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**REIMBURSEMENT OF THE EXPENDITURES FROM THE
JOINT PROPERTY OF THE SPOUSES ON THE REAL ESTATE
CONSTITUTING PERSONAL PROPERTY OF ONE OF THEM
– IS IT POSSIBLE TO EXTEND THE EXCEPTIONS TO THE
RETENTION RIGHT**

Abstract

Pursuant to Article 461§1 of Polish Civil Code (hereinafter referred to as: “CC”) related to Article 461§2 CC, a person obliged to release the property belonging to somebody else may retain such property until their claims for the reimbursement of expenditures on the thing of claims to redress the damage inflicted by the thing are satisfied or secured (retention rights). The aforementioned provision shall not apply when the duty to release the property results from tort or in the case of returning the property which have been leased, rented or loaned for use.¹

Hence the question about the possibility of applying an analogy to the exclusions to retention right listed in Article 461§2 CC in a situation where after the termination of the marriage (for example: by divorce) the former spouse resides on the property constituting the personal property of the other spouse, against their will, invoking the duty of

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¹ Polish regulation, contrary to the French one (see: Article 2286 *Code Civil*), exemplifies exceptions to the retention right, not to cases where this right is granted to the party.

reimbursement of the expenditures from the common property to the personal property of the other spouse. The author has applied a dogmatic method to the issue outlined above, analysing the current legal situation and concluding that it is permissible to extend exceptions to the right of detention. There are the following premises for application of analogy in the civil law: similarity due to important features and loophole in the law. The use of the real estate property of the ex-spouse, contrary to the will of the other spouse, fulfils all the premises for application of analogy.

The ex-spouse residence on the real estate belonging to another spouse, contrary to the others spouse's will, is reprehensible enough to be qualified as tort and cessation of the family law title to the apartment, referred to in Article 28¹ FGC – similarity to the cessation of continuous legal relationships, such as lending.

As proved, in accordance with applicable law it is admissible to create the analogy to Article 461§2 CC, so that the ex-spouse using the real property of another spouse upon termination of marriage could not invoke the retention right. As for the future, the statutory extension of the scope of the exceptions to the retention right should be suggested.

Keywords: retention right, analogy, expenditures, personal property, joint property

Introduction

Pursuant to Article 461§1 of Polish Civil Code (hereinafter referred to as: "CC") related to Article 461§2 CC, a person obliged to release the thing belonging to somebody else may retain such thing until their claims for the reimbursement of expenditures on the thing of claims to redress the damage inflicted by the thing are satisfied or secured (retention rights). The aforementioned provision shall not apply when the duty to release the property results from a tort or where it concerns the return of the thing which have been leased, rented or loaned for use.

It may occur in practice of law that the ex-spouse refuses to release the thing constituting the personal property of another spouse and profits from the retention right, provided for in Article 461§1 CC (*ius retentionis*; retention rights), claiming the reimbursement of the expenditures from the joint property of the spouses. If the expenditures were effectuated on the real estate property which satisfied the housing needs of the family (for example: the land built up with the residential building or the premises constituting a separate apartment), exercising the retention rights means refusal to quit the immovable property by the ex-spouse and cohabitation, most frequently, contrary to the will of another spouse.

Moreover, reimbursement of the expenditures from the joint property of the spouses on the personal property of another spouse are claimed in the proceedings concerning the division of the assets of joint property (often, reimbursement of the expenditures is the only issue to be considered during the proceedings),² the courts make the eviction of the responding divorced spouse conditional from the real estate on the other spouse executing the decision on the division of property, which lay down an obligation to account for expenditure on joint property to the personal property of the other spouse. In other words – the retention objection raised by the ex-spouse, who is the respondent in the eviction proceedings, is upheld. This means that the actual eviction of the ex-spouse who uses the real estate property of another spouse depends on the reimbursement of the expenditures from the joint property of the spouses on the personal property of the other spouse.³

