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THE LANDLORD'S LIEN IN COMPARATIVE PERSPECTIVE OF COMMON AND CIVIL (POLISH) LAW – SELECTED ISSUES

Abstract

The aim of this article is to conduct a fundamental analysis of the current selected issues regarding the landlord's lien, in comparative perspective of common and civil (Polish) legal systems. This issue is lately under a constant development, since the lease agreement gain a substantial importance in the legal turnover both in Poland and common law countries, in particular United States of America. Therefore an approach to some of the most relevant legal problems of landlord's lien, including specifically: types of landlords security interests, legal relation between statutory and contractual (consensual) lien, as well as the issues referring waiver and priority of the lien, seems to be beneficial in the light of resolving the present problems concerning landlord's lien.

Keywords

landlord's lien – lease agreement – statutory lien – contractual lien – common and Polish legal systems

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I. INTRODUCTION

Recently, in Polish legal turnover there may be perceived a substantial development of lease agreements regarding the large format facilities, including in particular shopping centres and storage houses¹. Landlords attempt to secure the payment of a considerable amount of a rent due, in the event of tenant's default, hence the issue of landlord's lien constantly acquire on relevance. However, these circumstances may imply a number of significant legal problems, as the Polish statutory provisions referring the landlord's lien seem to be insufficient. This issue has lately been noticed by the Supreme Court of the Republic of Poland².

Nonetheless the lease agreement is one of the most fundamental types of a contract in Polish law, still the straight majority of its current types were originated in common legal system countries (specifically the United States). Thus, the aim of this article is to approach some selected issues, both in common and civil law (Polish) comparative perspective, which might be considered beneficial, when resolving practical problems regarding landlord's lien.

As a matter of principle, both in Polish (civil) and common legal system landlord's lien has a quite similar purpose. Namely, landlord's lien may be perceived as a legal remedy which enhances potential monetary recovery of rent due against a defaulting tenant³. It is essential to mention, that in spite of various legal solutions provided for landlord in the case of a tenant's default, all of them involve a problem, whether a recovery

¹ See for instance: K. Siwiec, *Zastaw ustawowy na rzeczach wniesionych przez najemców do lokali komercyjnych – wybrane zagadnienia* [Statutory Landlord's Lien on Tenant's Personal Property Located in Commercial Premises – Selected Issues], *Nieruchomości* [Real Estate] 2013, no. 3, p. 16.

² See: the judgement of the Supreme Court of the Republic of Poland (hereinafter referred as Polish Supreme Court) of 16.12.2015, IV CSK 141/15, *Legalis* (Polish version) no. 1396490; for further regards see also M. Drewek, *Case note* to the above mentioned judgement, *Studia Iuridica Toruniensia* (in print).

³ See for instance: regarding common law: L. Rosen, S. Novak, T. Tracy, *The Landlord's Lien: An Often Overlooked Remedy for a Tenant's Default*, 2002, p. 1, available at: <http://www.sutherland.com/portalresource/lookup/poid/Z1tOl9NPluKPtDNIqLMRV56Pab6TfzcRXncKbDtRr9tObDdEv43Cs0!/fileUpload.name=/tenantdef.pdf> [last accessed: 12.09.2016]; regarding civil law: J. Panowicz-Lipska, *Ustawowe prawo zastawu* [Statutory Landlord's Lien], [in:] J. Panowicz-Lipska (ed.), *System Prawa Prywatnego. Prawo zobowiązań – część szczegółowa* [System of Private Law. Law of Obligations – Detailed Part], vol. 8, Warszawa 2011, p. 40.

of the full amount of rent due will be attainable. Consequently, for landlords on both common and civil legal system, it is substantial to gain an additional security through a landlord's lien, which grants an interest in tenant's personal property located within the leased premises⁴.

An analogy might also be noticed when referring subject, which is covered by landlord's lien. In accordance with Polish regulations, lien may secure unpaid rent, as well as other due amounts (Article 670 of Polish Civil Code⁵). This generally corresponds with common legal provisions⁶. Nevertheless, the discerning approach indicates a number of miscellaneous of admissible legal figures. Hence, the detailed scope of landlord's lien depends on its type⁷. Namely, the statutory landlord's lien is limited and, principally, covers merely an unpaid rent, whereas in legal practice it has been suggested that "rent" shall be defined broadly in the lease, so that the statute would apply to more than a monetary default. However, there is no current case law referring this issue⁸. Turning to common law distress and distraint, it authorizes landlord to reimburse the amount of unpaid rent and other liability⁹. In North Carolina, contractual landlord's lien may secure not exclusively the payment of all rent due, but also each indebtedness and liabilities existing or, which might incur. Whereas, the North Carolina's statutory lien grants recovery only for unpaid rent due¹⁰.

