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Articles

Studia Iuridica Lublinensia vol. 31, 2, 2022
DOI: 10.17951/sil.2022.31.2.101-116

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Auction of a Dwelling or a Plot of Land Developed with a Residential Building to Meet the Housing Needs of the Debtor Including the State of the SARS-CoV-2 Virus Epidemic

Licytacja lokalu mieszkalnego lub nieruchomości gruntowej zabudowanej budynkiem mieszkalnym służących zaspokojeniu potrzeb mieszkaniowych dłużnika z uwzględnieniem stanu epidemii wirusa SARS-CoV-2

ABSTRACT

The article submits to a scientific discussion on the issue of the auction of a dwelling or a plot of land developed with a residential building, serving to satisfy the debtor's housing needs during the SARS-CoV-2 virus epidemic. The key importance should be attached to the new Article 952^1 § 5 of the Civil Procedure Code, which states that an auction of a dwelling or a plot of land developed with a residential building, which is to meet the housing needs of the debtor, is not carried out during the state of epidemic threat or epidemic state and 90 days after its end. The new legal solution highlights the general problems with the organization of the work of the courts (related to judicial enforcement proceedings) during the SARS-CoV-2 virus epidemic and the division of duties between the district court and the court bailiff. The presented considerations postulate the introduction of innovative solutions applicable not only in the state of epidemics. Firstly, an introduction, through legislative intervention, of an electronic auction in the course of enforcement of real estate, following the example of an electronic auction of movable property. Secondly, breaking the rule according to which

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the auction of real estate requires direct supervision by a judge (court clerk). The article takes into account the legal status as of 1 January 2021.

Keywords: judicial enforcement proceedings; court bailiff; electronic auction; enforcement of real estate; SARS-CoV-2 virus epidemic

INTRODUCTION

On 20 March 2020, an epidemic was announced in the territory of the Republic of Poland because of SARS-CoV-2 virus infections.[1] The epidemic changed the face of the justice system, requiring the establishment of *ad hoc* solutions to meet the difficulties caused in the area of the administration of justice. The present considerations are focused on this part of the judicial enforcement proceedings, which concerns the issue of the auction of a dwelling or a plot of land developed with a residential building, serving to satisfy the debtor's housing needs. For this reason, other issues related to the course of judicial enforcement proceedings during the SARS-CoV-2 virus epidemic were consciously omitted.

The current legal status, as a response to the need to protect the health of the society in the face of an epidemic, while maintaining the right to a fair trial (including the right to effective judicial enforcement),[2] requires first and foremost an assessment of the correctness and proper targeting of the changes introduced by the Shield 3.0. We are talking about the amendment to the Code of Civil Procedure[3] introduced by the Act of 14 May 2020 amending certain acts in the field of protective measures in connection with the spread of the SARS-CoV-2 virus.[4] The pace of legislative work on the Act in question did not protect it from certain imperfections, which are also revealed in this study. It can be considered whether the existing procedural solutions could be adequate to the prevailing epidemic situation, after of course having made an appropriate purposeful and functional interpretation. It should also be noted at this point that the issues raised have not been subject to a broader doctrinal discussion so far, and the statements made so far on them have a reference character, which has an impact on the size of the polemical remarks.

[1] See Regulation of the Minister of Health of 20 March 2020 on the declaration of an epidemic in the territory of the Republic of Poland (Journal of Laws 2020, item 491).

[2] M. Purchase, E. Schutzer-Weissmann, *Human Rights Practice: Article 6 Right to a Fair Trial*, London 2006, p. 6001 ff., reported after P. Hofmański, A. Wróbel, [in:] *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, vol. 1: *Komentarz do artykułów 1–18*, ed. L. Garlicki, Warszawa 2010, p. 241.

[3] Act of 17 November 1964 – Code of Civil Procedure (consolidated text, Journal of Laws 2020, item 1575, as amended), hereinafter: the CCP.

[4] Journal of Laws 2020, item 875, hereinafter: the Shield 3.0.

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THE NATURE OF THE REGULATION INTRODUCED BY THE SHIELD 3.0

As a result of the amendment to the Code of Civil Procedure carried out under the Shield 3.0, the provision of Article 952[1] of the CCP was introduced. It entered into force on 30 May 2020. Importantly, this provision is not a typical protective regulation, because for the most part it contains permanent solutions, independent of the state of epidemic threat or the state of the epidemic. First of all, this provision introduced a procedural change consisting of the obligatory submission by the creditor of an application for the first auction of a dwelling or a plot of land developed with a residential building, which serve to satisfy the debtor's housing needs. This right was ruled out when the amount of the enforced debt is lower than the value of one-twentieth of the sum of the estimate. In the case of multiple creditors, the authorization to file an application depends on the total amount of principal claims enforced by all creditors (Article 952[1] §§ 1–3 of the CCP).