Such practice, although consistent with the literal meaning of Article 461§1 and §2 CC, is questionable, as in fact it renders null and void the proceedings for the divisions of joint assets which – as secondary to the cessation of the marriage – is aimed at “separation of the ex-spouses definitely, in the financial sense.” Making reimbursement of the expenditures claimed in the proceedings concerning the division of the assets of joint property a condition for eviction of the ex-spouse leads to the artificial “prolongation” of property relations between ex-spouses and gives rise to a conflict. Thus, it is against the purpose and essence of the proceedings for the division of assets and leads to granting unjustified protection against eviction to the divorced spouse, in a situation, when the subject of personal property, to which expenditures have been made from joint property, is the real estate used for housing purposes. In this context, a question arises, whether it is admissible to extend the scope of the exceptions to the retention rights, regulated in Article 461§2 CC. In other words – is it possible and justified to include in the catalogue of exceptions from the retention rights a divorced spouse who refuses to release the thing constituting personal property of another spouse, especially in the case of real estate which was used to meet the housing needs of the family.

² See Article 567§1 of the Polish Code of Civil Procedure (hereinafter referred to as: CCP).

³ It is stated in the jurisprudence that “the use of the retention right does not lead to the dismissal of the claim, but to adjudicating the return of the real estate under the obligation of reimbursement of expenditures.” [judgment of the Court of Appeal in Kraków – Civil Section I of 17 November 2016, I ACa 789/16, Legalis no. 1564467].

The issue in question is consistent with the theme of the conference, i.e.: “The principle of the unity of civil law and the cohesion of the regulations of civil, commercial and family law” (“Zasada jedności prawa cywilnego a spójność regulacji prawnohandlowych i prawnorodzinnych”) – as it concerns the specific incoherence of the family law regulation,⁴ regarding cessation of the marriage, division of joint property and reimbursement of the expenditures from the joint property of the spouses and civil law regulations regarding the retention right. In accordance with applicable law, a question arises whether it is admissible to remove the aforementioned incoherence by means of analogy to article 461§2 CC, and, consequently – whether it is possible to invoke the retention rights of the ex-spouse who refuses to release the property constituting personal property of another spouse.

In view of the social role of the immovable properties and the satisfaction of the housing needs of the family, taking into consideration the fact that the use of the real estate property of the ex-spouse contrary to their will is so reprehensible, the analysis concerning the obligation to “release the thing” will be conducted with reference to the real estate property.

The legal situation of the ex-spouse residing at the real estate property of another spouse and the legal exceptions to the retention rights

There is no doubt that the spouse holds the legal title to use the real estate property of another one during the marriage, within the context of family law regulations, i.e. Article 28¹ of Polish Family and Guardianship Code (hereinafter referred to as: “FGC”). The literature states without any reservation that “the entitlement to use the premises (by the other spouse – author’s explanation) is limited to a purpose, which consists in satisfying the needs of the family.”⁵, and the aforementioned right of the spouse is qualified as subjective right.⁶ On the other hand, the interpretation of the word “apartment” is very broad. On the grounds

⁴ Both on the grounds of substantive law and the proceedings; Article 28¹ FGC, Article 567§1 CCP.

⁵ Michałowska, K., *Niemajątkowe wartości życia rodzinnego w polskim prawie cywilnym*, Warszawa 2017, p. 436.

⁶ “It has been indicated that in this manner, the legislator has constructed a certain legal title for such spouse, as the entitlement in question is undoubtedly a subjective right.”: Pietrzykowski, K., in: Pietrzykowski, K. (ed.), *Kodeks rodzinny i opiekuńczy, Komentarz*, Warszawa 2018, p. 286.

of Article 28¹ FGC, an apartment is: “premises where living can be organised”.⁷

Moreover, it is obvious that termination of marriage (e.g. by divorce) results in an automatic termination of the right to premises, in view of the family law regulations.⁸ This means that the ex-spouse, who lives on the real estate intended for family residence which constitutes the personal property of another one upon cessation of marriage, uses the premises without a legal title. Thus, he or she is “obliged to release the thing” within the meaning of Article 461§1 CC. The literal interpretation of the exceptions to the retention right (Article 461§1 CC) means that the ex-spouse using the real estate of another one is entitled to enjoy this right. This means that the divorced spouse may live with the ex-spouse on the premises of the latter – even against their will.

