



Defendant's response in possessory interdicts: From the counterclaim to the procedural flexibility by the counterclaim

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ABSTRACT

This is a research that examined the typical possessory actions (possessory interdicts) from the perspective of the plaintiff defendant, who formulates a claim against the plaintiff.

The research aimed to identify and systematize the postulations that can be presented by the defendant in the context of possessory interdicts and their forms of conveyance (simple defense or counterclaim), with a view to delimiting the extent and effects of the postulative faculties conferred on the defendant in view of the characteristics and procedural techniques of the possessory procedure.

Keywords: Possession, Possessory actions, Civil procedural law, Procedural flexibility.

1 INTRODUCTION

This is a research that examined the typical possessory actions (possessory interdicts) from the perspective of the plaintiff defendant, who formulates a claim against the plaintiff.

The research aimed to identify and systematize the postulations that can be presented by the defendant in the context of possessory interdicts and their forms of conveyance (simple defense or counterclaim), with a view to delimiting the extent and effects of the postulative faculties conferred on the defendant in view of the characteristics and procedural techniques of the possessory procedure.

As a problem, the study found that there is still, in the Brazilian legal literature, an indiscriminate and confusing use of the words counterclaim, counterclaim and double action, not making a strict distinction between the legal concepts of each one. As a result, there is still no consensus on the legal consequences of the absence of a request made by the defendant in a possessory action, on the provision of article 556 of the Code of Civil Procedure and on the possibility, effects and limits of the counterclaim filed in the possessory court.



In view of this, as a problem to be examined, it was questioned whether, in the face of an alleged duplicity of typical possessory actions and the provisions of article 556 of the *Codex*, the Brazilian civil procedural system admits the broadcasting, by the defendant, of claims distinct from the request for possessory protection and the claim for damages and whether such possibility would not cause a denaturation of the possessory judgment. Therefore, is the procedural flexibility provided for in article 327, paragraph 2 of the Code of Civil Procedure also allowed to the defendant in a possessory interdict?

The hypothesis initially proposed and, in the end, confirmed, is that the counterclaim can be used in possessory interdicts to expand the object of the proceeding and convey postulations other than those listed in the list of article 556 of the Code of Civil Procedure. The procedural flexibility promoted by it, as well as the flexibility that would occur through the plaintiff's demand, with special reference to article 327, paragraph 2 of the Code of Civil Procedure, does not prejudice the use of special procedural techniques aimed at the assessment and protection of the request for possessory protection.

In fact, this study presents a propositional thesis, in the sense that a better understanding of the possibilities of the defendant's demand in a typical possessory action gives rise to a more adequate and efficient protection of possessory litigation.

2 MATERIALS AND METHODS

The methodology used was the qualitative approach, through the bibliographic review of different literary and normative sources, with an analytical approach and exegesis of the current norms. As for epistemology, the research was developed in a positivist way, insofar as it analyzed a supposed legal conflict that can be visualized in the same way from the hermeneutic proposal presented. As for the nature, the research was applied-practical, since it presented proposals for hermeneutical interpretations as a solution to the identified problem, providing greater efficiency for the resolution of possessory conflicts in the judicial sphere.

3 DEVELOPMENT AND RESULTS

A counterclaim can be defined as "an action by the defendant against the plaintiff, by means of which the defendant counterattacks the former in the same lawsuit already instituted by him, formulating his own claim, which could be exercised by means of a separate lawsuit".¹

For Fredie Didier Jr., Antonio do Passo Cabral and Leonardo Carneiro da Cunha, the provision of article 327, paragraph 2 allows us to conclude that the common procedure of the current system is *adaptable*, *malleable*, *flexible* and receptive to the incorporation, even if episodic, of differentiated techniques designed

¹ SICA, Heitor Vitor Mendonça. O direito de defesa no processo civil brasileiro: um estudo sobre a posição do réu. São Paulo: Atlas, 2011, p. 169-170.



for special procedures. According to the authors, the provision represents a "general clause" that "can be the normative source of reaffirmation and development of the principle of adequacy of the procedure".²

The possibility of applying the techniques in an interactive way,³ in different directions, is an interpretation extracted by the legal literature from provisions such as article 327, paragraph 2 and article 771, caput and sole paragraph, both of the Code of Civil Procedure of 2015.

