the house mostly for residence. If these requirements are equipped, the legal lease occurs naturally[8].

3. Japan

in Japan, the means that lease relationship can resist to a third party is generally during duration of the lease relationship, if the lease target substance was transferred to a third party by sale or auction etc. even if there is no separate agreement about succession between the parties, the transferee succeed naturally the status on lease agreements of previous landlord and understanding like this way is general[9]. Thus, according to the common view and cases of Japan, transferee succeeds the status of landlord and previous landlord secession from the lease relationship[10].

4. France

In the French civil law Article 1743 which was enacted in 1804 defined as "someone who obtained lease real estate through the sale, cannot evict the tenant of lease by authentic document or certificate which has definite date" and granted opposing power from early[11], After that, the registration was need to certain long-term lease of real estate by the Mortgage Registration Act enacted in 1855, however, protect the opposing power by allowing the tenant can register singly[12].

5. Review

As noted each country Housing Lease Law, the purpose of the Housing Lease Law is protect the residential stability of tenant. Thus, as the means to protect the housing stability of the tenants let the tenant able to get the opposing power with easy way

to housing lease right. Therefore, the case of Germany focuses on the existence protection, existence protection in UK, opposing power and existence protection in Japan, France focuses of the opposing power protection, and Korea focuses on the opposing power. Like this, the interesting direction for tenant protection in each country is different is the reality of the tenancy relationship is different each other.

III. Generalities of the opposing power on the Housing Lease Protection Act

1. Significance of Opposing power

Housing Lease Protection Act Article 3, Paragraph 1 defined as "if the registration does not exist, when finish the resident registration or delivery the house, the lease has the effect from next day to third party". Therefore, effect occurs to third party means that "it has the opposing power to a third party"[13]. In other words, to the assignee of rental housing, who succeeded rent authority, and other parties who have an interest about rental housing, even though there are no special agreement about succeed between the parties, they can claim the existence of the lease and this part can be seen as the most essential content of the Housing Lease Protection Act.

2. Requirements for obtaining opposing power

Pursuant to the Article 3, Paragraph 1, the Housing Lease Protection Act has been granted the opposing power by delivery the house and resident registration without a registration. In this section, let finish the delivery as well as resident registration means the delivery is incomplete as a way to public

announcement. So, add this way. Therefore, it is the system which cannot found other foreign legal case and have the strong opposing power[14].

2.1 Delivery of Housing

The delivery of housing means the possession of the housing, in other words, delivers the virtual control of housing. In this content the virtual delivery means the substantial domination of the housing is transfer from the lessor to the lessee and whether there was a substantial domination should be determined according to social norms. That is, as take over the key substantial domination of the rental house transfer to the tenant from the landlord.

Simplicity-delivery means the when the tenant already dominated the house virtually the delivery made with only intention of the parties without real delivery(Civil code Article 188, Paragraph 2). For example, in the case that to the house which is already occupied and in use by tenant make a new lease agreement with owner[15].

The transfer of the right to request a return object means the case of receives a lease for sub-lease housing. For example, the sub-lessee buys the house which took on lease to sub-lessor from owner[16].

Revision occupying means that the owner sells the house which is already used and leases that house from the buyer[17].

2.2 Moving-in notification of Tenant

resident registration is someone who has the purpose to live for more than 30 days and has an address or place of residence in the Republic of Korea report to the certain matters(resident registration matters) to the Mayor, Governor or the head of a Gu who having jurisdiction over the residence, and the Mayor, Governor or the head of a Gu register resident registration details on the table of resident

registration or its status(Resident Registration Act Article 6, Article 7, Article 10). However, in the Housing Lease Protection Act using the "resident registration" which is the convenience system of administration as the way to public announcement of a housing lease the criticism that the closed principles of resident registration and many of the problems has been raised[18].

in the range of occupancy and subject to resident registration, when doing the transfer report there are many cases such as householder or whole family including householder and including a spouse, child, etc. only a portion of the family did transfer report, etc. Judicial precedent considered as that even if the family such as spouse or child, etc. or furthermore legal sub-lessee or the person who received the lease did resident registration reported before the tenant, the date of acquisition of opposing power is next day[19].

if tenant move only his resident registration temporarily, as a requirement for a third party to resist as a lease, the housing tenant, the resident registration of "Housing Lease Protection Act" Article 3 keep the right not only on retrieval an opposing power but also constantly to keep the opposing power continually[20].

When move the resident registration to other site temporarily and do re-transfer, in the "Housing Lease Protection Act" Article 3 Paragraph 1 as a requirement explaining clearly that delivery the housing and resident registration to housing tenants, and in view of the fact that give a strong opposing power comparable to registered real right, at the housing lease which has non-disclosure method, the requirements for resist such as housing delivery and resident registration are not be satisfied only acquiring moment, must existence and continue to maintain its opposing power[21].

Only move the resident registration to other site temporarily and do re-transfer, first the obtained opposing power of lease is extinguished, after that new opposing power recurs again from the time of the transfer report, so, the tenant cannot resist with a lease to buyer who acquired the ownership by the execution of right to collateral security which set in the previous evictions after moving his resident registration[22].