A question arises, whether it is admissible to extend the scope of the exceptions thereto in order to include in such catalogue the ex-spouse who exercises this right with reference to the obligation to leave the real estate belonging to the other spouse (which, in fact, is an obligation to return it). This is an issue of the possibility to deprive the ex-spouse of the retention rights in the conditions specified. A question arises whether it is admissible to deprive them of this right by the extension of the scope of the exceptions thereto. It is assumed that the retention right is not absolute in nature and is subject to exceptions; moreover, it does not create the unconditional protection of the debtor.⁹

In this context, two issues must be taken into account: whether the ex-spouse owning the real estate has a stronger interest in receiving the thing back than the

⁷ Bieranowski, A., *Prawa małżonków do mieszkania*, in: *Małżeńskie prawo majątkowe*, Warszawa 2014, p. 278, Jadczak-Żebrowska, M., *Prawa i obowiązki małżonków*, Warszawa 2017, p. 293.

⁸ In relation to the spouse's right to premises pursuant to the provisions of family law and its derivative nature: Olczyk, M., *Komentarz do art. 28(1) Kodeksu Rodzinnego i Opiekuńczego*, LEX – el., Thesis 1.

⁹ It is assumed as follows: “The term «not applicable» used in Article 461(2) CC does not mean that the provision is a peremptory norm, but merely that the person concerned cannot invoke their retention right on the basis of their unilateral declaration of will, unless the parties have agreed otherwise in this regard. **The parties may also, by means of an agreement, expand the catalogue of cases where retention right is invalid.**” (Expression in bold by the author): Rzetecka-Gil, A., *Komentarz do art. 461 Kodeksu Cywilnego*, Lex – el., Thesis 49). As is: Rapała, A., in: Habdas, M. and Fras, M. (eds.), *Kodeks cywilny. Komentarz. Volume III. Zobowiązania. Część ogólna (art. 353–534)*, Warszawa 2018, p. 808; Wiśniewski, T., in: Gudowski, J. (ed.), *Kodeks cywilny. Komentarz. Volume III. Zobowiązania. Część ogólna*, Warszawa 2018, p. 1186; Zagrobelsky, K., in: Gniewek, E. (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2016, p. 946; Janiak, A., in: Gutowski, M. (ed.), *Kodeks cywilny. Komentarz. Volume II, Art. 353– 26*, Warszawa 2019, p. 1029.

ex-spouse who exercises the right to retention and whether the premises to use analogy from Article 461§2 CC have been fulfilled. There is also a question whether the charge of abusing the right (Article 5 CC) could constitute effective and sufficient protection of the interests of the ex-spouse who is the owner of the real estate.

One could not ignore the essence of the right to retention, which “is characterized by the fact that the holder of this right is **entitled to continuation of the possession of the thing** (expression in bold by the author) which already is at disposal – justified by law – of the holder of the right”.¹⁰ The reasons for the exceptions to the retention rights, in turn, result from “the fact that the legislator has noticed priority of the interests of the person claiming release of the thing comparing with the interests of the person obliged to release it”.¹¹

The priority of the interests of the owner claiming to recover the thing comparing with the interest of the person who profits from the retention right

The retention right is not absolute by nature. It is assumed in the literature that “the retention rights granted to the debtor might be somehow limited”. The exceptions thereto refer to the cases where the legislator decided that the interest of the creditor in having the thing returned has to be treated with priority over the interest of the debtor in obtaining reimbursement.”¹² It has been pointed out that in the events specified in Article 461§2 CC, “(...) the interest of the creditor in having the thing released has to be treated with priority over the interest of the debtor in obtaining reimbursement or securing the claims related to the thing”.¹³

¹⁰ Popiołek W., in: Pietrzykowski K (ed.), *Kodeks cywilny. Volume II. Komentarz. Art. 450–1088. Przepisy wprowadzające*, Warszawa 2018, p. 31.

