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EFFECTIVENESS OF EXECUTION FROM A BANK ACCOUNT

Summary

The paper presents execution of a debtor's bank account and the factors which, according to the author, influence directly its effectiveness. Despite the fact that the legislator seemingly has included a complete solution of this issue in the Code of Civil Proceedings, in the light of practical experience, the issue is more complicated and the solutions stated in the regulations cause serious trouble to the creditors, debtors, executive authorities as well as banks. The paper describes different types of bank accounts, for which it is possible to proceed with the execution, methods of searching for bank accounts by the executive authorities, and also the impact of Article 54 of banking law, which involves restriction on the execution.

Key words: execution, bank account, effectiveness

Introduction

When initiating execution, the creditor is obliged to indicate the method of its conducting and the debtor's assets that the execution relates to. If the creditor does not have knowledge of the debtor's assets, they may commission a court bailiff to trace the debtor for an appropriate fee. A request in the execution proceedings, particularly a request for the initiation of an execution, and a claim of the court or an authorised body to carry out the execution are essential. The executive authority is bound by the request and the claim relating to the rendition that is to be given and the method of conducting the execution or actions¹. In civil cases, the court bailiff does not act officially, which means that they cannot go

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¹ Z. Szczurek, *Egzekucja Sądowa w Polsce*, Sopot 2007, p. 129.

beyond the claim, on the basis of which the execution proceedings are carried out.

Among the execution methods, which the creditor may use there is also execution of the debtor's bank accounts (Article 889 at al. of the Code of Civil Proceedings). Nowadays bank accounts are so common they have become one of the most frequently indicated methods of execution, which is supposed to be simple in use by the executive authorities and effective.

1. Vagueness of legal provisions regulating the execution proceedings of debtor's account

Despite the fact that the execution of a debtor's bank accounts was seemingly regulated by the provisions of the Code of Civil Proceedings in a transparent and clear manner, in practice it is much more complicated. It is not limited to the following actions: banking seizure by a court bailiff, transferring the seized funds by the bank to the bank account indicated by the bailiff, dividing the seized funds from the execution among the creditors, if there are more than one. According to the author of the paper, the provisions on the execution of the bank account are not precise enough and do not include ready to use solutions to problems the executive authorities come across in execution proceedings. Therefore, this paper is devoted to methods of obtaining information on the debtors' accounts by bailiffs and the influence of the restriction resulting from Article 54 of the Banking Law Act of 29 August 1997² on the effectiveness of execution proceedings.

2. The concept of a bank account and its types

The presentation of an execution of a debtor's bank account and the factors which influence its effectiveness requires clarifying the concept of a "bank account" and determining the types of bank accounts, for which it is possible to carry out the execution proceedings. The term "bank account" is ambiguous. In relation to the "agreement" it is used to determine:

² Journal of Laws of 2012, item 1376, as amended.

- a civil law relationship, the content of which is within the statutory definition included in Article 725 of the Civil Code,
- a bilateral civil law action, which is the source of content of the bank account relationship.

The use of the term “bank account” in legal provisions without linking it with the word “agreement” means a bank account legal relationship or accounting records that reflect the status of claims of one party of civil law relationship towards the other. As may be noticed, the meaning of the term “bank account” depends significantly on the context, in which it is used. As the author claims, in case of execution of the debtor’s bank account in civil matters, the parties to the proceedings and the bailiff deal with all the meanings of the term “bank account” mentioned above. Depending on the situation, during execution proceedings the term “bank account” used for the purposes of proceedings shall mean civil law relationship and the powers and responsibilities resulting from this relationship, and oftentimes the claims of one party of the civil law relationship towards the other.

Bank accounts may be managed only by entities that on the basis of the provisions of the Banking Law Act own proper powers. These are primarily banks (Article 5, Section 1, Subsection 1 and 2 of the Banking Law and Article 5, Section 4 of the Banking Law). Organisational units other than banks may run a banking activity in terms of bank accounts management if the provisions of acts so allow (Article 5, Section 5 of the Banking Law)³. Conclusion of an agreement whose subject is keeping the funds and making the settlements by an entity legally unauthorised, is to be considered unacceptable (Article 58 of the Civil Code)⁴.