It is worth mentioning that, *in genere*, the issue of executing immovable property in violation of the balance between the intended purpose of enforcement (in the form of satisfying the creditor) and the manner of carrying out the execution may be perceived in terms of violation of Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, done in Paris on 20 March 1952.[5] The above conclusion was reached by the European Court of Human Rights in its judgment of 25 April 2017 in the case of *Zoran Vaskrsić v Slovenia*.[6] The Court indicated that the enforcement sale of a plot of land developed with a residential building should be a necessary measure to ensure effective enforcement proceedings (*des voies d'exécution effectives*). As it seems, the Court's motivation can be read in the sense that the enforcement sale of real estate should respect the principle of proportionality which is not articulated *expressis verbis*.[7] As accepted by the Court, cases in which procedural regulations do not impose an obligation on the enforcement authority (carried out ex officio) to choose less burdensome enforcement methods, or even the obligation to dismiss a disproportionate request by the creditor to initiate enforcement against real estate, should be assessed as highly reprehensible. The lack of a statutory minimum threshold for the amount of debt that may be collected through an auction sale of real estate serving to satisfy the debtor's housing needs deserves a similarly negative assessment.

Returning to the mainstream of considerations, it is worth noting that in the context of the epidemic, only Article 952[1] § 5 of the CCP has a typically protective

[5] Journal of Laws 1995, no. 36, item 175.

[6] Application no. 31371/12, Legalis.

[7] We are talking about the principle of proportionality in a postulative approach, i.e. in isolation from dogmatic considerations on the meaning of the term "principle". Cf. J. Wróblewski, *Zagadnienia teorii wykładni prawa ludowego*, Warszawa 1959, p. 259.

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character. As indicated by this provision, an auction of a dwelling or a plot of land developed with a residential building, which is to meet the housing needs of the debtor, is not carried out during the state of epidemic threat or epidemic state and 90 days after its end. Taking into account the above observations, as well as the complex nature of Article 952[1] of the CCP, further discussion of the legal regulation covered by it will take place in two ways. First, the specific limitations of enforcement referred to in Article 952[1] § 1–4 of the CCP will be analyzed. Second, the new solutions provided for in the circumstances of the epidemic caused by the SARS-CoV-2 virus (Article 952[1] § 5 of the CCP) will be presented.

PROTECTIVE SOLUTIONS FOR THE DEBTOR

The amendment to the Code of Civil Procedure carried out with the Shield 3.0 is part of a broader stream of changes in judicial enforcement proceedings aimed at protecting the debtor. At the same time, unfortunately, it is not consistent with the main purpose of enforcement aimed at effectively satisfying the creditor.[8] *De lege lata* there is no regulation directly prohibiting the initiation of enforcement against the real estate being the debtor's residence.[9] The provision of Article 952[1] of the CCP does not preclude the seizure of residential premises or land properties built-up with residential buildings to satisfy the debtor's housing needs, nor does it oppose their description and assessment. Only autonomously (against the background of all methods of enforcement, including enforcement against real estate), the legislator refers to the appointment of an auction of such real estate. Thus, Article 952[1] § 5 of the CCP applies to the auction of any apartment or land property built-up with residential buildings to meet the housing needs of the debtor, regardless of the amount of the main claim. Therefore, it does not refer to real estate other than those indicated literally, and as a consequence, it loses its relevance when enforcement is not conducted against debtors who are natural persons. This is indicated by the formula that excludes the auction of real estate serving the debtor's "housing needs".

[8] See Z. Gawlik, *Selected Institutions of the Polish Private Law for the Protection of the Creditor*, "Studia Iuridica Lublinensia" 2021, vol. 30(4), p. 170 ff.

[9] Only Article 15zzu par. 1 of the Act of 2 March 2020 on special solutions related to the prevention, counteracting and combating COVID-19, other infectious diseases and crisis situations caused by them (consolidated text, Journal of Laws 2020, item 1842, as amended) prohibits the exercise of executive titles ordering the emptying of the flat during the epidemic threat or epidemic state announced due to COVID-19. However, it is not absolute, as it does not apply to judgments issued under Article 11a of the Act of 29 July 2005 on counteracting domestic violence (consolidated text, Journal of Laws 2020, item 218, as amended). More broadly, see R. Kulski, *Wpływ stanu zagrożenia epidemicznego lub stanu epidemii ogłoszonego z powodu COVID-19 na postępowanie cywilne*, "Monitor Prawniczy" 2020, no. 9, p. 448.

