BRIEF COMMENTS ON ISSUES CONCERNING THE FORFEITURE OF RIGHT TO SUBMIT EVIDENCE IN THE CIVIL TRIAL

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Abstract

The Code of Civil Procedure lays down a series of timeframes in which the parties may propose the evidence under the sanction of the forfeiture of this right and, on the other hand, at the written stage regulated by art. 200 Civ. Proc. Code the application may also be annulled because the applicant has not proposed evidence within the 10-day time limit set by the court to fill the claim. We propose to analyze both the interferences between the sanction of the cancellation of the application and the forfeiture of right at the regularization stage, but also the scope of art. 254 par. (2) Civ. Proc. Code, respectively the cases in which the evidence may be submitted beyond the term stipulated by the law. In the paper we will propose solutions to the applicable sanction for not showing evidence in the civil action, analyzing the arguments proposed by the doctrine both for nullity and for forfeiture of right. In this respect, we will discuss the particular cases of art. 194 lit. e) Civ. Proc. Code on witness identification data and interrogators of the legal entity. In the last part, we will address the question of the removal of the sanction of forfeiture in cases where the administration of the evidence does not lead to the adjournment of the trial, more precisely the situations in which this law is to be applied.

Keywords: *nullity, forfeiture of right, art. 254 Civ. Proc. Code, evidence.*

1. Introduction

First of all, the analysis of the institution of forfeiture of right in civil procedural law is a complex issue that we do not intend to do on this occasion. In the present study, we aim only to present solutions for some issues that are not solved by both doctrine and judicial practice. In our opinion, these issues of interpretation and others which are not subject to our analysis, have arisen due to insufficient regulation of the forfeiture of right in the Civil Procedure Code, which led to the interpretation of the rules by using the guiding principles of the civil procedure regulated in the articles 5-23 Civ. Proc. Code, including the right of the parties, the role of the judge in finding out the truth, the legality, the obligations of the parties in the civil trial.

The correlation of these principles by giving greater weight to some or other of them has resulted in different solutions precisely because they are often antagonistic, although they have complementary roles, together forming a unitary one designed to govern the conduct of the civil process. n interpreting the rules on decoupling but also in other cases, divergences of solutions also arise from the difficulty in determining whether that rule primarily protects a private interest or, on the contrary, primarily protects public order.

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2. The applicable sanction for non-indicating evidence in the civil action.

This first point that we propose to consider in the course of this study has several components, and we will gradually consider the answer to several questions to provide a solution to the main problem. The first of these questions is to determine what the sanction is if the claimant does not request evidence in the civil action.

From the regulation of the written stage, respectively, art. 194 - 201 Civ. Proc. Code, it results that for non-fulfillment of the requirements stipulated by art. 194 - 197 Civ. Proc. Code the sanction is the anullment of the demand. The doctrine also expressed the view that in the case of non-evidence, the sanction should be the forfeiture of right to submit evidence[1]. Also, part of the judicial practice adopted this solution, considering that for failing to show evidence, the applicant could be sanctioned on the occasion of their approval.

To begin with, we can not fail to notice that the divergence of solutions in practice arises in this matter because there is a problem in determining which of the two sanctions is to be applied with priority, forfeiture of right or nullity. It seems useful to observe that the very premise of antithesis of the two sanctions is not a natural one, because the procedural act accomplished over the term is null due to the effects of the forfeiture of right, according to art. 185 par. (1) C. pr.civ. Therefore, it is in the logic of the Civil Procedure Code that the forfeiture of right to effect a procedural act leads to the annulment of that act. The distinction

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between the nullity and the forfeiture of right in the particular issue that we are analyzing is only of a temporal nature, as nullity operates during the regularization, and forfeiture of right occurs at the time of proposing the evidence beyond the statutory deadline. However, in addition to the above, the evidence submited after the legal term has passed will be penalized in essence also with nullity. In practice, the court establishes the forfeiture of right to propose evidence and rejects the request for evidence because it was submited overdue[2], but behind the solution is also a nullity of the procedural act represented by the proposal of evidence beyond the legal deadline.