⁴ See: H. Bridgers, A. Balshakova, *Commercial Eviction and Landlord's Liens*, 2008, pp. 8-9, available at: <http://www.williamsmullen.com/sites/default/files/wm-url-files/COMMERCIAL%20EVICTIION%20AND%20LANDLORD%E2%80%99S%20LIENS.pdf> [last accessed: 12.09.2016].

⁵ Statute of 23.04.1964 Civil Code, *Dziennik Ustaw* [Journal of Laws] 1964, No. 16, item 93 – hereinafter referred as p.c.c.; see also: J. Jezioro, [in:] E. Gniewek, P. Machnikowski (eds), *Kodeks cywilny. Komentarz* [Civil Code. Commentary], 2016, available at: Legalis (Polish version), [last accessed: 12.09.2016].

⁶ See for instance: K. Tremblay Jr, *Renting: Evictions and Landlord Liens*, Colorado State University Extension, Fact Sheet, no. 9.905, p. 2, available at: <http://extension.colostate.edu/docs/pubs/consumer/09905.pdf> [last accessed: 2.09.2016].

⁷ These differences, concerning various types of lien, will be clarified in the following part of this article.

⁸ See: Rosen, Novak, Tracy, *supra* note 3, pp. 7-8.

⁹ See: J. Kelly, *Landlords' Liens and Waivers: Competing Interests of Lenders and Landlords*, *Commercial Leasing Law & Strategy* 2012, vol. 25, no. 6, p. 1.

¹⁰ See: Bridgers, Balshakova, *supra* note 4, p. 9.

Additionally, Polish landlord's lien is somewhat similar to its common law correlate, as regulations regarding the time issues would be taken into consideration. In civil (Polish) law, the lien become binding with the commencement of the lease agreement and expires as the collateral is been removed from the leased premise¹¹. It covers the amount of rent due not exceeded one year period¹². When comparing this issue with common law regulations, it may be noticed, that in Florida landlord's statutory lien attaches at commencement of the tenancy or as soon as property is brought onto premises¹³. Nonetheless, a significant majority of statues attach the lien's commencement with a specific term. Moreover, the common law distress grants landlord the right to possess and claim the personal property to satisfy the tenant's lease obligations not relating the term, but merely when the landlord has taken possession of the property through other means or through the levying of a distress warrant¹⁴. Furthermore, in the District of Columbia, the statutory lien terminates three months after the rent owed became due or upon the termination of any action seeking such unpaid rent brought by the landlord within that three-month period. In addition, Virginia's lien relates back to the commencement of the lease and superior to any other lien upon the tenant's property located at the premises, except for liens attaching prior to the commencement of the lease term and tax liens¹⁵. Texas has specific provisions on so-called commercial lien. Landlord's lien is unenforceable for rent on a commercial building that is more than six months past due, unless the landlord files a lien statement with the county clerk of the county where the building is located. Also, the

¹¹ However this issue is questionable – see Siwiec, *supra* note 1, p. 19; for further regards see: Drewek, *supra* note 2; see also judgements: of Appeal Court in Poznań of 14.04.2010, I ACa 240/10, Legalis (Polish version) no. 237789 and of Appeal Court in Kraków of 29.05.2015, I ACa 333/15, Legalis (Polish version) no. 1315434.

¹² See for instance: J. Panowicz-Lipska, [in:] M. Gutowski (ed.), *Kodeks cywilny. Tom II. Komentarz [Civil Code. Volume II. Commentary]*, 2016, available at: Legalis (Polish version) [last accessed: 12.09.2016].

¹³ See: M. Sackel, *Pay Up or Get Out: The Landlord's Guide to the Perfect Eviction*, University of Miami Law Review 2014, vol. 66, no. 4, p. 979.

¹⁴ See: V.M. Kerman, *The Landlord's Lien Versus the Tenant's Ability to Obtain Financing, Retail Law Strategist*, 2004, p. 1, available at: <http://www.sutherland.com/portalresource/lookup/poid/Z1tOI9NPluKPtDNIqLMRV56Pab6TfzcRXncKbDtRr9tObDdEv43Cr0!/fileUpload.name=/KermanRetailLawStrategistSeptember2004.pdf> [last accessed: 12.09.2016].

¹⁵ See: Kelly, *supra* note 9, p. 2.

lien exists while the tenant occupies the building and until one month after the day that the tenant abandons the building¹⁶.

II. GENERAL TYPES OF LANDLORD'S LIEN

As it was already mentioned, landlord's lien is interiorly diverse. In Polish legal system statutory landlord's lien (provided by Article 670 and 671 of p.c.c.) may be indicated as the most essential type of lien, when regarding the lease contract. Recently, however, in legal practice there might be noticed increasing number of attempts of replacing (or even waivering) the statutory regulations of landlord's lien by contractual terms. This may be perceive, specifically, in the light of so-called wind contracts¹⁷. Therefore, there will be considered in particular the following problems: the general types of common law landlord liens, the legal relation between statutory and consensual (contractual) lien, landlord's lien waiver and the priority issues.