¹¹ Rąpała, A., *Ibidem*, Janiak, A., in: Gutowski, M. (ed.), *Kodeks cywilny. Komentarz. Volume II, Art. 353–626*, Warszawa 2019, p. 1029. As of the legal nature of the retention right – there is no agreement in the literature regarding the relationship between this right and the right to withhold performance of the benefit, provided for in Article 488 §2 CC: see: Zoll, F., in: Olejniczak, A. (ed.), *System Prawa Prywatnego. Volume 6. Prawo zobowiązań – część ogólna. Suplement* (series editor – Radwański, Z.), Warszawa 2010, p. 71; Wiśniewski, T., *Prawo zatrzymania w Kodeksie Cywilnym, part I*, PS 1999, No. 1, pp. 36–37. On the ground of the Code of Obligations – Longchamps de Berier, R., *Uzasadnienie projektu kodeksu zobowiązań. Komisja Kodyfikacyjna. Podkomisja prawa o zobowiązaniach*, book 4, Warszawa 1934, p. 313; Czechórski, W. et al., *Zobowiązania. Zarys wykładu*, Warszawa 2009, pp. 325, 755.

¹² Wiśniewski, T., *Glosa do uchwały SN z dnia 29 listopada 1991 r. III CZP 124/91, “Orzecznictwo Sądów Polskich”* 1992, No. 9 (207).

¹³ Kocot, W., *Prawo zatrzymania w prawie cywilnym i handlowym*, “Państwo i Prawo” 1994, No. 5, p. 57.

As a consequence, the interest of the owner who reclaims the real estate property has to be treated with priority over the interest of the debtor, being the ex-spouse. The situation when the ex-spouse resides at the real property of another one spouse following the divorce and the division of the joint assets is justified neither by virtue of law, nor the social circumstances.¹⁴ Such a situation only artificially prolongs the personal and financial relationships between ex-spouses. The real estate constituting personal property is to serve primarily to satisfy housing needs of the ex-spouse who is the owner of this property. It should also be noted that upon cessation of marriage by divorce, the duty of mutual assistance between the spouses, specified in Article 23 FGC, ceases as well. Moreover, it is not uncommon that the ex-spouse residing at the real property of another one spouse only hinders the fulfilment of obligation to reimburse the expenditures. The sale of the disputed real estate is often the only way for an ex-spouse, obliged to reimburse the expenditure, to obtain the funds to pay the dues. the ex-spouse residing at the real property of another one spouse is an obstacle in selling the property and obtaining funds to repay the value of expenditures made on the joint property.

To sum up, it is admissible to conclude, that the owner of the real property constituting personal property of the spouse during marriage has a further-reaching and more justified interest in eviction of ex-spouse than the latter in retention of the thing and settlement of the expenditures.

The retention right and the charge of abuse of the subjective right

There is also a question whether the charge of abusing the right (Article 5 CC), when the ex-spouse exercises their retention right, could constitute effective and sufficient protection of the interests of the ex-spouse who is the owner of the real estate. The general clause regulated in Article 5 CC leaves the court with a wide scope of discretion and makes it possible to take into consideration the

¹⁴ An opinion which may lead to a different conclusion is presented by Wiśniewski, who argues: "As it concerns the exceptions to the retention right such as tort, one ought to state that refusal to release the thing does not constitute tort as such, under the condition that the possession of the thing involved a legal title or good faith. Even possession in bad faith does not have to be automatically qualified as tort, although these situations may appear simultaneously." Wiśniewski, T., in: Gudowski, J. (ed.), *Kodeks cywilny. Komentarz. Vol. III. Zobowiązania. Część ogólna*, Warszawa 2018, p. 1186. In the course of the marriage, the spouse used the real estate of the other spouse on the basis of Article 28¹ FGC.