The answer we will give to this is based on the principle that the application of the sanction of forfeiture of right with regard to the proposition of evidence or, more precisely, the postponement of the imposition of a sanction in this respect until the moment of the admission of the evidence, defeats the purpose of the writen phase in the civil trial, that the parties declare in this stage the weapons they will later use.

If the sanction for failure to substantiate evidence in the request to sue would be the applicant's forfeiture of right to propose evidence, the defendant would find it difficult at the time of the complaint, since he could only rely on the evidence he considered useful from his point of view and not from the evidence proposed by the applicant in action. Subsequently, at the time of proposing the evidence, the court would have to find the forfeitor of right for the applicant to propose evidence, except for the incidence of one of the cases provided by art. 254 par. 2 pt. 1-5 Civ. Proc. Code. This would lead to a situation that should be prevented, and for which the legislator foresaw the solution at an earlier stage. In particular, the regularization procedure has the purpose of bringing the application in a position to be judged, including in terms of evidence. An application in which the applicant does not refer to any evidence should be annulled in so far as the applicant does not provide evidence[3] within the 10-day time limit set by the court for that purpose (art. 200 par. (3) and (4) Civ. Proc. Code). Not to apply this sanction in the regularization phase and to postpone it for a later moment of the trial means the non-application of the sanction of the anullment of the request set by the legislator for the regularization stage, and the effect is the elimination of regularization from the point of view of evidence request. It could not be a reason for the request not to be canceled, nor for the potential future agreement of the defendant at the time of the endorsement of the evidence doubled by the proposal by the applicant for further evidence. This reasoning is also not justified by the principle of availability, since in such situations priority is given to the principle of legality. Civil proceedings must be conducted in accordance with the law, even if the court is required to settle the dispute in accordance with the limits set by the parties. Forfeiture of right is therefore a sanction distinct from that of the cancellation of the application and applies later to the regularization stage. In the context of regularization, the only applicable sanction is the cancellation of demand. Subsequently, to the extent that the request for suing survives the regularization procedure, the sanction of the forfeiture may be applied for the evidence that the parties will propose beyond the deadline under art. 254 Civ. Proc. Code

3. The sanction applicable for non-compliance with the provisions of art. 194 lit. e) Civ. Proc. Code on witness identification data and interrogatories of the legal entity.

At the previous point, we concluded that the application would be canceled if the applicant did not show any evidence in support of his action. We believe that the same solution is also necessary if the applicant asks for the witness evidence, but does not indicate the name, surname or address. The absence and only of one of these elements of identification may mean that the witness can not be identified and the defendant will not be able to prepare his defense properly and the court will not be able to summon the witness for the first term[4]. Also, the request should be canceled if the interrogation of the defendant legal person is requested, but at the request of the court, the applicant does not submit the written questioning for communication.

The rule should apply regardless of the number of witnesses proposed and the fact that some are missing identification data only. There is no justification for a waiver in the sense that since for example three witnesses were proposed, out of which for two were given the name, surname and address, for the

[2] The procedural exception used by the case law for submittng a request overdue is called in romanian *excepția tardivității* and comes from the french word *tardiveté,* wich means *latenss/ tardiness.*

[3] A possible exception identified in the doctrine is the fact that the plaintiff expressly states in the application that he seeks to cause the defendant to be recognized and has no other evidence at hand; We also believe that this support is in fact a request for evidence by which the applicant seeks the interrogation of the defendant, it is not possible to specify by way of action only that the applicant is awaiting the respondent's reaction, the only hope of admitting the action is that the defendant will meet the claims formulated; the actual adherence to certain claims must be based on certain evidence that is usually exhibited by the applicant. For example, if a loan is to be paid and the claimant fails to submit a document or request further evidence, the plaintiff's passive position can not be considered as an attitude, and the submission of written notes or statements in a public hearing recognizing the existence of the loan will be a confession; normally by way of an application by the court, the plaintiff will have to indicate this if his only evidence could constitute the defendant's confession. However, this hypothesis has an extremely limited applicability field, so it should not be a ground for solving the problem under analysis.