Common legal system countries differ in regulations regarding landlord's lien. Namely, in United States some states provides statutory lien, while others demands the lease agreement to grant landlord's lien expressly. As the matter of principle, there may be indicated three types of landlord's lien: statutory, contractual and provided by common law. The statutory lien may be admitted by each state's law regulations, whereas a contractual lien is a consensual security interest created pursuant to the Article 9 of the Uniform Commercial Code. In comparison to Polish legal system, there is also a landlord's lien provided by common law¹⁸. For instance: in Texas a landlord has a number of available manners of seizing

¹⁶ See: J. Fambrough, *Landlords and Tenants Guide*, Texas A&M University Real Estate Centre 2016, Special Report no. 866 (revised 06.2016), p. 112.

¹⁷ See in particular judgement of the Polish Supreme Court: of 5.10.2012, IV CSK 244/12, Orzecznictwo Sądu Najwyższego Izba Cywilna [Decisions of the Supreme Court - Civil Chamber] 2013, no. 5, item 64; and of 7.11.2014, IV CSK 77/14, Orzecznictwo Sądu Najwyższego Izba Cywilna [Decisions of the Supreme Court - Civil Chamber] 2015, no. 11, item 131.

¹⁸ See for instance: M. Rees, S. Halpern, B. Thornton, *California Centers Magazine* 2010, no. 91, p. 1, available at: http://www.pircher.com/media/publication/31_lienwaiver.pdf [last accessed: 12.09.2016]; Rosen, Novak, Tracy, *supra* note 3, pp. 1-2; Kelly, *supra* note 9, pp. 1-2.

non-exempt property to secure payment for rent or to dispose of a tenant's personal property, which includes: first contractual landlord's lien for foreclosure on the property, next enforcement of the landlord's statutory lien under the Texas Property Code, furthermore treatment of the property as abandoned under the Texas Property Code or, finally, handling the disposition of the personal property through the judicial eviction process¹⁹. However, in some states there may be recognized court's decisions, which have deemed landlord's lien unconstitutional²⁰. In addition it may be highlighted, that a comprehensive legal remedies are developed in United Kingdom legal system²¹.

Statutory and common law lien (distress) may vary comparing each state jurisdiction. In about half of the states, landlords have been given a statutory landlord's lien right. The statutory lien rights differ from state to state as to timing, priority and limitations, but mostly provide the landlord with a lien on all of the tenant's personal property located within the leased premises as security for the tenant's obligations under the lease. Some states provides, that the statutory lien rights are limited to a specific amount or period of time and also, that the landlord's lien is subordinate to any perfected security interests in the tenant's personal property existing before such property was transferred to the premises. It might be concluded, that there is no uniform or model landlord's lien law and reference must be made to the specific statutes in each applicable jurisdiction. In addition, in a number of states statutory are replaced or supplement the common law remedies of distress and distraint. To exemplify, Maryland has no statutory lien rights, which results that a landlord is forced to pursue an action for distress with the ability to then lien the personal property, if successful in obtaining a judgment²². On the contrary, in Texas State for instant, in the case of a non-residential building,

¹⁹ See: L. Collins, A. Pearce, *Why Doesn't My Key Work? Landlord Commercial Lease Remedies: A Current View*, the South Texas College of Law Real Estate Law Conference Proceedings 2008, pp. 8-9, available at: http://www.boyarmiller.com/wp-content/uploads/6-5-08_Landlord_Commercial_Lease_Remedies_Collins-Pearce.pdf [last accessed: 12.09.2016].

²⁰ See: Tremblay Jr, supra note 6, p. 2.

²¹ For further regards see in particular: M. Wilkie, P. Luxton, J. Morgan, G. Cole, *Landlord and Tenant Law*, Lodnon 2006, pp. 127-129.

²² See: Kerman, supra note 14, pp. 1-2; Kelly, supra note 9, pp. 1-2.

provides the landlord a preference lien on the property of the tenant or a subtenant, to secure payment for rent due or to become due, is granted²³.

Second type of landlord's lien (which actually is considered not to be a *sensu stricte* lien) involves the common law remedy of distress or distrain. It authorizes a landlord to seize and sell a tenant's personal property located at the premises in order to reimburse the landlord for the amount of unpaid rent and other liability. Typically, as above mentioned these remedies have been refined by statute or replaced by statutory liens. Referring the examples of this second type of lien, it may be noticed, that Florida regulation provides landlords the right to exercise distress remedy for commercial but not residential properties²⁴. Maryland State ensures no automatic statutory lien. Instead, the Maryland Code grants the landlord an action for distress for the rent due. Correspondingly, the landlord's success may give rise to a lien on a tenant's personal property, which can then be levied upon²⁵. While in Virginia, as the rent became delinquent the landlord had a common law remedy of distress, with which is allowed to distrain tenant's property, and hold it as a sort of pledge to secure the payment²⁶.