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I aim to emphasize that the introduction of Article 952[1] §§ 1–4 of the CCP is closely related to the broader tendency to counteract harassment of the debtor, which less than a few years ago was the basis for the introduction of Article 801 §§ 2 and 3 of the CCP. Thus, in the indicated aspect, the Shield 3.0 corresponds to the trend initiated by the Act of 22 March 2018 on court bailiffs,[10] as a result of which the legislator amended and expanded the aforementioned Article 801 of the CCP. Moreover, its wider background can be seen when we look at one of the latest amendments to the civil procedure, made pursuant to the Act of 4 July 2019.[11] The last of these amendments led to an autonomous regulation of the institution of an abuse of procedural law (Article 41 of the CCP),[12] that is defining it in a manner independent of the current understanding of this institution, which undoubtedly existed in civil proceedings also in the legal status before 7 November 2019.[13] In the statements of the doctrine so far, the correlation I have indicated has not yet been expressed, therefore its assumptions need to be developed. For further considerations, therefore, it is crucial to determine whether the amendment introducing Article 952[1] §§ 1–4 of the CCP was necessary for the reorganization of the admissibility of executing real estate for the enforcement of relatively small amounts of debt.

Note that in the light of Article 801 §§ 2–3 of the CCP the legislator introduced the right of the bailiff to dismiss the creditor's application. The application will be dismissed if there are reasonable grounds to believe that it was filed solely for the purpose of harassing the debtor and (cumulatively) in the light of the circumstances of the case or other enforcement proceedings against the same debtor, it is highly probable that the application will not contribute to ensuring the proper

[10] Article 261 (9) of the Act of 22 March 2018 on court bailiffs (Journal of Laws 2018, item 771).

[11] Act of 4 July 2019 amending the Act – Code of Civil Procedure and certain other acts (Journal of Laws 2019, item 1469).

[12] Regarding the concept of an abuse of procedural law, cf. T. Cytowski, *Procesowe nadużycie prawa*, "Przegląd Sądowy" 2005, no. 5, p. 82, 102; M. Plebanek, *Nadużycie praw procesowych w postępowaniu cywilnym*, Warszawa 2012, p. 67; A. Góra-Błaszczykowska, *Zasada równości stron w procesie cywilnym*, Warszawa 2008, p. 350 ff.; K. Flaga-Gieruszyńska, *Zastój procesu cywilnego jako skutek niewłaściwego postępowania stron*, [in:] *Jus et remedium. Księga jubileuszowa Profesora Mieczysława Sawczuka*, eds. A. Jakubecki, J. Strzępka, Warszawa 2010, p. 162. The attention to the requirement of assigning a party intention to act in order to find an abuse of procedural law was drew by K. Weitz (*System koncentracji materiału procesowego według projektu zmian Kodeksu postępowania cywilnego*, [in:] *Reforma postępowania cywilnego w świetle projektów Komisji Kodyfikacyjnej*, ed. K. Markiewicz, Warszawa 2011, p. 18). Abuse of procedural law may be related to the procedural right, and not to the obligation or the procedural burden. See Ł. Błaszczak, *Komentarz do art. 4[1]*, [in:] *Kodeks postępowania cywilnego*, vol. 1: *Komornicy sądowi. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian*, ed. T. Zembrzuski, Warszawa 2019, p. 34.

[13] This is the date of entry into force of the provision of Article 4[1] of the CCP.

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course of execution. This regulation is an important contribution to the direct sanctioning of obstructive procedural actions undertaken by the creditor, and thus disproportionate to the degree of their ailments for the debtor. Such actions do not lead to the fulfillment of the assumptions of effective enforcement. The provision of Article 801 § 2 of the CCP *verba legis* refers to the application for undertaking specific enforcement actions. However, the case where the creditor files an application for enforcement against the debtor's real estate in order to recover receivables disproportionately smaller than the value of the real estate does not fall within the hypothesis of Article 801 § 2 of the CCP from two – *prima facie* visible – arguments. Firstly, the application to initiate enforcement is not an enforcement action within the meaning of this provision, which is confirmed by the wording of Section III Title I Part Three of the Code of Civil Procedure, entitled "Commencement of enforcement and further enforcement activities". This view is accepted in doctrine. As rightly assumed by P. Rylski, Article 801 of the CCP applies to bailiffs' actions performed in enforcement proceedings after their initiation.[14] It is also worth paying attention to the concept of the first enforcement action, which is directly indicated in Article 805 of the CCP. It is impossible to talk about an enforcement action in the context of an application for the initiation of enforcement or a request to remedy the deficiencies of this application, because enforcement activities are undertaken by the enforcement authority after the initiation of enforcement.[15] The first enforcement proceeding should be the action taken against the debtor (Articles 805 and 923 of the CCP).[16] Secondly, as a rule, the writ of execution constitutes the basis for enforcement of the entire debt covered by it and all parts of the debtor's property (Article 803 of the CCP). As a consequence of the above, it is essentially the creditor who selects the property to be enforced.