3. Time of occurrence of opposing power

Housing Lease Protection Act Article 3 paragraph 1 defined as "if the registration does not exist, when finish the resident registration or delivery the house, the lease has the effect from next day to third party", So, time of occurrence of opposing power is the next day of delivery and resident registration. When the tenant of Housing Lease Protection Act Article 3 finish the delivery of housing and resident registration, the effect arises from next day means that the opposing power occurs since midnight[23].

4. The range of opposing power

In the case of tenant who has the opposing power, the lease effect of the bonds which is relative rights is able to claim only on the other side of contract, however, in certain cases, it may have the opposing power to third party as the effect of the lease agreement. That is the peculiarities of this law.

In the case of a middle tenant, all buyers of rental housing are not succeeding the status of landlord. And to become the transferee who succeed status of landlord, also if tenant would like to resist to buyer[24], the provisional registration, provisional attachment, mortgage are not set before having the opposing power as the best ranking the lease of tenant.

5. Apply the Civil law

Housing Lease in Civil law is that one party allows using the all or part of a residential building to the other party, thereby, stipulates as paying the balance and the effect occurs. the right about Housing Lease is just bonds rights, the effect exist only to contracting parties, and does not effective for a third party, when the registered to the Housing Lease, finally the effect of registration occurs and it can be effective as resistance to third parties.

6. Review

About the Housing Lease Protection Act which regulate the delivery housing and resident registration as the acquisition requirements of opposing power to third party and compare to Housing Lease Law in Japan, It can be evaluated as outdated which reverse the age. Therefore, it should be interpreted mitigatedly[25] and etc. like this it has many problems to perform a function as the method of public notice for housing lease right and pointed out as the problem. However, it is undeniable fact that contributing to solve the he issues surrounding the Housing Lease.

IV. Problems and Solutions for opposing power

1. Problems for opposing power

1.1 Way to public announcement the resident registration

Unlike registration, resident registration is not occurs the expense, and made with only the unilateral declaration of tenant, and its procedure is quite simple, and there are views that as the seamless transaction relating to rental housing and the viewpoint as safety and in terms of prevention of

abuse the preferential payment for the small sum lessee, the resident registration of tenant cannot ignore the significance[26]. To protect not only tenants but also other parties who involved in this, and In order to solve the imperfection of disclosure that occurs only with a housing delivery, cannot ignore the complementarity of the disclosure function of the resident registration. Thus, housing delivery and resident registration must be maintained as a requirement of opposing power[27], however, Details that are described in the resident registration limited to just personal identity information. So, if it does not add a space to write in connection with the lease, it seems that there is a significant problem as a disclosure way of lease relationship.

1.2 Damages of opposing power

In the Housing Lease Protection Act, the resident registration is the way to obtains opposing power. Due to this, a number of damages are occurred. Damage caused by trading the relevant premises after entering before the resident registration, the execution of a security right and while living in relevant housing, transferred to another location temporary and recovered, caused by the loss of the opposing power of lease, and do moving-in notification with incorrect address or miss the number of apartments or multi-family housing, denial the opposing power of lease, in addition, by the matter of lessee if the resident registration was late and registration of security right have been made before the resident registration and temporarily move the resident registration to another place and moving back again. The opposing power occurs in the re-transfer time, thus, in the meantime the security right was set then the tenant get the damage, etc.

1.3 Way to issue the certified copy · register abstract

those who want to issue the certified copy · register abstract have to explicitly state name and address of the person(resident registration enforcement decree Article 43, paragraph 2). However, if it is need to perform by officially necessary or performed by applicable laws the clue provisions Article 18 paragraph 2 of resident registration law recognizes an exception for private resident registration. Because of this, viewing is possible, but there are some uncomfortable part rather than before. However, if anyone viewing possible the resident registration, personal information as well as the other things can be exploited, thus, these are also raised as a problem.

1.4 Time of occurrence the opposing power

About the time of occurrence the opposing power, the judicial precedent said "the lease even though it have no registration, if tenant finish the delivery housing and resident registration, the effect occurs to a third party since next day midnight". So, the opposing power is not "finished moment" about delivery housing and resident registration, the effect to third party occurs since the next day[28]. Accordingly, if the landlord abuses this, it makes the result that tenant cannot be protected completely, just landlord and secured party were protected. And considering a number of matters on moving day, In fact, it is not easy to do the moving-in notification, thus after moving and before moving-in notification these situations can be occurred that the housing was sold or set the real right granted by way of security, etc. due to these, acquisition the opposing power of tenant can be excluded and it has been exposed as a problem.

1.5 Extinction issue after the fixed date

There is the case that the tenant who had the opposing power with obtain the preferential payment

right by takes the fixed dates on the lease agreement with requisites for counteraction and loss the contract in any circumstances. At the notarization office, the fixed date document was written just address of claimant, grant date and etc. and the leasehold deposit which is important thing is not the matter for written. Thus, if they lose, the opposing power which is the effect of preferential payment right is loss and cannot receive the rental deposit, the case is often occurs that they receive the objection from subordinated secured party in the auction. Therefore, when the contract was lost or loss then how treats the opposing power which is preferential payment right of tenant has emerged as a big problem.