interests of various subjects in a specific situation.¹⁵ Therefore, it is not possible to define strict criteria of its application¹⁶ and the charge of abuse of the retention right could never guarantee effective protection for the owner of the real estate. Due to the purpose of the proceedings: divorce and liquidation of the joint property (termination of marriage) – the protection of the owner of the property should be generalized and within this sense – independent of the circumstances of the given case.

The premises of the reason by analogy to the exceptions to the retention right

Admissibility of the reason by analogy to Article 461§2 CC for such legal and factual situations, which have not been listed in the aforementioned provision and exhibit essential similarity to lease, rent or loan for use, as well as the tort and the interest of the owner of the thing has to be treated with priority over the interest of the person obliged to returning the thing, should also be taken into consideration.

The issue in question cannot be discussed without taking into consideration the analogy in the civil law. It is assumed in the literature and the case law that “*the precondition to apply reason by analogy is the loophole in law*”.¹⁷ The loophole in the law is usually understood as “such a state of affairs, when a specific social relationship is neither legally indifferent nor considered by the legislator to be unregulated, there is no legal norm, either explicit or implicit, in the interpretation of the law”.¹⁸ It should also be taken into consideration that: “the interpretation of the provisions of law has to respect the assumption of the reasonability of the legislator, as well as the cohesion of the legal system”.¹⁹

Apart from the loophole, the premise for admissibility of the application of analogy is the similarity of the facts subject to legal assessment. As it has been

¹⁵ Judgement of the Supreme Court – Civil Chamber of 28 May 2019, II CSK 587/18, Legalis no. 1942530.

¹⁶ Judgement of the Supreme Court – Civil Chamber of 31 May 2019, II CSK 618/18, Legalis no. 1950389.

¹⁷ Kabza, E., *Problem stosowania analogii w prawie cywilnym*, “Forum Prawnicze” 2010, No. 1, p. 56; Mróz-Krysta, D., *Obligacyjne skutki ustawowego prawa odstąpienia od umowy*, Warszawa 2014, p. 203.

¹⁸ Kabza, E., *Ibidem.*, p. 57; Mróz-Krysta, D., *Ibidem.*

¹⁹ Kabza, E., *Ibidem.*, p. 56; Mróz-Krysta, D., *Ibidem.*

emphasised in the literature, this context refers to “a provision regulating the closest cases, the most similar and the most relevant, the closest to the case in question due to their most characteristic features”.²⁰

Both premises of reason by analogy are met.

Legal loophole

The protection of a debtor resulting from the possibility to exercise retention right is not absolute in nature. This leads to a conclusion that the catalogue of exceptions specified in Article 461§2 CC does not need to be closed.

In the light of the above, as well as in view of Article 28¹ FGC, a question arises, whether it is admissible to exercise retention right by the divorced spouse who is to be evicted from the residential premises constituting personal property of the other spouse. This question is justified by specificity of the situation of the ex-spouses when one of them owns the property and the other resides at the premises, despite cessation of the marriage by divorce and therefore does so despite cessation of the family law title to the apartment, specified in Article 28¹ FGC. The literature emphasise that the rights provided for therein are situated within the content of the marriage relation, and cease as the elements of its content upon cessation or invalidation of marriage.²¹

If the seemingly exceptional²² nature of the provision of Article 461 §2 CC may be “exceeded” by the principle of freedom of contract,²³ then it may be “exceeded” even more so in a situation where there are so many reasons for granting stronger protection to the owner of the property entitled to its recovery, including in particular the reprehensible conduct of the divorced spouse who, without any justification in an objectively assessed property situation, resides with their ex-spouse.