The bank account agreement is not homogeneous. In practice, there are many types of bank accounts. For particular entities, especially natural persons and institutional entities, there are different types of bank accounts. They also differ in terms of the duration (agreements concluded for a definite and indefinite term) and their function as well⁵.

Article 49 of the Banking Law divides bank accounts as follows:

³ G. Sikorski, *Egzekucja z rachunków bankowych*, Sopot 2011, p. 22.

⁴ W. Pyziół, [in:] *System prawa prywatnego*, vol. 8. *Prawo zobowiązań – część szczegółowa*, J. Panowicz-Lipska (ed.), Warszawa 2004, p. 338.

⁵ G. Sikorski, [in:] *Egzekucja sądowa w Polsce*, pod kierunkiem Z. Szczurka, Sopot 2007, p. 417.

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- settlements accounts, including current and auxiliary accounts,
- term deposit accounts,
- savings accounts, savings and settlement accounts, and savings term deposit accounts,
- trust accounts.

In the provision mentioned above there were primarily basic categories (types) of bank accounts, which may be managed by banks. The list is prefixed with the word “especially”, therefore the catalogue of those bank accounts is left open by the legislator. This means that banks may also manage other types of bank accounts, provided that this results from separate provisions of law⁶.

If there are many types of bank accounts, there arises a question: for which types of bank accounts can the bailiff conduct the execution proceedings? The answer is any type. It is definitely a convenience for the executive authority, except from trust accounts. This restriction results from a specific concept behind such a type of bank account. On trust accounts there can be deposited only funds entrusted to the owner of the bank account by a third party on the basis of a separate agreement. This agreement is a trust deed, the owner of the bank account is a trustee, and the third party is a trustor. Importantly, on such a bank account there cannot be deposited funds that belong to the third party, as well as funds from various sources, i.e. funds that belong to the third party together with the bank account owner’s funds. The trust account is usually used for various transactions in order to increase the safety of paying the price. The parties of the trust account agreement are the bank that opens and manages the account and the owner of the account (the trustee). The third party that deposits funds into the trust account is not a party of the agreement. However, the funds located on this account are still their property, which disenables a possibility of execution proceedings on such a type of account by a bailiff.

⁶ P. Bodył-Szymala, *Małoletni posiadaczem rachunku bankowego*, Pr. Bank. 2004, no 4, p. 76.

3. The methods of gaining information on the debtor's bank accounts by the executive authorities

One of the most common difficulties that juridical executive authorities face when proceeding with the creditor's request is the lack of precise information on the debtor's assets necessary to conduct an effective execution. Very often, this problem relates to the requests of the creditor for an execution of the debtor's bank account. The creditor is not burdened with any obligation to possess detailed information, and bearing in mind that one person, natural or legal, may be the owner of several bank accounts, it is even impossible. The debtor may not have any bank account at all, because they do not need it. Therefore, it can be stated that in terms of having a bank account there is discretion of decision. Only in few cases, the Polish legislature provides the obligation to have a bank account. According to Article 22 of the Act of 22 July 2004 on Freedom of Economic Activity⁷ cash deposits or receiving payments related to the performed economic activity is done through an entrepreneur's bank account always when:

- the party of transaction which is the reason of the payment is another entrepreneur
- the one-off value transaction, regardless of the number of payments, exceeds 1.500 EUR converted to PLN at the average exchange rates for the foreign currencies announced by the National Bank of Poland on the last day of the month, preceding the one in which the transaction was carried out.

