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ADWOKACI I RADCOWIE PRAWNI

NEWSLETTER

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The liability of the guarantor under the contract for the performance by a third party

We would like to inform you about an interesting case, which was faced by the Court of Appeal in Gdańsk. It's object was to determine whether in the situation of the sale of shares, the outgoing president may submit effective assurance that members of his closest family will abstain from competitive activity (judgment of August 7, 2013, file no V ACa 295/13). Gdańsk Court stated that he could not.

I.
Commented judgment related to a provision in a contract of sale of shares of the company which produces casings for meat. At its best, the buyer (company A) wanted to guarantee itself that both the outgoing president and members of his family - wife and son - during a period of three years from the signing the contract would not undertake any competitive activities to the business of the company. However, in less than two months from the sale of shares, the president's family started its activity in the production of casings - the president's wife as the majority shareholder of the newly formed company B, and the son as the president of its single board. In view of the situation company A applied for an order that the defendant president pay the amount of 250,000 PLN, which was to constitute the amount of the lost income of the company A, because of the competitive activities of the company B.

II.
The District Court when hearing the case at first instance found that the parties of the contract of sale of shares differently interpreted and understood the content of the provisions on the prohibition of competition. Company A recognized the provision as a guarantee to stop by the president, his wife, descendants and any entities in which they would have shares of any competitive activity. The defendant, however, counting on continued employment in the company A, downplayed provision. However, after not receiving a compensation for non-competition clause, he found in time that this clause directly concerned only his activities. In view of the situation, **the Court had to determine whether an undertaking which has been taken by the defendant, is a promise of performance by a third party (Art. 391 of the Civil Code), or was it a kind of guarantee contract (art. 353[1] Civil Code).**

In the Court's opinion, for the existence of liability provided for in Article 391 of the Civil Code, the existence of a bond between the third party and the creditor promising

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is required. On the basis of the case it meant that assurance submitted by the president would be effective if both his wife and son obliged to either company A or himself, that they would not take competitive activities. However, due to the fact that the assurance was filed to Company A by the president on behalf of his relatives, bond mentioned above was formed. For this reason, it was not possible to enforce the liability of the president under Article 391 of the Civil Code.

The Court also considered whether the assurance filed by the president did not have the nature of the guarantee contract, which would cover the risk of non-performance or improper performance of obligation. The wording of Article 353[1] Civil Code states that *the contracting parties may lay the legal relationship at their own discretion, as long as its content or purpose is not opposed to the properties (nature) ratio, the law or principles of social coexistence*. Therefore, conclusion of the guarantee contract covering other risk than non-performance or improper performance of an obligation, should specify the boundaries of risk. In this case, the Court first decided to determine whether the defendant president assumed the risk of liability for the behavior of third parties, and whether such a commitment at all was possible to meet. In the Court's opinion, the president had no real opportunity to influence the behavior of both relatives, and other entities associated with them and therefore, the performance of such obligations was impossible to fulfill.

For these reasons, the District Court dismissed the claim of the company A.

III. From that judgment, the plaintiff company filed an appeal, which accused the judgment, among others, erroneous assumption that the conclusion of the contract guaranteeing certain behavior of third parties is a commitment to provide the impossible performance, and consequently is invalid.

With so filed charges, the Court of Appeal agreed. The Court stated that the promise made by the guarantor may not be at all considered in terms of the impossible performance. In any case, if the guarantor makes a promise that a third party entering into a specific commitment or fulfills specific performance, takes responsibility for the behavior of this person. The Court also pointed out that it often happens that the guarantor has no effect on the behavior of a third party. However, the performance in this case is impossible, because he becomes responsible for the damage. It is one thing while submitting promise that a particular person will enter into a commitment or fulfills particular performance, which promise do not constitute performance in itself.

But in spite of that misconduct, the Court of Appeal held that it has no significant effect on the final decision, since the dismissal of the appeal of Company A finds its basis in correctly applied provision of Article 391 of the Civil Code. For the liability to incur on the president's side, it was necessary that the aforementioned ratio of the bond exist between his family and the plaintiff company, but the ratio in the commented case was not formed.

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