The comments presented above justify the thesis that the noticeable tendency to base the enforcement proceedings on the unarticulated principle of proportionality required supplementing the existing provisions with a clearly protective regulation for the debtor (Article 952^1 §§ 1–4 of the CCP), limiting the disposition of Article 803 of the CCP. Despite the entry into force of Article 952^1 § 2 of the CCP, the views emphasizing the importance of classifying a given creditor's action as an abuse of procedural law are still valid, which is associated with specific procedural effects. The right to initiate enforcement may be abused when the creditor,

[14] P. Rylski, *Złożenie przez dłużnika wykazu majątku komornikowi sądowemu w postępowaniu egzekucyjnym w sprawach cywilnych (art. 801^1 k.p.c.)*, [in:] *Sądowe postępowanie egzekucyjne. Nowe wyzwania i perspektywy*, ed. J. Jagieła, Warszawa 2020, p. 131.

[15] On the subject of enforcement activities, see also S. Cieślak, *Skutki procesowe niezachowania wymagań prawnych czynności egzekucyjnych komornika sądowego*, "Przegląd Sądowy" 2003, no. 11–12, p. 106 ff.

[16] See W. Siedlecki, [in:] *Kodeks postępowania cywilnego. Komentarz*, eds. Z. Resich, W. Siedlecki, Warszawa 1976, p. 1137.

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disregarding other methods of enforcement, requests that the enforcement be immediately directed to the property that meets the housing needs of the debtor. The regulations do not exclude such a case, shifting the burden of responsibility for further enforcement actions onto the court bailiff (Article 799 § 1 sentence 4 of the CCP), who uses the method of execution that is least burdensome for the debtor.[17] In the discussed situation (irrespective of the amount ratio in which the value of the enforced principal debt remains to the value of the estimated sum), the mere fact of directing enforcement to the debtor's real estate should qualify as an abuse of procedural law. This is not an illegal act *per se*.[18] Hence, Article 952^1 § 2 of the CCP is complementary to Article 4^1 of the CCP, introducing an unequivocal amount threshold which determines the inadmissibility of an application to set a date for the first auction of real estate serving to satisfy the debtor's housing needs.

Still, the dominant protective and preventive importance against the obstructive actions of the creditor should be attributed to the provision of Article 4^1 of the CCP, which has a universal dimension.[19] It allows to classify as a form of an abuse of procedural law the very procedural act initiating enforcement proceedings,[20] and Article 952^1 §§ 2–3 of the CCP only significantly postpones the moment of finding that we are dealing with an unacceptable act undertaken in the course of execution. For the sake of accuracy, the mere submission of an application for the first auction under conditions that do not meet the hypothesis of Article 952^1 §§ 1–3 of the CCP cannot be perceived as an abuse of procedural law, as it is an action devoid of a normative basis.

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[17] If, of course, the creditor has indicated several methods of enforcement. If he did not do so, a protective nature for the debtor have also the provisions of Articles 946 and 979 of the CCP. Cf. I. Kunicki, *Wybór sposobu egzekucji i ustalenie majątku dłużnika w świetle projektowanych zmian Kodeksu postępowania cywilnego (druk sejmowy nr 2678)*, "Przegląd Prawa Egzekucyjnego" 2015, no. 5, p. 20 ff.

[18] See T. Ereciński, *Nadużycie praw procesowych w postępowaniu cywilnym. Tezy i wstępne propozycje do dyskusji*, [in:] *Nadużycie prawa procesowego cywilnego*, eds. P. Grzegorczyk, M. Walasik, F. Zedler, Warszawa 2019, p. 14; A. Marciniak, *Nadużycie prawa procesowego w sądowym postępowaniu egzekucyjnym*, [in:] *Nadużycie prawa procesowego cywilnego*, eds. P. Grzegorczyk, M. Walasik, F. Zedler, Warszawa 2019, p. 372, 374.

[19] In the legal status prior to the entry into force of the 2019 amendment to the Code of Civil Procedure, it was assumed that the ineffectiveness of the application for the initiation of enforcement due to its inconsistency with good practice (Article 3 of the CCP) may constitute grounds for its dismissal as unfounded. On the other hand, the initiation of such unintentional enforcement proceedings should be discontinued pursuant to Article 355 in conjunction with Article 13 § 2 of the CCP. See A. Marciniak, *Nadużycie prawa…*, p. 384. Since, in the legal status at that time, the doctrine rightly allowed for Article 3 of the CCP of the character of a sanctioning (introducing a sanction) norm, and not only a sanctioned one (pointing to reprehensible behavior requiring sanction), this role has been taken over by Article 4^1 of the CCP.