The provisions that regulate the obligation to have a bank account are also included in the Tax Ordinance⁸ and the Law on Goods and Services⁹. According to Article 61 of the ordinance, the payment of taxes by the taxpayers who run a business and are obligated to keep an accounting book or a tax revenue and expense ledger is done as a remittance order. It is irrelevant if the transfer is executed from the business or private account. Such a form of financial settlement relates also to payments of taxes collected by taxpayers. In case of the VAT Act the entrepreneur is obliged to have a bank account so that the tax

⁷ Journals of Laws of 2004, No 173, item 1807 as amended.

⁸ Journal of Laws of 2012, item 749 as amended.

⁹ Journal of Laws of 2004, No 54 item 535.

authority can reimburse the difference between the input and output taxes.

The creditor usually does not have information on the debtor's bank accounts and the obligation to search for it is imposed on the executive authority. Establishing by the bailiff the fact that the debtor concluded the bank account agreements may take place by calling upon the debtor pursuant to Article 801 of the Code of Civil Proceedings, sending proper inquiries to the Tax Office and the Social Insurance Institution or the banks covered by the OGNIVO system. Using all these possibilities may facilitate identification of the debtor's account. However, full success is not guaranteed.

On the basis of Article 801 of the Code of Civil Proceedings, the bailiff may call upon the debtor's to provide explanations, including information on the debtor's bank accounts if the creditor or the court ordering officially an execution proceedings or an empowered body that claims an execution proceedings does not indicate the assets which can satisfy the claims. The debtor is obligated to give true information and for an unjustified refusal or giving knowingly false information or explanation the debtor or a person responsible for transferring the information may be fined the amount of two thousand PLN officially by the executive authority or upon request of the creditor. Such a regulation of liability is not flawless. Taking actions by the bailiff in order to establish the bank in which the debtor concluded the agreement causes a lack of surprise in the subsequent banking seizure, which influences significantly the effectiveness of the execution.

Hearing of the debtor takes place standardly in the bailiff's office or the debtor fills in the form prepared by the bailiff and delivered by mail, which has to be send back to the bailiff. According to the author of the paper, the second solution is particularly insufficient in terms of the effectiveness of the execution of the bank account. The initiation and conduct of the execution proceedings against the debtor have reasonable grounds, which is failure to comply with the financial liabilities. Allowing the debtor to submit a written declaration and send it back to the bailiff by mail is not a proper solution, because this creates conditions to take actions by the debtor in order to withdraw the funds from the account or even terminate the bank account agreement. In such a situation, the bailiff shall have useless information for the conducted execution proceedings. Within the current regulations fining the debtor

causes little harm, it is a long-lasting process and rarely applied by bailiffs. This sanction may be implemented under two conditions¹⁰:

- the person, whom the executive authority called upon to submit a statement or information is burdened with the obligation to submit a statement or information on the basis of Article 761 of the Code of Civil Procedure
- the person refused to submit an explanation or information without reasoning or knowingly submitted false information or explanation.

Current regulations do not include a possibility of fining the unreliable debtor in case when the debtor, despite the knowledge of the initiated execution but before hearing pursuant to Article 801 of the Code of Civil Proceedings knowingly emptied or closed the bank account.

According to the author, it is necessary to tighten up the debtor's liability for such a behaviour, for example by implementing an obligation to fine debtors by bailiffs officially and instituting by the legislator the calculation of a relative amount of fine depending on the amount of debt. It would also be preferable to implement a possibility of fining the debtor who, duly notified of initiation of the execution proceedings, acting to the detriment of the creditor, obstructed the conduct of the execution proceedings of the possessed bank account by withdrawing the funds or terminating the bank account agreement with the bank. According to the author, using by the bailiff the right to gain information on the debtor's bank accounts on the basis of Article 801 of the Code of Civil Proceedings should take place only when all other methods fail.