[4] Although we do not propose an in-depth analysis of the Article 203 of the Code of Civil Procedure, we only specify that the court may order a series of preparatory measures for the first term, and among them it is possible to summon the witnesses proposed. We appreciate that this measure should be used with caution of this right only when it is anticipated that the hearing of the cited witnesses will take place at the first term.

unidentified witness the sanction forfeiture of right will be applied in the phase of evidence proposal. This denial is based on the same misapplication of **t**he sanction of forfeiture of right at the regularization stage, or more correctly, the non-application of any sanction and the transfer of the sanction at the procedural moment of the approval of the evidence.

It has also been argued that the provisions of art. 254 par. (1) according to which, under the sanction of the forfeiture of right, the applicant may propose the evidence by means of a request for a summons, to be a special rule in relation to the provisions of art. 200 Civ. Proc. Code, so the forfeiture of right should be applied with priority. This statement is wrong first of all because art. 254 is, as its marginal name suggests, the text that generally governs the proposition of evidence. Its general nature in proposing evidence is conferred by its placement in ”Paragraph 1. General Provisions" of ”Subsection 3. Evidence”, of ”Section 2. Process Investigation". Far from being a special norm, art. 254 is the framework norm in the matter of proposing evidence in the judicial investigation phase, and in its first paragraph only sets out the general rule as to the time of proposing the evidence. The purpose of the first paragraph of the text of the law is to establish the temporal scope of the sanction of forfeiture of right and is in fact the premise for paragraphs 2 to 6, in which the legislator has understood to detail the sanction of forfeiture of right regime. Another argument for which we find that between art. 254 and art. 200 Civ. Proc. Code there is no special to the general relation is that the two rules are located in the regulations of different stages of the civil process. While art. 200 Civ. Proc. Code governs the regularization procedure within the written stage, the provisions of art. 254 Civ. Proc. Code are intended, as we have indicated above, to lay down the rules applicable to the proposal of evidence in the judicial investigation phase. So the legislator's intention was that each of these rules should be applicable at different times in the civil process, and saying that one of them has priority in a particular case is a disregard for the scope of law provided for by each of the two rules of law.

4. The scope of art. 254 par. (2) point 4. Civ. Proc. Code on the removal of the sanction of forfeiture in cases where "the administration of the evidence does not lead to the adjournment of the trial"

The main problem that comes with the interpretation of this rule is to know whether it should be understood restrictively in the sense that the evidence can be administered at that term, that is, the administration of the evidence itself does not lead to postponement or we can interpret this text in the sense that the administration of the evidence does not lead to the postponement because there are other reasons for postponement for which a new term of trial will be granted.

The first solution, according to which the meaning of the text is that the evidence itself does not lead to the postponement of the judgment, is not only a strict interpretation of the text that maintains within the literal meaning of the syntagm, but also an abstract, purely formal approach which can also produce undesirable consequences. For example, if we look at the hypothesis of proposing the evidence with witnesses, interpreting strictly the point number 4 of art. 254 par. (2) Civ. Proc. Code it would result that this evidence should only be admissible when witnesses are present at the time of their proposal. Only this interpretation would be in accordance with the principle that the evidence itself does not have a dilatory effect on the judgment. But most of the time, witnesses will not be heard at the same time as they were proposed, but at a later date, so the court will approve the evidence because it does not postpone the trial, but will also establich another date for the hearing of the witness .

Of course, this hypothesis is just the starting point, it can undergo changes, so the solution will also be nuanced for each of the various hypotheses. Before moving on to the analysis of various scenarios and possible solutions, we believe it is important to identify the purpose for which the rule in question was edited in order to be able to use the teleological interpretation. We firmly believe that teleological interpretation should always prevail, even though grammatical and logical-juridical interpretation is often sufficient to clarify the scope of a text. However, if the text is presented in a form in which these methods can not determine exactly what the meaning of the norm is, the balance should be leaning against the purpose for which the provision subject to the exegesis has been edited. In the case provided by art. 254 par. (2) point 4. Civ. Proc. Code is that the party enjoys the right to a defense even if he has not proposed the overdue evidence due to negligence, but the administration of the evidence does not cause the process to be prejudiced in order to harm the adversary and the speed with which the courts are required to settle a dispute. In other words, this rule is intended to give the negligent right to the defense, but without disregarding the right of the adverse party to benefit from the speed of the settlement process, in other words the settlement of the case within an optimal and predictable timeframe.

