

WITHDRAWAL FROM A CONTRACT TRANSFERRING THE OWNERSHIP OF REAL ESTATE

1. The issue of withdrawal from a contract transferring ownership of real estate and, most of all, the legal consequences of such an act, are very controversial, both in judicial decisions and in the doctrine. This issue concerns the mutual relation between contract law and property law and the influence of the former on institutions of the latter, and involves the question of whether the material relations and the regulations of property law can modify, or even exclude, the possibility to apply the provisions of contract law with respect to contracts concerning real estate. It is necessary to consider whether a party to a contract can have a statutory right to withdraw from a contract transferring ownership of real estate but also whether such possibility is provided for by the principle of freedom of contract. The right to withdraw that may be effectively reserved in a contract with obligatory consequences is unquestionable, whereas in dual-consequence contracts as well as contracts of solely dispositive nature, the effectiveness of such a reservation causes doubts.

The provision of Art. 560 of the Civil Code lists the possibility to withdraw from a sales contract as one of the rights granted by virtue of warranty. The code does not mention any restrictions as to the object of a sales contract. Consequently, withdrawal from a contract transferring ownership of real estate can also be deemed as allowed. Also Art. 491 of the Civil Code provides for the possibility to withdraw from a reciprocal contract when one of the parties is late in performing its obligations. A real estate sale contract is a reciprocal contract and, therefore, based on the letter of the legal provision one ought to consider withdrawal from a contract transferring ownership of real estate as allowed, unless the provision stipulates some exceptions. The condition, however, is that the contract cannot have been performed¹. What raises doubts is the permissibility of a contract including a reservation on withdrawal, if both parties have performed their duties.

¹ See also Art. 898 § 1 of the Civil Code which provides for the possibility to cancel a donation contract which has been performed.

When discussing the issue of termination of a contract transferring ownership of real estate, it is important to note that Art. 901 of the Civil Code provides for the possibility to terminate a donation contract, subject to meeting some conditions stipulated therein, while Art. 913 § 2 of the Civil Code allows for terminating a life usufruct contract.

2. The problem of termination of and withdrawal from a contract transferring ownership of real estate, as well as the legal consequences of such an act, has been the object of several decisions of the Supreme Court. One of the most notable is the resolution of the Supreme Court of 17 November 1993², in which the Court decided that, on the basis of Art. 491 § 1 of the Civil Code, it is permissible to withdraw from a contract transferring the right of perpetual usufruct of land and the building located thereon, subject to the condition that the reciprocal contract can not have been performed. According to the court, this results from the provision of the code. Based on Art. 155 § 1 of the Civil Code, transfer of ownership of real estate takes place at the moment a contract is concluded, but in order for the contract to be performed, the other party also must perform its obligation consisting in the payment of the sale price. Consequently, if the buyer is late in the payment of even a small portion of the total price, the contract can be deemed as not performed. In such situations, the conditions stipulated in Art. 491 § 1 of the Civil Code are not met and, thus, withdrawal from the contract is possible.

In its next resolution³ concerning this issue, the Supreme Court confirmed its earlier position. The court decided that a party can, within its statutory rights, withdraw from an obligation–disposition contract that constitutes a basis for the transfer of ownership of real estate. The condition for termination of a contract by its parties is that the contract must not be performed in its entirety. The Court declared that the location of the institution of transfer of ownership within property law does not exclude the application of provisions of contract law. Nevertheless, the Court concluded that reservation of the right to withdraw in a contract transferring ownership must be treated in the same manner as the condition for termination that is forbidden in Art. 157 § 2 of the Civil Code. Despite the differences between the two institutions, they lead to the same consequence: a grave threat to security and certainty of transactions. According to Art. 395 § 2 of the Civil Code, the execution of the right to withdrawal reverses the conclusion of a contract, which results in the obligation to return the received benefits. In the case of dual–consequence contracts, this impairs the permanence of the appropriation. With respect to the statutory right of a party to withdraw from a contract, the Supreme Court stated that it has

2 III CZP 156/93, OSNC 1994, No. 6, item. 128.

3 Ordinance of the Supreme Court of 30 November 1994, III CZP 130/94, OSNC 1995, No. 3, item 42, with a critical gloss of E. Drozd. "Przegląd Sądowy" 1995, No. 10, p. 109.

a different nature. The essence of this right is that it does not exist at the moment a contract is concluded, that it emerges during the performance of the contract, and that it is dependent on the other party's behavior. The fact that a contract results in a material consequence does not contradict the right to withdraw from the contract. A transfer of ownership of real estate is not irreversible and separate from the status of obligations. The Court noted, as it did in its earlier resolution of 1993, that transfer of ownership does not have to mean that all obligations have been performed on time. Consequently, the contractual relation is still in place, and that is why the condition stipulated in Art. 491 § 1 of the Civil Code is met. The Supreme Court also pointed at Art. 560 of the Civil Code and stated that improper performance of an obligation due to the existence of defects in the good that is the subject of an obligation, does not completely break the obligatory tie between the parties. The court also concluded that if a contract has not been performed, then its termination by agreement of both parties is possible in accordance with the freedom of contract (Art. 3531 of the Civil Code). On the other hand, a complete performance of the contract makes its termination invalid.