Another method of collecting information by the bailiff, which is essential for the initiation and conduct of the execution proceedings of the debtor's bank account, is sending a proper inquiry to the Tax Office and the Social Insurance Institution. The right of the bailiff to send the inquiry to the authorities mentioned above is included in Article 2 Section 5 of the Act on Court Bailiffs and Execution¹¹. According to the content: *Public administration authorities, tax offices, pension authorities, determined in Article 476 Section 4 of the Code of Civil Proceedings, banks, credit unions, brokerage houses, housing*

¹⁰ O. Marcewicz, Komentarz aktualizowany do art. 762 Kodeksu postępowania cywilnego, [in:] Komentarz aktualizowany do ustawy z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego, A. Jakubecki (ed.), LEX/El., 2013.

¹¹ Journals of Laws of 2011, No 231, item 1376.

associations, boards of housing communities, other entities that administrate residential units, and also other institutions are obligated to provide information on written request of the bailiff, which are necessary for proper conduct of the execution proceedings, the execution of a provision on pledge establishment and other actions within the scope of the bailiff's statutory tasks, particularly related to the debtor's assets and allowing their identification. The bailiff on the basis of the quoted provision may demand information on the debtor's assets, including the bank accounts, despite the fiscal secret, for example.

The above mentioned institutions may own information valuable to the bailiff on the grounds that their knowledge of the debtor's assets is based primarily on various explanations, declarations and specifications submitted by the taxpayer, information provided by the payers (e.g. the employer), data gained from financial institutions (e.g. brokerage houses). Officials may also own information on the debtor's assets if there were tax proceedings against the debtor or inspections in order to provide the tax payment guarantee. The group of entities on which the bailiff can gain information by sending the inquiry is, therefore, limited and directly linked to the obligation of having a bank account by some entrepreneurs. In relation to natural persons who do not run a business those inquiries are not meaningful because they usually do not bring any efficiency.

As the author claims, the last and most effective method of gaining information on the debtor's bank accounts by a juridical executive authority is using the modern module under the service OGNIVO. The service was made available to bailiffs in the second quarter of 2011. Originally, OGNIVO was created in order to improve the process of exchanging the information on interbank settlements and restrict the related costs. The cooperation of the National Clearing House, the National Council of Judicial officers and Currenda company resulted in the module, which allows the bailiff, by means of a special computer application, to gain information on the debtors' bank accounts. The solution reduces the time and increases the effectiveness of the execution proceedings. It is worth mentioning that the system is fully automatic. It collects data on the debtor, checks if a given person is a customer of the bank and sends the feedback to the bailiff. The bailiff, having the confirmation on the debtor's bank account or accounts, conducts the proper seizure of financial claims on this account or accounts. This solution is very convenient to the executive authority, because it

eliminates a possibility of an error of the seizure of financial claims in the banks in which the debtor did not conclude any bank account agreements. Despite fast development, OGNIVO does not allow gaining information from all banks on the Polish market. Until today, such a possibility has been offered by 118 banks, including 97 cooperative banks. The increase of the number of banks from which the information on the debtor's bank account may be obtained has been fast, which brings positive prospects for the future.

4. The role of the creditor in the execution proceedings

Therefore, there are currently several possibilities of obtaining information on the debtor's bank accounts by court bailiffs. Unfortunately, until today there has been no method, which would guarantee full effectiveness. An important role in shaping the process of gaining information necessary for initiation of the execution of the bank account plays the creditor. In order to enable the bailiff to use all the possibilities, there is a proper request needed that indicates for example: sending the inquiry to particular offices or using the OGNIVO system. The responses to those inquiries are chargeable for civil cases and it depends on the creditor if the proper payment is done, which allows the executive authority to obtain such important information for further execution proceedings. The persons applying for the initiation of the execution are often unaware of the restrictions concerning the discretion of the executive authorities, which influence the effectiveness of the execution and its conduct. Because the creditor is not always represented by a professional representative who knows the current procedure on the grounds of the professional qualifications, it is essential at the stage of submitting the request that the bailiff informs the creditor on the necessary steps that need to be taken for the effective execution. As Z. Knypl rightly noted¹², the creditor should be active during the whole procedure, submit requests, demands, participate in the activities and give the necessary information to the bailiff. However, according to the author, on the grounds of the possessed knowledge, it is the bailiff who should direct the creditor properly, using suitable requests and the information given to the creditor so that the execution proceedings follow the right direction.