For example, if the defendant puts forward the documentary evidence over the term and puts them in the file, the question arises whether the court may find the forfeit on the ground that the indirect administration of the evidence with these documents leads to the adjournment of the trial because the applicant requests a time limit for the examination of the submitted documents. We believe that the answer should be negative because such an interpretation would excessively restrict the scope of the text and only documents with such limited content would be admissible than any court would find it unnecessary to grant a term for their study.

Starting from the previous example, in practice it was cconsidered that the request of contrary revidence

by the opposing party is also a reason why the evidence would not meet the requirement not to delay the trial. But this solution violates art. 254 par. (3) Civ. Proc. Code that establishes the right of the other party to propose the contrary evidence as a natural consequence of the admission of a later probation. urning to the purpose of the rule, if it contains both the right of defense of the party and the principle of celerity by granting the opponent the right to put forward the opposite proof, the legislator has once again set the priority of the right of defense over celerity, but this time it is conferred to the other party who was surprised with a new trial weapon. A simpler expression would be that the lawmaker accepts that the party breaks the deadline for proposing evidence, but only in certain cases and with respect for the other party's right to defend themselves. We appreciate that celerity has been left behind in the editing of these exceptions from the sanction of forfeiture of right, precisely so that the parties can support each thesis with the help of evidence, so that the right to defense and the finding of truth are prevalent principles within these rules. This is precisely why we believe that this conclusion should also be applied in altered assumptions in which a test is proposed over time, and the judge must determine whether or not this leads to the adjournment of the trial.

At the beginning we gave the example of the evidence, which should not always lead to the postponement of judgment itself. If, according to art. 254 par. (3) the opposing party has the right to the contrary, and we have indicated that his exercise could not be regarded as a ground for postponing the trial, we considere that *a fortiori* the right to study the written documents should not have this effect, because the study of some writings is also an exercise of the right to defense, in a less energetic form than the submission of evidence to the contrary.

Next, it is likely that the party proposing the evidence with overdue documents shows that it is not in a position to submit it to this deadline for certain reasons. If the court finds that it will retain the case for settlement of this term, then it will undoubtedly notice the decline of the right to propose the documentary evidence because it leads to the adjournment of the trial. But even in this case the legislator, by art. 254 par. (5) Civ. Proc. Code, provides the possibility to administer the evidence with the *ex officio* documents insofar as the evidence already administered is not capable of leading itself to complete the process.

But if the court has other grounds for postponing, the question arises whether the overdue proposed evidence leads to the adjournment of the trial or not. The easiest interpretation is to notice the decline because the administration of the sample by itself leads to postponement. Turning to the balance between the right of defense and celerity, we consider that, since celerity is not affected, the right to defense should be respected by administering the document to be filed at the next term, and the evidence should be granted because it does not cause delays in concrete, but only in abstract. This reasoning should also apply when the party proposes to the late first term the evidence with a witness but does not bring it to the moment of the proposal, knowing that the most predictable, the trial will have a postponement for the hearing of all the witnesses, thus as is usually the case. Also in this case, although the evidence will be rejected as late because it leads to the adjournment of the trial, the court will allow the hearing of the witnesses proposed in due time. We believe that the evidence should be admitted regardless of the presence in the room of late-proposed witnesses if the judgment is postponed for any reason. Of course, as we have shown, there is no art incident. 254 par. (2) point 4. Civ. Proc. Code if the court is to retain the case for settlement even at the time the witness evidence is proposed.

5. Conclusions

The analyzed issues concern the interpretation of the application of the sanction of decay either independently or in relation to the sanction of nullity in the regularization. It follows from the foregoing analysis that in practice there are difficulties in determining the scope of the sanction of deferral in relation to other sanctions that occur during the civil process. On the other hand, the different jurisprudential interpretations given to rules on decoupling lead to the conclusion that this institution is interpreted in a non-uniform manner in judicial practice.

The solutions we have provided above are our vision of an interpretation of norms in the matter of decay in spirit rather than in their letter.

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