The third type of landlord lien might be originated by the agreement between the tenant and landlord. This is recognized as consensual or contractual landlord's lien. This ensures landlord to obtain a lien against the tenant's personal property and fixtures is through a consensual security interest under the Article 9 of the Uniform Commercial Code²⁷. Moreover it should be highlighted, that the statutory or common law landlord's lien in some cases might be limited, nonetheless landlord obtain a duly protection by including certain provision in the lease agreement, regarding the security interest as well as describing the collateral. As far as the contract lien is concerned, the collateral description ought to be broadly, so that it covers all categories of property, personal, intangible and

²³ See: Collins, Pearce, *supra* note 19, pp. 8-9; see also Texas Property Code § 54.021.

²⁴ See in particular: Kerman, *supra* note 14, pp. 1-2; see also: Kelly, *supra* note 9, pp. 1-2.

²⁵ See: Rosen, Novak, Tracy, *supra* note 3, p. 5; Maryland Code § 8-302.

²⁶ See: N. DiVita, *Conflicts Between the West Virginia Landlord's Lien and Article Nine of the Uniform Commercial Code*, *West Virginia Law Review* 1983-1984, vol. 86, no. 2, p. 417.

²⁷ See: Kerman, *supra* note 14, pp. 1-2; Kelly, *supra* note 9, pp. 1-2; the Uniform Commercial Code of the United States of America (hereinafter referred as u.c.c.).

otherwise, used by the tenant in the conduct of its business, inclusive of after-acquired collateral²⁸. For instance, in North Carolina landlords frequently contract for a lien on a tenant's property by virtue of the lease agreement. However, this state provides also statutory lien, which landlords may benefit from²⁹.

With reference to the issue of landlord's lien types, it is indispensable to concisely regard the lien division in the scope of particular types of lease agreements. The civil (Polish) legal system provides merely one significant type of landlord's lien (Article 670 of p.c.c.). For each specific types of lease this regulation is applied either respectively³⁰ or, non statutory reference is provided. Whereas, in this dimension common legal system is much more developed and adapted to the demands of the legal turnover. Thus, it should be emphasized, that there may be indicated miscellaneous types of liens, for instance depending on whether a lease has a commercial nature or not. In the commercial type of lease contract the landlord may obtain benefits of several types of liens, some by virtue of statute, while others provided consensually by the lease agreement³¹. Particularly, the Texas Property Code allows commercial landlords to place a lien on a tenant's property within a building to secure rent payments. In addition, the requirements indispensable in order to grant the lien are quite analogous to the type of residential landlord's lien³². In North Carolina instead, the legal relationship between landlord and tenant in a commercial type of lease is governed principally by the provisions of the lease agreement³³. Furthermore, in certain states the landlord's lien is not applicable to commercial tenancies³⁴.

²⁸ See: Rosen, Novak, Tracy, *supra* note 3, p. 8.

²⁹ See: Bridgers, Balshakova, *supra* note 4, p. 9; North Carolina General Statutes § 44A-2(e).

³⁰ See in particular Article 694 of p.c.c.; see also: K. Zaradkiewicz, [in:] K. Peitrzykowski (ed.), *Kodeks cywilny. Tom II. Komentarz [Civil Code. Volume II. Commentary]*, 2015, available at: Legalis (Polish version) [last accessed: 12.09.2016].

³¹ See in particular: Kerman, *supra* note 14, p. 1.

³² See: Fambrough, *supra* note 16, p. 112.

³³ See: Bridgers, Balshakova, *supra* note 4, p. 1.

³⁴ See: Kerman, *supra* note 14, pp. 1-2.

III. LEGAL RELATION BETWEEN STATUTORY AND CONTRACTUAL LIEN

When regarding types of landlord's lien, the issue of relation between statutory and contractual (consensual) arises. Polish law provides, that the general statutory provisions referring contractual lien shall be applied respectively to the provisions regulating specific types of statutory lien, in particular landlord's lien³⁵. This however does not resolve the problem, whether statutory and contractual lien does have the same legal power or not. Hence, a following question arise, namely, is it admissible to limit or even repeal the statutory landlord's lien by a virtue of landlord's consent provided in lease agreement. The above mentioned issue is recently extended its relevance, principally due already mentioned wind contracts³⁶. Therefore it is beneficial to refer the common law *acquis* in this field, since this issue is there also current.

As the matter of principal, in common legal system contractual security interests and statutory landlord's liens are not considered to be mutually exclusive. This result, that landlord may obtain both. However, under this condition, that the lease constitutes a valid security contract and the jurisdiction grants a statutory lien on a property of a tenant. In other words, contractual and statutory liens exist independently. The property covered by the security interest is determined by the provisions of the lease agreement, which determine that the lien must not always cover the entire tenant's property located in the leased premises³⁷.