¹² Z. Knypl, [in:] *Encyklopedia egzekucji sądowej*, Sopot 2002, p. 738.

5. The limitations on the execution

Some powers of the debtor in the execution proceedings are protected. In Articles 829 – 839 of the Code of Civil Procedure, the legislator implemented limitations on the execution, which involve a statutory preclusion of certain assets of the debtor. The provisions on limitations on the execution are mandatory and binding, which does not allow the debtor to abandon the rights resulting from those limitations or amicably submit to the execution the assets, which were statutorily precluded from the execution. The implemented limitations are intended to provide the debtor and their family with the minimum subsistence and in economic cases a possibility of further business activity. The limitations on execution in civil procedure are not the only protection of the debtor. In case of execution of the debtor's bank account, Article 54 Section 1 of the Banking Law states that *the funds on savings accounts, savings and settlement accounts and savings term deposit accounts of one person, regardless of the number of the agreements concluded, are free from seizure of claims on the basis of a legal or administrative executory entitlement to three times the average monthly salary in the enterprise sector, without payments from the profit, published by the President of the Central Statistical Office for the period directly preceding the day of issuing the executory entitlement*. The legislator determined the amount of the claim on the bank account that cannot be transferred to the executive authority by the bank.

In the doctrine, there are two points of view concerning the nature of anti-enforcement proceedings provided for in Article 54 of the Banking Law. According to the first one, propagated by Dominika Rogoń¹³, exemption from seizure is a one-off procedure, i.e. the debtor in the execution procedure of the bank account may invoke it only once. If at the moment of seizure of the claims the bank account balance does not exceed “the amount of three times the average monthly salary in the enterprise sector”, the funds will not be transferred to the executive authority. Only those funds that exceed the amount free from seizure will be submitted to the seizure and transfer. However, if at the moment of seizure there were no funds on the account or the cash balance was below the amount of seizure, the debtor (the owner of the account) has the right

¹³ D. Rogoń, Komentarz do art. 54 ustawy – Prawo bankowe, [in:] Prawo bankowe. Komentarz Tom I i II, F. Zoll (ed.), Zakamycze 2005.

to keep the funds or supply the account with further inflows to the account.

The other view propagated by W. Pyzioł¹⁴ states that the exemption from seizure pursuant to Article 54 of the Banking Law is permanent, which means that the dispose of funds free from seizure and then resupplying the bank account causes an automatic exemption of the funds from seizure within the statutory limit. In this case the anti-enforcement proceedings of the funds collected on the bank account will result in a situation when every time the account balance does not exceed the limit determined in Article 54 of the Banking Law, the funds constitute the amount free from seizure, which the debtor may dispose of freely, particularly by withdrawing the funds or a wire transfer.

The creditor's right is better protected by accepting the first of the presented solutions. Otherwise, in case of a constant renewal of the limit of the amount free from deduction, the debtor, with a proper attitude, is able to keep the amount of the funds on the account at the level, which allows a free disposal, which makes the execution of the bank account ineffective. The practice shows that banks also opted for a one-off exemption from seizure. After receiving the notification on the seizure of claims on the debtor's account, the bank should pay the debtor on request the funds collected on the account up to the amount free from deduction. In case of taking advantage of the privilege by the debtor, each new amount, which inflows to the debtor's bank account should be seized and submitted to the bailiff.