[20] Cf. the position of A. Marciniak (*ibidem*, p. 367), who rightly indicated that the initiation of enforcement may constitute an abuse of the right to execution.

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AUCTION DURING AN EPIDEMIC – PROCEDURAL COMMENTS TAKING INTO ACCOUNT THE TRANSITIONAL PROVISIONS

Addition of the provision of Article 952[1] of the CCP exemplifies its protective function visible in the context of ensuring the protection of the debtor's housing needs in the event of an epidemic. It is worth analyzing what kind of auction is mentioned in Article 952[1] of the CCP. In particular, it should be determined whether this provision applies only to the first auction of the seized real estate or whether its instruction extends to the second auction. A question also arises as to how the bailiff should respond to the creditor's request for a second auction, submitted after the entry into force of the amendment to the Code of Civil Procedure of 14 May 2020, made with the Shield 3.0. There is no doubt about the application of Article 952[1] of the CCP for enforcement proceedings initiated after the date of entry into force of the Shield 3.0, i.e., after 30 May 2020.

Regarding the application of Article 952[1] of the CCP, the enforcement proceedings initiated before the date of entry into force of the amendment in question refer to the interim provision – Article 64 of the Shield 3.0. This provision stipulates that the provisions of the Code of Civil Procedure, as amended by this Act, also apply to proceedings initiated and not completed before the date of entry into force of this Act, if the creditor has not submitted an application for setting the date of the first real estate auction before that date. Therefore, it should be assumed that the key to assessing the application of Article 952[1] of the CCP for enforcement proceedings initiated on 30 May 2020 is the date of submitting the application for setting the date of the first auction. The problem, however, is that before the effective date of the Shield 3.0, the creditor did not apply for the first auction at all (unlike in the case of the second auction), because the bailiff in the public announcement about the auction indicated ex officio the time and place of the auction (Article 953 § 1 (2) of the CCP). It could therefore be assumed that, since Article 64 of the Shield 3.0 refers to an application to conduct the first auction, in the proceedings initiated before the entry into force of the Shield 3.0, the new Article 952[1] of the CCP only in cases where the first auction has not yet been scheduled.[21] If the application for the appointment of the first auction was received after 30 May, the bailiff shall not conduct any auction. This provision then applies to both the first auction, re-auction (pursuant to Article 970 of the CCP) and the second auction in the case specified in Article 983 of the CCP.

The problem also concerns determining whether the prohibition of the auction of real estate serving the debtor's housing needs applies when the first auction was already carried out in the enforcement initiated before the Shield 3.0 entry into

[21] I. Kunicki, *Ograniczenie wyznaczenia i przeprowadzenia licytacji nieruchomości z mocy art. 952[1] k.p.c.*, "Przegląd Prawa Egzekucyjnego" 2020, no. 12, p. 7 ff.

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force (then it did not require the creditor's request), but the auction did not take place and no one filed an application for taking over the property (Article 983 of the CCP). It seems that then the hypothesis of Article 64 of the Shield 3.0, which *expressis verbis* provision links the prohibition of auction (during the state of epidemic threat or epidemic state as well as 90 days after its end) only with the submission of an application for the appointment of the first auction by the creditor after 30 May 2020. Thus, and contrary to Article 64 *in fine* of the Shield 3.0, Article 952^1 of the CCP is not applied when the first auction has already taken place, and after the amendment in question comes into force, the creditor has applied for a second auction. In other words, the prohibition of auction under Article 952^1 § 5 of the CCP applies only when the enforcement proceedings initiated before 30 May 2020 are at such a stage that it was possible to submit an application for the appointment of the first auction of real estate "under the new regulations" outlined by Article 952^1 § 1 of the CCP. Any other enforcement proceedings that were initiated before the entry into force of the Shield 3.0 will take place after 30 May 2020 in accordance with the rules of the continuation system (i.e., under the rule of law in force at the time of initiation), i.e., without the prohibition of bidding. The conclusions drawn here on the rules of conduct resulting from a literal interpretation of Article 64 of the Shield 3.0 reflect the legislator's clear intention was that the rules should be different to apply to pending proceedings, which are already at a certain stage of advancement. This state, according to the *ratio legis* of Article 64 *in fine* of the Shield 3.0, justifies breaking the new rule of prohibition of auction. However, far-reaching reservations in this respect may be raised, leading to the conclusion that the transitional provisions should be uniformly regulated, regardless of the stage of advancement of the proceedings. In the author's opinion, due to the state of epidemic threat or epidemic is recommended to implement the update rule uniformly. If, by interpreting Article 64 *in fine* of the Shield 3.0 we consider that the understanding of the phrases "application for the appointment of the first auction" and "setting the date of the first auction" may be synonymous, then the application of the prohibition of auction (Article 952^1 § 5 of the CCP) during the transitional period will depend on the moments, which can actually be spread over a considerable period of time. The application for the appointment of the auction as the decisive moment in the applicable legal regime, also before 30 May 2020, could already be submitted in the enforcement application. Under the new regulations, it is not the date of submission of the enforcement application, but the application for the appointment of an auction, that determines the application of the prohibition of auction.