1.6 Review

Using and make profit the housing of someone else and when make the agreement to pay a certain amount of benefit as the reward, the power that tenant who is usufructuary person can insist on the rights to others is called the opposing power. In this regard, as mentioned above, the problems have emerged at the resident registration public announcement, the damage caused by let the resident registration as acquisition requirement for opposing power, misapplication possibility about resident registration reading to public, when the tenant finish the delivery housing and resident registration, it cannot resist to third party from next midnight.

2. Improvement on opposing power

2.1 Improvement of resident registration

As the improvement, if the resident registration does functions as method of public notice, the resident registration law should be amended. First, when the house tenant do moving-in notification, staff have to record followings that the landlord and the name, address, the location of housing of tenant, the area of

lease object, the moving-in notification date of resident registration, deposit and balance at the time of moving-in notification date, the lease period, the receipt day of confirmed date on the lease contract, if lease agreement has been changed or updated then changed date, deposit and balance, the lease period, the receipt day of newly confirmed date on the tenant list, etc. and stock. So, in this regard, if interested parties ask to see, that would be viewed.

2.2 Delete resident registration requirements

Resident registration is the registration for general public including tenants, not a method of public notice of leasehold the property. Thus, it will be required to obtain the opposing power only delivery housing except for the resident registration. Therefore, it will fit the purpose of revision the Resident Registration Act for in order to protect the rights and privacy of the residents in 2006. And through the introducing the House Lease Law of Japan, if Korean Housing Lease Protection Act regulate as "if there is the delivery of building without registration, the lease of a residential building effect arises to whom who get the right for building", it will be deemed to be desirable to supplement the lease problems related to the registration on civil code[29].

2.3 Unifying the fixed date

The judicial precedent has been argued as the address between public law and private law must be matched[30]. Therefore, unify the agency that granting the fixed date on the lease contract to the competent registration office in the rental housing premises. And receive the fixed date of lease contract at the competent registration office first, then with matched address do moving-in notification at the community service center. Institutionalizing the procedure like this way, it seems a good idea to

improve the resident registration procedures to prevent in advance the different between public law and private law.

2.4 Improve the timing for opposing power

In order to meet the legislative purpose of the Housing Lease Protection Act which was born to ensure the residential stability for people, it seems to that the timing for opposing power will be improved to reasonable way. Therefore, acknowledge the opposing power the day that the housing tenant delivery the housing and moving-in notification day, and if the real right registered on the same day, establish the precedence relationships, and if proves impossible, protect the tenant by considering all as the equal standing. Therefore, it seems to be right revision the Article 3 paragraph 1 "from the next day" to "from the day" to cut off the tyranny of landlord who exploit the regulation of Housing Lease Protection Act, Article 3.

2.5 Improvement the fixed date document

After the fixed date, as the protection way to lose the lease contract, if making the copy of lease contract with fixed date in the notarization office, it deemed to be that damage of conflict about post opposing power can prevent. And in the case of residents center or the court registry office, as stability of housing living of the common people and in terms of protecting the rights of third parties, the active improvement of fixed date system is needed. Therefore, introducing the public announcement and confidence are needed to keep the copy of the contract. When give the public confidence to fixed date document, damage to opposing power of tenant can prevent in advance and the stable residential living can be guaranteed.

2.6 Review

The opposing power on the Housing Lease Protection Act, its essence is to protect the right of tenant. So the opposing power should ensure within the scope of not impairing the rights of others, that is meet its purpose of system. Also, public announcement function of the lease which resident registration performing as the requisites for counteraction of current housing lease right goes well, how much public announcement function of the lease need also should be reviewed with the real estate registration system, and for acquisition requirement also period of existence and use, the opposing power should be considered with its requirements.

V. Conclusion

As following the paper, there are many problems in the opposing power of the Housing Lease Protection Act in Article 3 which performed for the stability of residential living of Homeless people. Among them, I agree the plan that through the introducing housing tenant list and if interested parties request viewing, allows using actively. And as the against requirements, it can be the example that the delivery to residence of tenant and moving-in notification of resident registration, in Germany, does not require a move the resident registration to the residence as against the requirement of housing lease.

Also, it seems that is necessary to revise the resident registration procedures by unifying confirmation of fixed date need to competent registration office in rental housing premises and prevent in advance the difference of address between public law and private law. And part of the timing about occurrence of opposing power, it consistent with the legislative purpose of residential life stability

for homeless people, and to cut off the tyranny of landlord in advance, revise the occurrence timing, it seems to be right revision the Article 3 paragraph 1 "from the next day" to "from the day". And about the way of loss the lease contract after the fixed date, receive the fixed date from the notarization office and keep the its copy, then it can prevent the damage of post-conflict. Therefore, in the case of the residents center of court registry office protect the right of third party by keep the copy which has the fixed date and lease contract deposit. And as ensuring the stable housing living of tenant, active improvement of fixed date system is needed. Therefore, point out that the Lease Protection Act still has many insufficient things, and hope these problems can be solved as soon as possible.

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