In practice, many tenants request a waiver or subordination of the statutory or common law lien and, in a number of cases landlord's consent. Moreover, Landlord may agree not to assert against any of the tenant's personal property any statutory, common law, contractual or possessory lien, including without limitation, any right of levy or distraint for rent³⁸.

³⁵ See in particular: Article 326 of p.c.c.; for further regards see also: judgement of the Polish Supreme Court: of 25.03.2011, IV CSK 477/10, *Legalis* (Polish version) no. 428298; see also for instance: Siwiec, *supra* note 1, p. 17; J. Górecki, G. Matusik, [in:] K. Osajda (ed.), *Kodeks cywilny. Komentarz [Civil Code. Commentary]*, Warszawa 2016, *Legalis* (Polish version) [last accessed: 15.06.2016].

³⁶ See: *supra* note 17.

³⁷ See: Kerman, *supra* note 14, p. 5; DiVita, *supra* note 25, p. 420.

³⁸ See for instance: Rosen, Novak, Tracy, *supra* note 3, p. 8; Kerman, *supra* note 14, p. 2.

Compared with Polish legal regulations, a common law statutory lien would be considered to be so-called *ius dispositivum* (available to be change by contracting parties).

However, there might be indicated some recent and questionable for common law system legal issues. For instance, under the Texas law, the landlord is entitled to constitute a contractual lien on other tenant's property. Nevertheless such lien would be enforceable only if the provision contained in the agreement: first: are underlined or printed in conspicuous bold print and, second: the landlord does not waive or diminish a right, liability or exemption provided by law. The problem is however, as the statute language is confusing as to what the term "other property" does mean. There are two types of personal property – exempt and non-exempt, whereas merely the non-exempt may be seized for the rent. That implicates, that the creation of a contractual lien on other property seems to be impossible³⁹.

Additionally, the common law scholars noticed the problem regarding the conflict between liens given landlords in West Virginia for the collection of rent and the legal rights of secured parties under Article 9 of the u.c.c. In the conclusion of the research there was highlighted, that although there is no simple solution to this problem, some possibilities do suggest themselves. First, what is substantial, nowadays trend is to place the landlord on an equal protection level to that of any other creditor in the commercial turnover. Moreover, despite the historical development, there was noticed no current reason for the law to confer less financial and legal risk on the landlord than on other commercial entities. It was also highlighted, that the landlord shall bargain for lien to secure rent obligations. Therefore, the modern trend is to treat leases of real property as essentially matters of contract, rather than so-called "estates in property". What was also perceived, that the development of the law transfer from statutory towards contractual (consensual) regulations. In conclusion scholars indicated, that there shall be reasonable arguments, which will justify whether to entitle landlord (by virtue of statutory lien) to

³⁹ See: Fambrough, *supra* note 16, p. 56, sec. 54.043.

take priority over other participants of commercial turnover, who acquired a contractual interest in the tenant's property as security⁴⁰.

IV. LANDLORD'S LIEN WAIVER

Developed countries of common legal system are currently dealing with an issue concerning so-called landlord's lien waivers. This is significant mainly to commercial agreements. Correspondingly, lately in Polish law the similar process might be observed. This issue is not considerably advanced, nonetheless in the nearest future might become substantial. Therefore elementary approach to the principal common law *acquis* in this scope might be worth regarding.

To simplify, landlords are provided with statutory or contractual lien over tenant's personal property. Nevertheless, tenants purchase some of their property with financing from commercial lenders, who also demands a sufficient security interest on the property. Thus, tenant's property may contemporaneously be under both landlord's and lender's lien. Thereby, in order to resolve potential disputes which might arise, lenders principally condition the financing on the landlord's execution of a waiver of the landlord's lien or, alternatively, landlord's consent that its lien will be subordinate to the lender's security interest. Landlords generally assent, as a result of the fact, that tenants use the property financed by lenders to operate an activities which generates an income to pay the rent. The problem is, however, that a number of commercial lenders impose an additional obligation with regard to the leased premises, which frequently are contrary to landlord's interest. Moreover, despite the fact that a subordination of a lien is more favour for landlords than a waiver, in practice oftentimes the value of collateral non subordinate is not sufficient, hence decrease the effectiveness of the landlord's lien⁴¹.

⁴⁰ See for instance: F. Bowman, *Uniform Commercial Code – Secured Transactions and the West Virginia Landlord's Lien*, *West Virginia Law Review* 1962, vol. 65, no. 1, p. 46; for further regards see pp. 40-47; DiVita, *supra* note 25, p. 435; *Teller v. McCoy*, 253 S.E.2d 114 (W. Va. 1979).

⁴¹ For further regards see for instance: Rees, Halpern, Thornton, *supra* note 18, pp. 1-2; Rosen, Novak, Tracy, *supra* note 3, p. 8.