Representatives of the doctrine have not elaborated an unequivocal position in relation to the resolutions of the Supreme Court. It is important to note that the issue of withdrawal from a contract transferring ownership had not been uniformly interpreted in the literature. According to S. Breyer, Art. 491 of the Civil Code does not refer to contracts transferring ownership of real estate of obligatory-material nature and that such contracts, in the meaning of this legal provision, must be considered as performed⁴. J. S. Piąkowski believes that if the provisions of contract law do not exclude it, then there is no reason to question the permissibility of withdrawal from a contract transferring ownership of real estate⁵.

Those authors who accept the opinions of the Supreme Court and object to the possibility to include a withdrawal clause in contracts transferring ownership of real estate argue that the reservation has an effect similar to that which is eliminated by the legislator by the prohibition included in Art. 157 § 1 of the Civil Code. Until the deadline for the execution of the withdrawal right, neither the transfer of the ownership to the buyer nor the loss of ownership by the seller are definitive. In such a situation, transfer of ownership is neither permanent nor certain. The authors also point at Art. 395 § 2 of the Civil Code which defines the responsibilities of parties resulting from the contractual right of withdrawal. According to this legal provision, the buyer of real estate cannot take any actions that would lead to a change of its substance because he is obligated to return the real estate in an unchanged state⁶.

4 S. Breyer, *Przeniesienie własności nieruchomości*, Warsaw 1971, p. 136.

5 J.S. Piąkowski, in: *System prawa cywilnego. Prawo rzeczowe*.

6 P. Drapała, in: E. Łętowska, ed., *System Prawa Prywatnego. Prawo zobowiązań – cz. ogólna*, Warsaw 2006, p. 943.

A. Szpunar presents a very interesting opinion on the issue of withdrawal from a contract transferring the property right. In his opinion, both contractual and statutory right of withdrawal are permissible⁷. If a contract includes a reservation, the uncertainty is sustained only for a period indicated by the parties in the relevant clause. A. Szpunar highlights the fact that in Polish law, the registration of the buyer in the land and mortgage registry is not a necessary condition for the transfer of ownership of real estate, which results in the lack of stability and permanence of the transaction⁸. E. Drozd excludes the permissibility for the parties to include in the contract a withdrawal clause and, concerning the statutory withdrawal right, he states that its conditions are stipulated in the law itself and there is no need to make an additional condition of the contract not being performed in its entirety⁹. Both authors are critical of the opinion of the Supreme Court on termination of contracts, in particular of its permissibility only when the contract transferring ownership has not been performed completely. Especially E. Drozd rightfully points at practical problems, especially in determining when a contract is not performed in its entirety. He highlights the fact that, given such a position of judicial decisions, the parties should preventively not make a complete payment of the full sales price (e.g. pay 1 złoty less) in order for the contract to be performed incompletely. The notary who makes the notarial deed, is not in a position to determine if a contract has been performed completely and must rely on the declaration of the parties, which may not be true¹⁰. The author makes a proposition that the possibility to make a reservation in a real estate sale contract as to the right to repurchase, supports the admissibility to terminate a contract that has been performed. He also makes a comparison between termination of a real estate sales contract and the right to repurchase. The functions of both actions are similar but their consequences are very different. The difference lies, most of all, in the warranty of public faith in the land and mortgage registry (which is present in the case of a sale, and is questionable in the case of termination, as the termination would have to be payable), and in the responsibility for defects (present in the case of a sale and absent in the case of a termination)¹¹.

One must agree with the opinion that it is the statute that determines the conditions that must be met in execution of the statutory right of withdrawal. Setting a condition in judicial decisions that a contract must not be performed appears to be unjustified. Most of all, it causes practical difficulties in determining the verity of the parties' declarations, which results in such a condition being fictitious. It appears

7 A. Szpunar, *Odstąpienie od umowy o przeniesienie własności nieruchomości*, "Rejent" 1995, No. 6, p. 16 ff. The same in W. Czachórski, A. Brzozowski, M. Safjan, E. Skowrońska-Bocian, *Zobowiązania. Zarys wykładu* Warsaw 2007, p. 213.