²⁰ Kabza, E., *Ibidem*, p. 56; Mróz-Krysta, D., *Ibidem*.

²¹ Nazar, M., in: T. Smyczyński (ed.), *System Prawa Prywatnego. Volume 11. Prawo Rodzinne i Opiekuńcze*, Warszawa 2014, pp. 446–447.

²² The literature stresses the exceptional nature of the exclusions of retention right: “On the other hand, the retention right of a thing belonging to another person, provided for in Article 461§2 CC **exceptionally shall not arise** («exceptionally» author’s emphasis, «shall not arise» – original emphasis), when the duty to release the property results from a tort or where it concerns the return of the property which have been leased, rented or loaned for use”, Doliwa, A., in: Załucki, M. (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2019, p. 1066, No 1.

²³ Rzetecka-Gil, A., *Komentarz do art. 461 Kodeksu Cywilnego*, Lex – el., Thesis 49.

Failure to mention the obligation to return the thing resulting from the cessation of the derivative family civil law right to the thing in question in Article 461§2 CC and the temporal relationship between Article 461§1 and §2 and Article 281 FGC (the latter provision has come into force later) allow to conclude that there is a loophole in the regulation of the exceptions to the right of retention. Moreover, it is necessary to look for a general mode of protection of the owner of the real estate, which is not granted *de lege lata*.

Similarities concerning the characteristic features

The legal situation of the ex-spouse who uses the real estate of the other spouse is similar to all situations exemplified as exceptions to the retention right.

One of the arguments in favour of exclusion of retention right in the event when the divorced spouse wants to exercise it, is similarity of the family law title to the apartment referred to in Article 28¹ FGC to a lending relationship, especially due to the similarity of the purpose of both institutions (assisting the spouse and the lending party). The derivative family law title held by the spouse who is not the owner of the apartment (understood in any form) indicates numerous similarities to the loan agreement, especially in terms of the aim of both institutions (assistance). The aim of the regulation is undoubtedly a “significant issue” and an important criterion of similarity in terms of premises for the application of analogy. The legal academics emphasise the gratuitous and relief nature of the loan agreement.²⁴ It can be assumed in this context that in light of Article 23 FGC spouses are obliged to assist each other and regulation of Article 28¹ which protects housing needs of the spouse who is not the owner of the property is a certain manifestation and expression of this obligation.²⁵ It is emphasised that

²⁴ As of loan, the views of the legal scholars are as follows: “*As it results from the provision of Article 710 of the Civil Code, the lender commits, by a lending for use contract, to permit the borrower, for a fixed or a non-fixed term, to use a thing free of charge for the stated purpose. In fact, it is the lender gratuitously depriving themselves of the use of a particular item for the convenience of the borrower. A lending agreement, usually motivated by the willingness to help relatives, is intended to benefit the lender to the benefit of the borrower, who may use the lender’s property free of charge*” (author’s emphasis), Gawlik Z., et al., in: Kidyba, A. (ed.), *Komentarz do art. 710 Kodeksu Cywilnego*, LEX – el., Thesis 3.

²⁵ On the basis of the previously binding legal status, it was claimed that “***the obligation of mutual assistance*** (original emphasis – author’s explanation) *may, in specific circumstances, constitute a basis for providing the spouse with legal protection by allowing them to use the premises constituting a separate (currently personal) property of the other spouse.*”, Pietrzykowski, K., in: Pietrzykowski, K. (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2018, p. 286.

termination of the contract of loan of use which is linked with the voluntary aid, justifies the weaker protection of the debtor obliged to release the thing; it is more justified to eliminate the retention right in the case when the aid connected with the terminated legal relationship was a duty of the owner of the thing (between the spouses, by the virtue of Article 23 CFG).