The above mentioned issue may be resolved by various types of legal institutions. Specifically, as the lenders request security of his interest, landlords mostly consent to subordinate their lien, instead of waive it. Even though tenants with strong forceful commercial position regularly may insist on the waiver or subordination of the landlord's lien, a number of slighter (in particular regional) tenants are pressured to balance between, in most cases competing, landlord's and lender's interests. Furthermore, in practice, landlords demand the tenant to provide certain substitute collateral, for instance establish a security deposit (or increase an existing one). Landlords may also insist that tenant will pay an additional cost (for example major rent). Regarding this issue it is worth mentioning, that landlord ought to obtain a specific contractual clause, providing that once the loan is fully paid and lender's interest is released, the landlord's lien will acquire a priority status. Thus, it is also essential to determine towards which specific part of tenant's personal property the subordination (or waiver) applies. Specifically, this may be granted either by limiting the collateral to specific items (if the lender's lien regards only some part of personal property) or excluding specific items (in the case when lender's lien regards most of tenant's chattels)⁴².

As far as the waiver (or subordination) of landlord's lien is concerned, the issue of lender's access to leased premises comes into question. Due to the fact, that the collateral is located in leased premise, lenders take interest in ensuring their access to the premise. This is indispensable, in order to duly inspect or even remove the collateral in certain cases. The removal may, however, result in damaging the leased premise or interrupt other tenants. Therefore it is substantial to grant landlord's interest, specifically by containing clauses providing: lender's access exclusively outside business hours, access only in landlord's presence and prohibiting advertising the liquidation proceedings in leased premises, as it may influence the landlord's reputation (for instance when landlord is leading a shopping centre)⁴³.

⁴² See for instance: Rees, Halpern, Thornton, supra note 18, p. 1; Kelly, supra note 9, p. 1.

⁴³ See for instance: Rees, Halpern, Thornton, supra note 18, p. 2.

In addition, it may be perceived, that currently in Polish legal turnover similar issues, concerning damages with regard to removing the collateral from the leased premises, are being judged in the court's proceedings⁴⁴.

Similarly, with reference to the issue of removing the equipment from the leased premises, the common law scholars noticed few significant dimensions. First of all, landlord should be encouraged to grant himself a set of essential instruments which will be sufficient to control lender actions carried out when removing the collateral. For instance it shall be provided, that lender's action may be conducted merely in a specific time, particularly after business hours, as well as from designated loading areas. Substantial is also the lender's consent to indemnify the damage caused while entering the premises when removing collateral, including claims of the third parties claims resulting from the lender's such purposes. Moreover, landlord may demand the lender to furnish a proper evidence of insurance prior entering onto the premises. Analogously, it shall be determined, which exact equipment is the part of the collateral. Namely, landlord may consent to recognize personal property remains to be construed as personalty (instead of realty – real estate), whereas lender will agree to exclude his security interest against building systems (including for instance plumbing fixtures)⁴⁵.

The above mentioned relation between lender and landlord, results additionally when approaching the issue of tenant's default and its potential recovery. As the matter of principle, the landlord is entitled to negotiate the restrictions on lender's rights, provided in the event of a default under tenant's financing. This may specifically regard the limitation of the lender's right to replace the tenant, as well as the limitation of the lender's ability to auction the equipment from the leased premises⁴⁶. Predominantly, lenders reserve the right to obtain a notice of tenant's default under the lease together with an option to repair on behalf of the tenant. Therefore it is relevant for landlord to limit the number

⁴⁴ See in particular: judgement of Appeal Court in Białystok of 30.09.2015, I ACa 429/15, Legalis (Polish version) no. 1359123.

⁴⁵ See: Kelly, *supra* note 9, pp. 6-7; Kerman, *supra* note 14, pp. 2-3.

⁴⁶ See: M. Sherman, S. Young, B. Smiley, *Issues Unique to Restaurant Leasing: If You Can't Take the (Legal) Heat, Stay out of the Kitchen*, Practical Real Estate Lawyer 2016, vol. 32, no. 3, p. 18.

and causes of notices. There should also be strictly provided time period, within which the lender would be entitled to cure the tenant's default. Furthermore, this time period ought to be short and, in addition, reduced merely to monetary defaults. Equally, landlord shall stipulate, that in the case of tenant defaults under the loan agreement, the lender would be authorized to enter the leased premises in order to collect its collateral, however exclusively for a specific period of time. It is firmly recommended to provide a period of 30 to 90 days, whereas the retail landlords are advised not to consent any lender's right to sell the collateral out of the leased premises. Correspondingly, the landlord shall provide himself, that the lender will be obligated to pay the certain sum of money, during such period, and conceivable including a premium for lost percentage rent⁴⁷.