8 *Ibid.*, 16

9 E. Drozd, a critical gloss to the ordinance by a bench composed of 7 judges of 30 November 1994, (III CZP 130/94), "Przegląd Sądowy" 1995, No. 10, p. 110–111.

10 *Ibid.*, 112 ff.

11 *Ibid.*, 117.

that making a reservation on the right of withdrawal from a contract transferring ownership of real estate can also be deemed as allowed. Similar to the right of repurchase, such a clause is not detrimental to the security of transactions if the parties meet the condition set in Art. 395 § 1 of the Civil Code by indicating a period in which withdrawal from the contract will be allowed. Nevertheless, in order to increase the certainty of the transaction, the parties may also stipulate conditions for such withdrawal, e.g. if the sale price is not paid in full by a certain date.

Referring to the necessity to assure the security and certainty of transactions as a reason against limiting the discretion of parties appears to be not substantiated since reservation of the right to repurchase in real estate sale contracts is allowed. Both actions have a similar effect: the transfer of the property right from the buyer to the seller of real estate. Nevertheless, there are some differences: in the case of withdrawal, the contract is considered as not concluded, while the execution of the right to repurchase does not lead to the contract being deemed as null and void. In the case of a withdrawal, a party is entitled to claim damages, while the right to repurchase constitutes the execution of a power that forms that very right.

3. The issue of withdrawal and termination of a contract transferring property rights is related to the issue of legal consequences of such acts. The judicial decisions do not interpret this issue in a uniform fashion¹². As to the literature, E. Drozd concludes that a reverse transfer of ownership takes place by virtue of law and, therefore, additional contracts with material consequences are unnecessary¹³. The doctrine leans towards the opinion, which should be accepted, that termination of a contract leads to an obligatory consequence: the obligation of the buyer to transfer the ownership back to the seller. Thus, it is necessary to conclude a contract transferring ownership; nevertheless, it is deemed as possible to include in one notarial deed both a contract concerning the termination of the obligating contract and a contract concerning the transfer of ownership¹⁴.

12 In its ordinance of 5 May 1993 (III CZP 9/93, OSNCP 1993, no. 12, item 215), the Supreme Court stated that termination by parties of a contract transferring ownership of real estate results in the ownership going back to the seller. In the ordinances of 17 November 1993 (III CZP 156/93, OSNC 1994, no 6, item 128) and of 27 April 1994 (III CZP 58/94, "Wokanda" 1994, No. 6, p. 5), the Supreme Court stated that, in order for material consequences to occur, it is necessary that the ownership of real estate be transferred. In reference to withdrawal from a sale contract of a movable object, the Supreme Court concluded that the consequence is the transfer of the object back to the seller. See the Supreme Court ordinance (7) of 27 February 2003, III CZP 80/02, OSNC 2003, no. 11, item 141.

13 E. Drozd, *Glosa...*, p. 118.

14 S. Rudnicki, *Odstąpienie od umowy i rozwiązanie umowy przeniesienia własności nieruchomości* in: G. Bieniek, S. Rudnicki, ed., *Nieruchomości. Problematyka prawna*, Warsaw 2007, p. 455, A. Szpunar, *Odstąpienie od umowy...*, p. 24.

Streszczenie

Zagadnieniem wywołującym kontrowersje oraz spory, zarówno w orzecznictwie, jak i w doktrynie, jest problematyka odstąpienia od umowy przenoszącej własność nieruchomości, a przede wszystkim skutków prawnych takiej czynności. Tematyka dotyczy wzajemnego stosunku i wpływu prawa zobowiązań na instytucje prawa rzeczowego: czy istniejący stosunek rzeczowy i reglamentacje wynikające z prawa rzeczowego mogą modyfikować, czy wręcz wykluczać możliwość stosowania postanowień prawa zobowiązań w odniesieniu do umów, których przedmiotem jest nieruchomość. Problematyka ta stała się przedmiotem szeregu wypowiedzi Sądu Najwyższego, w stosunku do których przedstawiciele doktryny nie wypracowali jednoznacznego stanowiska.

W kwestii skutków prawnych należy zaaprobować przeważający pogląd, że rozwiązanie umowy wywołuje skutek obligacyjny – zobowiązanie nabywcy do przeniesienia własności z powrotem na zbywcę. Konieczne jest zawarcie umowy przenoszącej własność, nie ma przeszkód, aby obie umowy o rozwiązanie umowy zobowiązującej i o przeniesienie własności zostały zawarte w jednym akcie notarialnym.