In the doctrine, M. Dończyk expressed the view that the second part of Article 64 of the Shield 3.0, which reads as follows: "if the creditor has not submitted an application for setting the date of the first real estate auction before that date" is redundant, because before the entry into force of Article 952^1 of the CCP, the date

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of the auction of the seized property was set without the creditor's request.[22] This author, however, did not indicate a model for the interpretation of this provision in the wording it postulated. Taking into account the above observations, it seems that attempts to interpret Article 64 *in fine* of the Shield 3.0 may face the objection of law-making interpretation.

WITHDRAWAL FROM THE AUCTION

Moving on to the procedures initiated after 30 May 2020, the issue of withdrawing from the auction requires more detailed discussion. The doctrine indicates that the bailiff refrains from conducting the auction without issuing an order in this regard. The auction is therefore subject to appeal upon necessary notice.[23] In the literature, there is no doubt that there is a distinction between stopping an action by way of a decision and not actually executing it "until the situation is clarified".[24] *Prima facie*, it should be assumed that on the basis of Article 952[1] § 5 of the CCP, we are not dealing with the bailiff's refraining from performing an action, as e.g. in the case of Article 822 of the CCP. There are, however, some similarities between the bailiff's refraining from performing the activities referred to in the above provision, and not conducting an auction under Article 952[1] § 5 of the CCP. From the construction side, in both of these cases we deal with situations similar to the adjournment of a court session,[25] however, which are not *verba legis* as a basis for suspending enforcement proceedings. The provision of Article 952[1] § 5 of the CCP provides for an intended and planned act, therefore it is not appropriate to speak of abandoning the act, but not taking it. We can also use the terminology adopted by M. Allerhand, who pointed to the cases of "cessation of activities".[26]

The supplement to the indication that Article 952[1] § 5 of the CCP does not apply to suspending an action, there may also be a thesis that the main purpose of the suspension is to prevent actions that could turn out to be completely unnecessary for the further course of the proceedings.[27] This is the purpose of the withholding that is

[22] M. Dończyk, *Komentarz do art. 64*, [in:] *Ustawa o zmianie niektórych ustaw w zakresie działań osłonowych w związku z rozprzestrzenianiem się wirusa SARS-CoV-2. Komentarz*, ed. K. Szmid, Legalis 2020, side number 7.

[23] A. Szymańska-Grodzka, [in:] *Zmiany w Kodeksie postępowania cywilnego wynikające z regulacji COVID-19. Komentarz*, ed. T. Szanciło, Warszawa 2020, pp. 38–39.

[24] M. Allerhand, *Kodeks postępowania cywilnego*, part 2: *Postępowanie egzekucyjne i zabezpieczające*, Lwów 1933, p. 113.

[25] E. Wengerek, *Postępowanie zabezpieczające i egzekucyjne. Komentarz*, Warszawa 1972, p. 548; M. Krakowiak, [in:] *Kodeks postępowania cywilnego*, vol. 2: *Komentarz. Art. 730–1217*, ed. J. Jankowski, Warszawa 2019, p. 1075.

[26] M. Allerhand, *op. cit.*, p. 116.

[27] M. Krakowiak, *op. cit.*, p. 1084.

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quite commonly visible, e.g. against the background of Article 822, Article 979 or Article 988 § 2 of the CCP. Meanwhile, the failure to conduct the auction referred to in Article 952[1] § 5 of the CCP, it is undoubtedly closer to the suspension of the proceedings due to the occurrence of an obstacle of an extraordinary nature (*vis maior, quae humana infirmitas resistere non potest*). Suspension of proceedings always lasts only until a specific event occurs, not for an indefinite period.[28] While the framework of this study does not allow for a closer consideration of the state of epidemic threat or state of the epidemic in the context of force majeure, it should be fully assumed that this state is an extraordinary event that causes the enforcement to stop for reasons beyond the control of the parties and the enforcement authority. Thus, it should not be ruled out in the context of the suspension of enforcement proceedings under Article 173 in conjunction with Article 13 § 2 of the CCP,[29] regardless of the provisions of Article 952[1] § 5 of the CCP, leading to not conducting only the first auction of a specific type of real estate.