In addition, it might be mentioned, that when referring Florida law for example, the landlord is entitled to waive landlord's lien, for rent due and owing, however with respect to property placed on the premises. Nevertheless, without the landlord consent to subordinate lien to that of chattel mortgage, the landlord continues to possess priority of lien⁴⁸.

V. ISSUES REGARDING LANDLORD'S LIEN PRIORITY

Consecutive issue, being lately discussed in the common law practice, is the problem of landlord's lien priority. This predominantly regards the determination of the rank (priority) of the landlord's secured interest with reference to the interests of other third party creditors, covered in the same tenant's personal property⁴⁹. Admittedly, this subject is remarkably significant in connection with the current common law countries legal turnover. Conversely, in the civil (Polish) law this issue, principally, seems not to be extensively concerned by the nowadays legal practice. Generally, this might be caused due the considerably developed diverse types of liens covering tenant's chattel (including, among others, specifically landlord's

⁴⁷ See for instance: Kerman, *supra* note 14, pp. 2-3; Kelly, *supra* note 9, p. 7.

⁴⁸ See: Sackel, *supra* note 13, p. 978; *Robie v. Port Douglas (Florida) Inc.*, 662 So. 2d 1389, 1391 (Fla. Dist. Ct. App. 1995); see also *Hennessey Capital SE v. David* (In re Miller Eng'g, Inc.), 398 B.R. 473, 485 (Bankr. S.D. Fla. 2008); *Lynch Austin Realty, Inc. v. Engler*, 647 So. 2d 988, 989 (Fla. Dist. Ct. App. 1994).

⁴⁹ See in particular: Bridgers, Balshakova, *supra* note 3, p. 10.

security interests), which are provided by common legal system countries. Whereas, in this scope the Polish practice, the landlord's security interest is first and foremost determined by the statutory landlord's lien. Nevertheless, since these circumstances are subjected to constant and intensive alternation, therefore it is not excluded, whether this situation will presently change. Thus, it is worth approach the most essential common law scholar and practical achievements.

As the matter of principle, it shall be perceived, that a prevalent number of states provides in their statutory regulations, that the landlord's lien is subordinate to security interests against the tenant's personal property, which were perfected prior the property was located in the leased premises⁵⁰. Furthermore, statutory landlord's lien also will not be considered superior against any other lien, which was acquired by the time of the commencement of the tenancy under lease⁵¹.

Correspondingly, when referring the contractual (consensual) landlord's lien, it is highlighted that it does not grant the landlord priority with regard to the different security interests. Instead, the landlord is obligated (pursuant to the Article 9 of u.c.c.) to perfect the security interest by filing a respective financing statement in the proper recording office. While non accomplishment of this condition, the landlord's lien will be subordinate towards a legal entity, whose security interest is perfected. However, the revised Article 9 of u.c.c. has simplified the filing proceedings, since financing statement may currently be filed without the tenant's, signature, if only the filing is duly authorized. In addition, the landlord shall also properly support a system of tracking the statements prior to the certain time of expiration⁵².

For instance, regarding some more detailed analysis, in the light of the North Carolina law, the landlord is advice to determine the nature of the lien (namely, whether it is statutory or contractual). In the case of statutory landlord's lien, it is subordinate to all other security interests, which already have been perfected. Respectively, when the lien has a contractual nature, the priority is governed by the provisions of Article 9 of u.c.c. However, in the event of conflict of the security interests referring the same

⁵⁰ See: Kerman, *supra* note 14, p. 1.

⁵¹ See: Sackel, *supra* note 13, p. 979.

⁵² See: Rosen, Novak, Tracy, *supra* note 3, p. 9.

collateral, the North Carolina regulations principally determine which interest is superior against the collateral. Particularly, the priority is granted to this legal entity, who first filed a financing statement or, alternatively, who first perfected its interest. Additionally, as there are competing security interests, which both were not perfected, the first security agreement to affix to the collateral will gain the priority⁵³.

As far as the North Carolina statutory landlord's lien is concerned, it might be noticed, that it is perfected by virtue of law within 21 days from the time the tenant has left the leased premises. However, this may occur only under a condition that during the whole period the landlord would also have a valid claim against the tenant for the unpaid rent or, similarly, a claim for the damage to the leased premises. As it was mentioned above, the landlord's lien will not have a priority to any security interest in the tenant's personal property, which was perfected prior the landlord gained its lien. Hence, in the case when the tenant leaves the leased premises, along with its personal property, it is rather unlikely that the landlord will benefit with regard to the statutory lien, primarily in connection with two separate issues. First, it is reasonably probable, that the remaining collateral has no potential value. Second, another entity might yet perfect its security interest in the remaining tenant's personal property. Thus, it may be perceived, that in this scope statutory landlord's lien would provide less security, comparing to the conventional contractual lien. Therefore, it is advice that the landlord ought to grant a lien due the provisions of the lease agreement, and then execute and file the financing statement to ensure the sufficient security for its interests⁵⁴.