Another important feature, due to which residence on the property by the divorced spouse on the property of the former spouse justifies the analogy with the exclusions of the retention right, is the similarity between cessation of the marriage and termination of the continuous legal relationships referred to in Article 461§2 CC. The continuous nature of the compared legal relationships and the consequences of their termination are undoubtedly similar in view of the “essential features” of the conditions for the application of the analogy. The fact not to be overlooked is that the legislator provided for exceptions to the retention right upon termination of the legal relationships of a continuous nature (lending, renting, leasing) and, in such situations, considered the interest of the owner of the property in receiving it back to be a priority. The literature states that: “The parties of the contracts of the continuous character, as for example: the contract of lease of the labour contract, dissolution of which are effective ex nunc are not entitled to the retention right”.²⁶ The presented examples, including the employment contract not listed in Article 461§2 CC, suggest that a certain general rule is being created according to which for legal relationships of a continuous nature, whose termination results exclusively with future effect, the interest of the owner in receiving the thing back – due to this continuance of a legal relationship – is more justified than the protection of the debtor resulting from the need to secure or satisfy his claims related to the thing. In this context, it should also be noted that the marriage – which is the initial factor as well as the reason of the regulation of Article 28¹ CFG, but is not a contract – is similar to the legal relations of continuous nature. It should be added that under the assumption of the provisions of the Family and Guardianship Code, marriage is a relationship of permanent nature, whose annulment, determination of non-existence or dissolution requires court intervention on the basis of strictly defined rules and premises. What is more, termination of the marriage as a result of the proclamation of the divorce effective ex nunc, i.e. for the future, constitutes the new legal state not

²⁶ Kocot, W., *Prawo zatrzymania w prawie cywilnym i handlowym*, “Państwo i Prawo” 1994, No. 5, p. 57.

only between the ex-spouses, but towards the third parties as well. In this context, the legal nature of cessation of marriage, and, consequently, the cessation of a derivative family law title of a spouse to the premises – justifies its similarity to cease the continuous legal relationships, and thus further reaching protection of the owner of the real estate than the protection of the debtor obliged to release it.

Another exclusion from retention right is the obligation to release the thing resulting from tort. The continuous and constant residence by the ex-spouse on the real estate belonging to another spouse, contrary to the other spouse's will and following the divorce, is reprehensible enough to be qualified as tort, thus another exclusion of retention right.²⁷ Reprehensible conduct is another feature constituting a significant similarity criterion which is a premise to apply analogy. The above statement is justified, as the literature adopts a wide definition of tort based on Article 461§2 CC.²⁸

It should be concluded that the use of the real estate property of the ex-spouse, contrary to the will of the other spouse and without any support in the legal status, following the divorce and the division of property is a situation constituting a broadly understood conflict with the law, and therefore may be classified as tort within the meaning of Article 461§2 CC. It should also be noted that the Authors quoted do not use the notion: "conflict with the statutory act", but "conflict with the law". The latter notion has obviously broader meaning, comprising also the contradiction to the principles of community life, as well as the conflict with the legal order.

It may also be argued that the ex-spouse using the real estate belonging to the other spouse contrary to their will and after the divorce may be qualified as tort – and the retention right is just excluded. In such a case, there would be no need to apply analogy. However, in such a case the generalized protection of the owner of the real estate will not be granted, because the judgement on whether tort has occurred will be dependent on the circumstances of the specific case.

²⁷ It is important to bear in mind that different conclusions may be reached through the approval of view expressed by T. Wiśniewski: "As regards the exclusion of the retention right due to tort, it should be noted that such an act is not a mere refusal by the holder to return the thing, if the thing had been acquired due to holding a legal title or in good faith. Also, possession in bad faith cannot be equated with tort, although sometimes there will be overlaps." Wiśniewski, T., in: Gudowski, J. (ed.), *Kodeks cywilny. Komentarz. Volume III. Zobowiązania. Część ogólna*, Warszawa 2018, p. 1186.