The bailiff's obligations resulting from the analyzed provision are performed ex officio, without the party's request. They also include the bailiff's information obligation (immediate notification of failure to conduct an auction), implemented in writing or orally. Its omission updates the basis of the complaint under Article 767 of the CCP, as well as – due to the procedural and social consequences of the bailiff's behavior – is a manifestation of a flagrant breach of the provisions that allows the use of supervisory activities as part of judicial supervision (Article 166 (4) of the Act on court bailiffs)[30].

It is noted in the literature that Article 952[1] § 5 of the CCP meets the needs of debtors and their families, because it cannot be ruled out that there will be a justified need for quarantine to stay in the premises or apartment building of the debtor himself or those who have lived with him so far.[31] Moreover, the lack of the said regulation would undermine the implementation of the public nature of the auction.[32] Sharing these observations, as well as emphasizing the seriousness of

[28] M. Allerhand, *op. cit.*, p. 113.

[29] Por. A. Marciniak, *Sądowe postępowanie egzekucyjne w sprawach cywilnych*, Warszawa 2019, p. 289; E. Wengerek, *op. cit.*, p. 216; M. Łochowski, [in:] *Kodeks postępowania cywilnego*, vol. 2: *Komentarz. Art. 506–1217*, ed. T. Szanciło, Warszawa 2019, p. 769.

[30] If the bailiff conducts an auction against the imperative of the available part of Article 952[1] § 5 of the CCP. However, it is not possible to apply judicial supervision undertaken by the court – pursuant to Article 759 § 2 of the CCP – as an obligation carried out ex officio. It should be considered that the bailiff's act has already caused effects that cannot be removed under this procedure. More broadly, see T. Zembrzuski, *Zarządzenia sądu z urzędu a odpowiedzialność odszkodowawcza komornika sądowego i Skarbu Państwa*, [in:] *Sądowe postępowanie egzekucyjne. Nowe wyzwania i perspektywy*, ed. J. Jagieła, Warszawa 2020, p. 152.

[31] I. Gil, *Komentarz do art. 952[1]*, [in:] *Kodeks postępowania cywilnego. Komentarz*, ed. E. Marszałkowska-Krześ, Legalis 2020, side number 2.

[32] *Ibidem*.

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the type of threat in the form of the spread of SARS-CoV-2 virus, it is acceptable to consider that it is justified not to introduce any exceptions to the general rule of not conducting auctions. To be precise, by way of example, it is worth recalling cases where, in certain circumstances, the legislator provides for privileging certain categories of maintenance creditors (and others in a similarly significant need of quick satisfaction), e.g. pursuant to Article 890^2 of the CCP, when an account of a qualified entity is blocked within the meaning of tax regulations.[33] Regardless of the special situation of certain groups of creditors (e.g., maintenance), in the state of the epidemic, no category of creditors was privileged by breaking the prohibition of auction.

CONCLUSIONS AND *DE LEGE FERENDA* POSTULATES

The COVID-19 pandemic is forcing an *ad hoc* legislative response, tailored to the current needs of judicial enforcement proceedings. As a result, as can be seen against the background of the discussed issues, protective regulations are introduced for the debtor not only in the event of an epidemic, but also general ones, preventing his harassment.[34] This is confirmed by Article 952^1 §§ 1–4 of the CCP. Changes in the recently indicated scope deserve a positive assessment. However, the regulation indicated in Article 952^1 § 5 of the CCP can be assessed a bit differently. Especially in the context of shielding solutions, the goal intended by the legislator could also be achieved in other ways. In particular, the introduction, through legislative intervention, of an electronic auction in the course of enforcement of real estate,[35] following the example of an electronic auction of movable property,[36] should contribute to alleviating the problems of modern enforcement proceedings in the time of a pandemic. A separate problem is the still existing inadmissibility to conduct an auction of real estate independently by a bailiff. *De lege lata*, the public auction of each real estate takes place in the presence and under the supervision of a judge or a court clerk (Article 972 § 1 of the CCP), which in the current state of the epidemic causes a number of practical problems. The legislator recognizes

[33] Article 119zg (2) of the Act of 29 August 1997 – Tax Ordinance (consolidated text, Journal of Laws 2020, item 1325, as amended).

[34] A. Sikorska-Lewandowska, *Zmiana regulacji prawnych w zakresie egzekucji z nieruchomości mieszkalnych wprowadzona w związku ze stanem epidemii*, "Nieruchomości" 2021, no. 2, pp. 4–7.