In Article 54, it should be noticed that the debtor is protected with the amount free from deduction but regardless of a number of the concluded bank account agreements. According to the author, it is a clear indication that the debtor may dispose of the amount three times the average monthly salary in the enterprise sector as a one-off procedure only on one bank account or conduct this procedure several times on one or several bank accounts, without exceeding the indicated total value. In case when the debtor has several bank accounts in various banks and on each account the debtor does not have the funds exceeding the amount free from deduction, it causes the executive proceedings of the bank account ineffective when applied to each of those accounts. Unfortunately, such a situation takes place quite often and it is caused by

¹⁴ W. Pyzioł, *Prawo bankowe. Komentarz*, Warszawa 2007, p. 195.

the lack of information flow between the banks. The bailiff currently does not have an impact on the course of the execution proceedings after conduct of the seizure and the whole responsibility is burdened on the bank, which checks the funds on the customer's account, conducts a deduction of the amount indicated by the executive authority or in case of lack of funds on the account, it informs the executive authority about the difficulty. The notification from the bank contains little information. It informs only on the fact that the debtor does not have the funds allowing the effective execution of the bank account. The bailiff, in case of establishing several accounts of the debtor, may receive the same response concerning the effectiveness of the conducted seizure from all the banks, which does not mean that the debtor does not have the funds allowing the payment of the redemption. The solution to this seemingly stalemate situation could be sending an inquiry to the banks in which the debtor has accounts, concerning the amount of the funds collected on those accounts in order to establish if they constitute a total amount which "exceeds the amount free from deduction". Among the persons entitled to obtain such information there is also the court bailiff. The condition of providing the information covered by the bank secrecy to the bailiff by the bank is that the information is needed for the execution proceedings being conducted. In the discussed situation, the condition is fulfilled but there arises the question if during the execution the bailiff can take such measures and if they can force the bank to conduct of seizure in case when the total amount of the funds collected on the debtor's bank accounts in various banks exceeds the amount free from deduction?

According to the author, the bailiff is burdened with an obligation to conduct the execution in as effective a way as possible and all the measures allowing this standard should be taken by the bailiff. Moreover, the bank in terms of giving information, on the basis of the Article 105 Section 6 of the Banking Law is free from liability for damage resulting from a disclosure of information covered by the bank secrecy by persons or institutions entitled by the act to demand of this information. The bailiff, having gained the knowledge of the current level of the debtor's funds on the bank accounts, should update the seizure procedure on the debtor's bank account, with the indication that the amount on the bank customer's account is not protected according to Article 54 of the Banking Law due to the fact that it was exceeded. The banks should conduct such seizure procedures on the grounds that the bailiff is a public

confidence officer and the whole execution is a continuation of the court proceedings. Furthermore, the executive authority is responsible for the course of the execution proceedings and the debtor has a possibility of protection, e.g. in the form of a complaint concerning the bailiff's performance.

Conclusions

The author of the paper believes that he succeeded in explaining the issues connected with effectiveness of the execution proceedings of the debtor's bank account, prove the influence of the creditor and the bailiff on the proceedings, and limitations resulting from Article 54 of the Banking Law. There are still lots of inadequacies in this field and the solutions to them constitutes a challenge for the legislator and the authorities participating in the execution proceedings. In author's opinion the legitimacy of implementing and maintaining by the legislator such a broad protection of the debtor, resulting from Article 54 of the Banking Law is doubtful. It is not difficult to imagine a situation when the creditor is in worse financial condition than the debtor and the binding regulations hinder and sometimes even disenable the conduct of effectiveness execution proceedings of the debtor's bank account. It should be remembered that the creditor is the injured party, and the injury was granted by the Court by issuing the executory entitlement, on the basis of which the execution proceedings were initiated.

Legal acts

- [1.] The Banking Law Act, Journals of Laws of 2012, item 1376, as amended.
- [2.] The Act on Economic Freedom, Journals of Laws of 2004, No 173, item 1807 as amended.
- [3.] The Tax Ordinance Act, Journals of Laws of 2012, item 749 as amended.
- [4.] The Act on Taxation of Goods and Services, Journals of Laws of 2004, No 54, item 535.
- [5.] The Act on Court Bailiffs and Executions, Journals of Laws of 2011, No 231, item 1376.

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- [1.] Z. Szczurek, Egzekucja Sądowa w Polsce, Sopot 2007.
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