²⁸ It was stated that: "The term 'tort' cannot be understood only as civil delict referred to in the Civil Code (Article 415 et seq. of the Civil Code), but all unlawful situations.", Koziński, M. H., *Glosa do wyroku SN z dnia 31 stycznia 2002 r. IV CKN 651/00*, PS 2003, No. 10, p. 127; Rzetecka-Gil, A., *Komentarz do art. 461 Kodeksu Cywilnego*, Lex – el., Thesis 50.

Conclusions

Proceedings for divorce and for the division of property are intended to separate the spouses from each other, both in a personal and financial sense. Possible security of housing needs or claims for maintenance of the divorced spouse are regulated by separate legal institutions provided for in the FGC, which are of a strict nature. Article 461 CC cannot constitute a basis for legitimizing the fact of residing with a divorced spouse without the consent of the other former spouse and outside the framework provided by the provisions of the Family and Guardianship Code. The limits of the protection of the housing needs of the ex-spouse are regulated by the judgement of use the real estate property until the division of common assets by divorce decree.²⁹ Moreover, the mechanisms allowing for execution are the sufficient guarantee of the reimbursement of the expenditures from the common property to the benefit of the ex-spouse, who is entitled to such reimbursement.

It should also be noted that upon cessation of marriage by divorce, the duty of mutual assistance between the spouses, specified in Article 23 FGC, ceases as well. The limits of the protection of the housing needs of the ex-spouse are regulated by the judgement on use of the real estate property until the division of common assets by a divorce decree. Moreover, the mechanisms allowing for execution are the sufficient guarantee of the reimbursement of the expenditures from the common property to the benefit of the ex-spouse, who is entitled to such reimbursement.

What is more, the rejection of the claim of the retention right does not deprive the ex-spouse of the right to claim reimbursement of expenditures in separate proceedings.³⁰

It is also emphasised that: "Legal scholars have recently held the view that the relationship between FGC and CC is similar to the one existing between *lex specialis* and *lex generalis*".³¹ The approval of such view leads to a conclusion that if the interests of the divorced spouse are understood as: housing needs or assistance regarding maintenance obligation are protected – in strictly specified

²⁹ See: Pietrzykowski, K., *Ibidem*.

³⁰ Judgement of the Court of Appeal in Warszawa – VI Civil Section of 24 March 2016, VI ACa 67/07, Legalis no. 1460551.

³¹ Smyczyński, T., in: Smyczyński T. (ed.), *System Prawa Prywatnego. Volume 11. Prawo Rodzinne i Opiekuńcze*, Warszawa 2014, p. 35.

cases – the provisions of FGC, there is no ground for extending such protection by granting retention right to the ex-spouse. The specific nature of family and legal relationships and the similarity of the spouse's derived right to housing to the legal relationships justifying the exclusion of the retention right cannot be ignored in this respect.

The aforementioned reasons and arguments raise serious doubts as to the scope of application of Article 461§1 CC in the context of Article 28¹ CC with regard to a divorced spouse who resides with their former spouse on their property, and with regard to the legal and social significance of marriage and its dissolution, it is necessary to interpret the aforementioned provisions. All the premises for application of analogy to Article 461§2 CC have been fulfilled – i.e. the loophole in the law and similarity concerning the characteristic features. The use of the real estate property of the ex-spouse, contrary to the will of the other spouse, fulfils all the premises for application of analogy to Article 461§2 CC and the fact that the nature of this provision is not absolute, constitutes authorisation to use this analogy.

In the context of the considerations set out above, and in view of the fact that the right of retention is not absolute and therefore there are no grounds for assuming the absolute nature of the debtor's protection resulting therefrom, it must be assumed that the divorced spouse does not have retention right in the event of his or her eviction from the property of the other spouse.

In accordance with applicable law, it is admissible to create the analogy to Article 461§2 CC. As for the future, the extension of the scope of the exceptions to the retention right by the ex-spouse obliged to leave the real property of another one, should be suggested.

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