EDITURA LUMEN în elita editurilor românești

Available online http://lumenpublishing.com/journals/index.php/jls

e-ISSN: 2067-8509; ISSN-L: 1841-6195

Jurnalul de Studii Juridice

Year XV, No. 3-4, December, 2020, pp. 61-65

LEGAL CONDITIONS IMPOSED BY ART. 78 OF THE ROMANIAN CIVIL PROCEDURE CODE REGARDING THE HEARING OF A CASE WITHOUT RULING ON ITS MERITS

Alexandru BLEOANCĂ

DOI: https://doi.org/10.18662/jls/15.3-4/76

Covered in:
CEEOL, CrossRef, CrossCheck,
Index Copernicus, Ideas RePeC,
EconPapers, Socionet,
HeinOnline

©2020 The Authors & LUMEN Publishing House

How to cite: Bleoancă, A. (2020). Legal Conditions Imposed by Art. 78 of the Romanian Civil Procedure Code regarding the Hearing of a Case without Ruling on its Merits. *Jurnalul de Studii Juridice, XV* (3-4), 61-65. https://doi.org/10.18662/jls/15.3-4/76

LEGAL CONDITIONS IMPOSED BY ART. 78 OF THE ROMANIAN CIVIL PROCEDURE CODE REGARDING THE HEARING OF A CASE WITHOUT RULING ON ITS MERITS

Alexandru BLEOANCĂ[1]

Abstract

In contentious matters, when the conditions impose it, the judge will put in discussion of the parties the necessity of introducing other persons in the procedure; if neither party requests the introduction of the third party in question, and the judge considers that the case cannot be heard without the participation of the third party, he will dismiss the claim, without ruling on the merits.

The legal text imposes two conditions for hearing the case without ruling on the merits: neither party to request the introduction of the third party and the judge to appreciate that the case cannot be heard without the participation of the third party.

The text does not state whether the necessity of fulfillment of the second condition must be brought to the attention of the parties before or after the judgement is delivered (by the decision rejecting the application itself). However, the interpretation of the legal text leads to the conclusion that the first one is the solution considered by the legislator.

Keywords:
Insolvency procedure, civil procedure, lack of capacity to take proceedings, debtor represented by its special administrator.

[1] Ph.D., Judge at the Galaţi Court of Appeals, Lecturer at the Faculty of Juridical, Social and Political Sciences of "Dunărea de Jos" University of Galaţi.

On 3 February 2017, the Galaţi County Tribunal opened the general insolvency procedure of the debtor AI SRL (i.e., Ltd.) and appointed S as judicial administrator of the debtor.

During the insolvency procedure of the debtor AI SRL, the judicial administrator S filed a claim with the Galaţi County Tribunal on 19 February 2018, asking for the cancellation of the debt assignment contract no. C02/2015 between the debtor and AIB SRL, as well as the cancellation of the operation consisting in the payment of the amount of 1,447,137 RON made by AIB SRL, on behalf of AI SRL, to PA with title of assignment of shares to the shareholder based on the assignment contract of receivables, with the consequence of restoring the parties to the previous situation, i.e. forcing the defendants to return to AI SRL the amount shown above, updated with legal interest. S founded its request on Law no. 85/2014 on the procedures for preventing insolvency and for insolvency[2] (further referred to as "the Insolvency Law").

At the hearing held on 8 April 2019, the attorney of the defendants AIB SRL and PA applied for the case to be struck out on the ground that the applicants lacked the capacity to take proceedings (exception of the lack of passive procedural co-participation), based on the fact that the debtor company (i.e., AI SRL) was not part of the litigation process, although it should have been, represented either by the special administrator or by a specially appointed curator. In support of its argument, the attorney invoked the provisions of art. 117 and 122 of the Insolvency Law.

In its decision from 20 May 2019, the Galaţi County Tribunal stroke out the case (admitted the exception of the lack of passive procedural co-participation invoked by the defendant of AIB SRL and PA and dismissed the claim accordingly).

The Court held that the claim was founded on the provisions of art. 117 and 122 of the Insolvency Law. Applying the specific rules to the case, the capacity to take proceeding (procedural capacity) was the following:

- active capacity to take proceeding belonged to S in its quality of judicial administrator of the debtor AI SRL;
- passive capacity to take proceeding belonged to the debtor itself, AI SRL, represented by its special administrator, and to the other parties of the challenged contract.