Referring the contractual landlord's liens, the North Carolina legal regulations provide, that a landlord shall perfect its interest in order to protect towards the claims of other authorized legal entities. Principally, the contractual landlord's liens may be perfected in two manners. With regard to the first manner, the lien will be perfected by virtue of the lease agreement, if there would be included clauses, which conspicuously provides a landlord a lien on the tenant's personal property (so-called

⁵³ See: Bridgers, Balshakova, *supra* note 3, p. 10; North Carolina General Statutes § 44A-2(e), § 25-9-203, § 25-9-301, § 25-9-317, § 25-9-322 and § 25-9-501.

⁵⁴ *Ibidem*, pp. 9-10; North Carolina General Statutes § 44A-2(e).

attachment). Second, the lien may also be perfected by executing and filing the financing statement within the North Carolina Secretary of State's office in accordance with the respective law provisions (so-called perfection). The financing statement shall comply with specific conditions. Namely, should provide the legal name and address of the tenant, as well as the name and address of the landlord, and also contain a description of the property covered by the lien. Regarding the North Carolina law, the financing statement will be valid by five years period, even though shall be renewed within 6 months from the date of its expiration, in order to remain the landlord's interest secured⁵⁵.

On the contrary, in Virginia law for instance, the landlord's lien over the tenant's personal property located in the leased premises is superior against any other lien, which covers the same collateral. Furthermore, the commencement of the lien is related back to the date of lease. Nevertheless, there might be indicated some exceptions. First and foremost, the landlord's lien supremacy is excluded towards a tax lien of the United States, and also liens, which were fixed prior to the commencement of the tenancy. Moreover, landlord's lien is limited against the so-called "shifting stock" of the retail tenant. Similarly, in pursuant to the Columbia legal regulations, the landlord's lien is not superior in reference to the federal tax liens⁵⁶.

Additionally, aside from referring the tax lien, a couple of significant issues might also be noticed when regarding the legal relation between landlord's lien and tenant's bankruptcy⁵⁷. Specifically, in the case the tenant defaults the obligation to pay the rent due, although simultaneously files a petition for bankruptcy, then the landlord might not only be limited when enforcing the lien by the automatic stay, but also the trustee might avoid entirely the landlord's lien pursuant to the respective provisions of the United States Code⁵⁸. With the reference to the contractual landlord's

⁵⁵ Ibidem, pp. 9-10; North Carolina General Statutes § 25-9-310, 25-9-501, § 25-9-502, § 25-9-515, § 9-25- 521.

⁵⁶ See: Rosen, Novak, Tracy, supra note 3, pp. 2 and 4; *American Exch. Bank v. Goodlee Realty Corp.*, 116 S.E. 505 (Va. 1923).

⁵⁷ For further regards see in particular: Bridgers, Balshakova, supra note 3, pp. 10-11.

⁵⁸ See: Rosen, Novak, Tracy, supra note 3, pp. 8 and 10; see also: Title 11 of the United States Code § 545 (3) and (4).

lien however, when the tenant is bankrupt, the landlord with its secured interest perfected is concerned to be treated as any other secured legal entity⁵⁹.

VI. SUMMARY

With regard to this elementary approach to some selected issues, conducted with reference to the current legal problems on common and civil (Polish) landlord's lien, it might be perceived, that there is a substantial correlation between above mentioned problems and the degree of development of commercial turnover. Hence, the greater number of diverse types of liens and other remedies on secured interests on tenant's personal property is permissible to be applied, the more extensive legal problems may arise⁶⁰. Considering the differences in the scope of Polish and common law advancement of the lease agreement (but also including the principal dissimilarities concerning common and civil legal systems) it might simply be noticed, that multiple problems lately discussed in common law scholarship, might in non-distant future surface in Polish legal practice.

Moreover, this might be recognized even currently, for instance in connection with issues regarding types of lien, reciprocal relation between statutory and contractual landlord's lien and, similarly, lien's waiver or subordination. It may be assumed, that also the landlord's lien priority issues will presently increase its significance. In comparison, some problems are probable to remain exclusive towards, respectively, common or civil (Polish) law. Specifically, there might be mentioned the common law remedies of distress with reference to statutory lien regulations.

In conclusion, it might be ascertain, that conducting an adjunctive studies in the comparative light, with regard to common and civil law (despite the existing differences), might result in a number of benefits. Particularly, on one hand, it may enrich the present legal solutions, while

⁵⁹ See: *ibidem*, pp. 8 and 10.

⁶⁰ In order to compare the amount of diverse types of the lease agreement exist in the *acquis* of the common legal system, see in particular: M. Davys, *Land Law*, Croydon 2015, pp. 51-54.

on the other may assist in resolving the current problems. This might represent an essential help with the object of improvement existing legal system towards the nowadays society requirements.