It may generate some uneasiness and perplexity the fact that the plaintiff, opting for the typical procedure of possessory interdicts, could have this procedure "denatured" by the will of the defendant, who would supposedly be allowed, as of article 327, paragraph 2, to "transpose" the process to the rails of the common procedure. However, a few points need to be clarified.

What attracts the applications of the specific techniques provided for the possessory procedure is not the *nomen iuris of the "action"*, that is, whether the claim is classified as an action for repossession, an action for maintenance of possession or a prohibitory interdict; but the request for possessory protection based on the right of possession (*jus possessionis*). Such techniques are linked, therefore, to the request for possessory guardianship with a fulcrum in *jus possessionis*. They are not tied to the possessory procedure itself.

Therefore, even if there are other claims other than those listed in article 556 of the Code of Civil Procedure – e.g., *request* for double refund of amounts unduly charged, revision of contractual clauses and resolution and annulment of purchase and sale agreement – the request for possessory relief will continue to be examined and protected by the specific provisions of the procedure of possessory interdicts – without prejudice to the application of rules of the ordinary procedure.

Thus, it can be seen that there would be no denaturation of the possessory judgment, insofar as both the defendant, by counterclaim, and the plaintiff have the right to make the procedure more flexible, adopting the common procedure without prejudice to the application of special techniques compatible and appropriate to the possessory protection.

Consequently, the specific provisions of the possessory procedure that are compatible with the right of possession brought before the court will still apply – e.g., *the interlocutory relief of article 562, in the case of an action of new force; or the provisions contained in the caput and paragraphs of article 565, in the case of a possessory action involving multitudes*.

Thus, it is demonstrated that the counterclaim can be used in possessory interdicts to expand the object of the proceeding and convey postulations other than those listed in the list of article 556 of the Code

² DIDIER JÚNIOR, Fredie; CABRAL, Antonio do Passo; CUNHA, Leonardo Carneiro da. Por uma nova teoria dos procedimentos especiais: dos procedimentos às técnicas. 4. ed. Salvador: JusPodivm, 2023, p. 67.

³ MAZZEI, Rodrigo; GONÇALVES, Tiago Figueiredo. Ensaio sobre o processo de execução e o cumprimento da sentença como bases de importação e exportação no transporte de técnicas processuais. *In*: ASSIS, Araken de; BRUSCHI, Gilberto Gomes (coords.). Processo de execução e cumprimento de sentença: temas atuais e controvertidos. São Paulo: RT, 2020, p. 33.



of Civil Procedure. The procedural flexibility promoted by it, as well as the flexibility that would occur through the plaintiff's demand, with special reference to article 327, paragraph 2 of the CPC, does not prejudice the use of special procedural techniques aimed at the assessment and protection of the request for possessory protection.

4 FINAL CONSIDERATIONS

The hypothesis initially suggested in this research was confirmed throughout its development. Thus, it can be unequivocally stated that the defendant in a possessory interdict may use the counterclaim to convey claims other than those listed in article 556 of the Code of Civil Procedure, without this distorting the possessory judgment or impairing, in theory, the protection of possession.

It was found that the procedural flexibility of article 327, paragraph 2 of the procedural law is applied in this case, adopting the common procedure for requests of a different nature, without prejudice to the application of special techniques compatible and appropriate to the possessory protection. Thus, the specific provisions of the possessory procedure that are compatible with the right of possession brought before the court will still apply – *e.g.*, the interlocutory relief of article 562, in the case of an action of new force; or the provisions contained in the caput and paragraphs of article 565, in the case of a possessory action involving multitudes.

Secondly, the research concluded that typical possessory actions have a duplicity in a broad sense (procedural duplicity) only with regard to possessory protection and indemnity claims, matters provided for in the list of article 556 of the Code of Civil Procedure. It was also defined that this provision provides for the technique of the counterclaim, to be used by the defendant to demand possessory protection and indemnity without the need for a counterclaim, that is, by postulating by means of a simple defense (defence).



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