[35] The provisions of Articles 986^1–986^{11} of the CCP have been introduced by the Act of 28 May 2021 amending the Act – Code of Civil Procedure and certain other acts (Journal of Laws 2021, item 1090), which entered into force on 19 September 2021.

[36] This auction was introduced by the Act of 10 July 2015 amending the Act – Civil Code, Act – Code of Civil Procedure and certain other acts (Journal of Laws, item 1311, as amended), and in this respect it entered into force on 1 March 2017.

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the increasing independence of the bailiff as the basic enforcement authority also during real estate enforcement. An example of a tendency to increase this independence is, for example, the bailiff's resignation from drawing up a draft plan for the division of the sum obtained by execution on real estate, made pursuant to the amendment of the Code of Civil Procedure of 2015, which entered into force on 8 September 2016.[37] Nevertheless, the auction of real estate still requires direct supervision by a judge (court clerk). It is hoped that breaking this rule will become the next legislative challenge.

Finally, it seems that the general problem with the organization of the work of the courts, as well as the risks associated with conducting each auction during an epidemic, could be mitigated by the general provisions on the suspension of enforcement proceedings (taking into account the provisions on suspension in examination proceedings),[38] without the need to introduce an essentially unclear provision prohibiting auctions. In this context, when assessing the *ratio legis* of the Shield 3.0, one can have doubts as to whether the interpretation of Article 64 of the Shield 3.0, based on the admissibility of holding a second auction, when the first auction was carried out during an epidemic but before the entry into force of Shield 3.0 is correct. It seems that the epidemic risk would be equally reduced in the event of a general (optional) waiver of auctioning during a pandemic, regardless of when the creditor applied for the first auction.

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[37] After the 2015 amendment to the Code of Civil Procedure (in the current legal state), it is the bailiff who immediately draws up the plan, and not only the draft plan for the distribution of the sum obtained from the enforcement (Article 1035 of the CCP). Changes leading in this direction should be welcomed. Cf. A. Antkiewicz, *Sporządzanie przez komornika projektu planu podziału sumy uzyskanej z egzekucji z nieruchomości (art. 1035 k.p.c.)*, "Przegląd Prawa Egzekucyjnego" 2007, no. 6–8, pp. 74–77; J. Derlatka, *Zaskarżenie planu podziału sumy uzyskanej przez egzekucję z nieruchomości*, [in:] *Środki zaskarżenia w postępowaniu egzekucyjnym. Studia i materiały*, ed. J. Misztal-Konecka, Sopot 2017, p. 150.

[38] See M.J. Mania, *Tarcza antykryzysowa 3.0 a postępowanie egzekucyjne*, LEX/el. 2020.

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ABSTRAKT

W niniejszym artykule poddano pod naukową dyskusję problematykę licytacji lokalu mieszkalnego lub nieruchomości gruntowej zabudowanej budynkiem mieszkalnym służących zaspokojeniu potrzeb mieszkaniowych dłużnika w czasie epidemii wirusa SARS-CoV-2. Kluczowe znaczenie należy przypisać nowemu art. 952^1 § 5 Kodeksu postępowania cywilnego, według którego licytacji lokalu mieszkalnego lub nieruchomości gruntowej zabudowanej budynkiem mieszkalnym, które służą zaspokojeniu potrzeb mieszkaniowych dłużnika, nie przeprowadza się w czasie obowiązywania stanu

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zagrożenia epidemicznego lub stanu epidemii oraz 90 dni po jego zakończeniu. Nowe rozwiązanie prawne zwraca uwagę na podstawowe problemy z organizacją pracy sądów (związane z sądowym postępowaniem egzekucyjnym) w okresie epidemii wirusa SARS-CoV-2 oraz z podziałem obowiązków pomiędzy sądem rejonowym a komornikiem sądowym. W zaprezentowanych rozważaniach postuluje się wprowadzenie nowatorskich rozwiązań, obowiązujących nie tylko w stanie epidemii. Po pierwsze, wprowadzenie w drodze interwencji ustawodawczej licytacji elektronicznej w toku egzekucji z nieruchomości, na wzór licytacji elektronicznej z ruchomości. Po drugie, przełamanie zasady, według której licytacja nieruchomości wymaga bezpośredniego nadzoru sędziego (referendarza sądowego). Artykuł uwzględnia stan prawny na dzień 1 stycznia 2021 r.

Słowa kluczowe: sądowe postępowanie egzekucyjne; komornik sądowy; licytacja elektroniczna; egzekucja z nieruchomości; epidemia wirusa SARS-CoV-2

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