It was held that, although the special administrator was sued, he did not act as the representative of the debtor, but only as a natural person (supporting his own interest). Therefore, as the debtor AI SRL was not sued in the case as a defendant, the court held that the exception of lack of

[2] Published in the Official Gazette of Romania no. 466 of 25 June 2014.

passive procedural co-participation was grounded and the claim was ill-funded.

S, the judicial administrator of the debtor AI SRL, appealed against the decision of the Galati County Tribunal, claiming for the annulment of the judgement and for retrial of the case. It invoked the wrongfully application of the provisions of art. 78 para. 2 of the Romanian Civil Procedure Code[3], regarding the obligation of the court to discuss the need for the call of other persons (than the initial parties) during the trial. It argued that the court had an obligation to challenge the parties' need to sue other persons during the hearing, and only if neither party requested that the third party be sued would it order the rejection of the claim.

According to the legal experts, a special issue concerns whether the court has the obligation or, on the contrary, only the faculty to question the need to introduce other persons, in the case regulated by art.78 para. 2 of the Civil Procedure Code. As the law is worded in mandatory terms, it is concluded that it establishes not only a right but also an obligation for the court, namely that, before concluding the applicants lacked the capacity to take proceedings, it has to question the need to complete the litigation framework and allow the parties to express their agreement to this effect. Moreover, it should be noted that the second sentence of the paragraph in question entitles the court to invoke and admit the exception of lack of compulsory procedural participation and to reject the application as inadmissible only if it has not been obtained the agreement of the parties to the introduction of the missing party (whose participation is required).

Therefore, if the court rules on a dismissal of the application as inadmissible for lack of the capacity to take proceedings, without challenging the need to complete the procedural framework, then the judgment may be set aside on appeal for non-compliance with the procedural provisions prescribed by art. 78 para. 2 of the Civil Procedure Code.

The Galaţi Court of Appeal – Second Civil Section, in its decision no. 348 of 6 November 2019, held that, at the hearing of 8 April 2019 before the tribunal, the attorney of AIB SRL and PA applied for the case to be struck out on the ground that the applicants lacked the capacity to take proceedings. The counsel claimed that the debtor AI SRL had to be sued, as defendant, represented by its special administrator, as it is imposed by art. 122 of the Insolvency Law, but this did not happen. The tribunal admitted the exception and dismissed the claim accordingly.

[3] Law no. 134/2010 on the Civil Procedure Code was re-published in the Official Gazette of Romania no. 247 of 10 April 2015.

In law, according to art. 78 para. (2) of the Civil Procedure Code, in contentious matters, when the conditions impose it, the judge will put in discussion of the parties the necessity of introducing other persons in the procedure; if neither party requests the introduction of the third party in question, and the judge considers that the case cannot be heard without the participation of the third party, he will dismiss the claim, without ruling on the merits.

The text imposes two conditions for hearing the case without ruling on the merits:

- neither party requests the introduction of the third party; and
- the judge appreciates that the case cannot be heard without the participation of the third party.

The text does not explain whether the necessity of fulfillment of the second condition must be brought to the attention of the parties before or after the judgement is delivered (by the decision rejecting the application itself). However, the interpretation of the legal text leads to the conclusion that the first one is the solution considered by the legislator.

Firstly, it is the judge himself who questions the need to bring the third party into question, or, it would be absurd to consider that the judge raises *ex officio* a matter which he considers, from the very beginning, to be ill-founded.

And, secondly, the civil procedure is subject to the principle that the parties have the right to a fair trial, in an optimal and predictable time. Or, if the second solution were accepted (that the parties find that the judge considers that the case cannot be resolved without the participation of a third party by the very decision rejecting the application), then they would not be able to comply with that obligation, but they would have to file a new claim, which would prolong the litigation unpredictably.

Therefore, in this case, it was necessary for the tribunal to inform the parties that the claim cannot be judged without the participation, as defendant, of the debtor AI SRL itself, represented by the special administrator. And the tribunal should have done that before stating its decision, obligation that hasn't been complied with.

Consequently, the Galaţi Court of Appeal – Second Civil Section admitted the appeal filed by S, judicial administrator of the debtor AI SRL, and, declaring null the decision of the Galaţi County Tribunal, sent the case for retrial.

Bibliography

Law no. 85/2014 on the procedures for preventing insolvency and for insolvency published in the Official Gazette of Romania no. 466 of 25 June 2014.

Law no. 134/2010 on the Civil Procedure Code was re-published in the Official Gazette of Romania no. 247 of 10 April 2015.