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INSOLVENCY LAW: REQUIREMENTS FOR ENGAGING THE PATRIMONIAL LIABILITY OF THE JUDICIAL LIQUIDATOR

Alexandru BLEOANCĂ[1]

Abstract

In the case we present the courts analyzed the liability of the judicial liquidator. The interest of this case resides in the material implications of the engagement of patrimonial liability and in the rarity of the judicial requests for engaging this liability.

The application was registered under no. 5342/113/2012 and was heard by the syndic-judge from the Braila County Court, as the first instance, who issued decision no. 211 of 18.03.2013, and by the Galati Court of Appeal, which issued the appellate decision no. 600 of 02.10.2013.

Keywords

Judicial liquidator, patrimonial liability, requirements for engaging the liability, syndic-judge, Braila County Court, Galati Court of Appeal.

One of the creditors of a bankrupt limited liability company, **BT SA, a bank** (further referred as "the Bank") claimed the engagement of the civil liability of the judicial liquidator of the debtor, SQ SPRL (further referred as "the Liquidator") consisting in the payment of an amount of money representing the value of the property of the debtor that was sold at an auction organized by the Liquidator.

The Bank underlined that, the day before the auction regarding certain goods of the debtor took place, it filed all the necessary documents in order to participate at the auction. However, the Bank was disqualified by the liquidator for the reason that the indemnity bond, issued to guarantee the conclusion of contract in case of winning the auction, revealed that the sum was payed to the Liquidator's bank account, not the debtor's one. The Bank obtained a court decision stating that it was illegally disqualified, so the misconduct of the judicial liquidator is proven.

As proximate cause of this misconduct, the Bank suffered a loss equal to the value of the sold property, because, if the Liquidator did not disqualify, it would have won the auction (as its offer was higher than of the actual winner), thus becoming the owner of the property. All the conditions

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for the engagement of the Liquidator's liability are met, as the said decision also stated it had acted by ill intention when disqualifying the Bank.

The patrimony liability of the judicial liquidator is regulated by art. 63 par. 1 and art. 60 par. 2 and 3 of Law 85 of 2014 on the procedures for preventing insolvency and for insolvency[2] (further referred to as "the Insolvency Law"), as follows:

(2) The syndic-judge shall sanction the judicial administrator with a judicial fine from RON 1.000 to RON 5.000 in case that he, by his fault or by ill intention, does not fulfil or fulfils with delay the powers provided by law or established by the syndic-judge.

(3) If, by the deed provided in paragraph (2), the judicial administrator caused damage, the syndic-judge may, at the request of any party concerned, oblige the judicial administrator to cover the damage caused.

This legal solution is the same previously provided by art. 24 par. 1 and art. 22 par. 2 and 3 of the Law no. 85 of 2006 on the insolvency proceedings[3] (further referred as "old Insolvency Law"), which Law no.85/2014 repealed, so the judicial solution, although referring to the old legislation, is also incident under the provisions of Law no.85 of 2014.

The liability of the judicial liquidator is a special form of civil liability for damage due to misfeasance or nonfeasance, nature constantly recognized by the juridical doctrine[4]. Therefore, the common features are compulsory, together with the specific elements provided by the Insolvency Law. The requirements for engaging the liability are:

- the misconduct of the judicial liquidator, who does not fulfil or fulfils with delay the powers provided by law or established by the syndic-judge;
- the plaintiff must have suffered a loss;
- the negligent act must have been the proximate cause of the loss, which means that it directly caused the loss so that if the proximate cause didn't happen, then the harm would not have happened;
- the judicial liquidator must have acted by his fault or by ill intention.

The defendant (the Liquidator) argued that the conditions of tort law are not met. It pointed out that the exclusion of the Bank from participation in the auction was based on his liquidator attributions

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

[3] Published in the Official Gazette of Romania no. 359 of 21 April 2006.

[4] N.Ţăndăreanu, *Insolvenţa în reglementarea Legii nr.85/2006*, Editura Universul Juridic, Bucureşti, 2012, pp.402-406; Gh.Piperea, *Insolvenţa: legea, regulile, realitatea*, Editura Wolters Kluwer, Bucureşti, 2008, p.737, nr.238.

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conferred by the law and the measure could be challenged by the Bank according to the procedure specifically regulated by the law in this respect.

The syndic-judge from the Braila County Court ruled against the Bank, holding that, in order to oblige the judicial liquidator to cover the damage suffered, the damage must be the consequence of his failure to fulfill his obligations or of his delay in doing so. In the case, the alleged damage, namely the fact that the Bank did not adjudicate on the bid, did not occur due to the failure or late fulfillment of the liquidator's duties, but it is the consequence of a measure taken by the liquidator under its statutory duties. As all the conditions of tort liability must be met cumulatively, and there is no unlawful act in the way provided by Law no.85 of 2006, the action is ill founded.

The Bank appealed against the sentence, alleging that the interpretation given to the law by the syndic-judge is faulty, in its opinion the misdemeanor consisting exclusively in the failure to fulfill the duties or in their late fulfillment. However, this interpretation equates to a refusal to hear the case.

Thus, the illicit act may consist both in action and in lack of action, the essential condition being that it is contrary to the law or provisions given by the syndic-judge. The appellant objects, stating that is contrary to the letter and spirit of the law, to the view that the liquidator may take action or act in the proceedings without sanction, on the grounds that the law penalizes only his inaction or delayed action. In this case, the first regulated situation, when the liquidator fails to perform his duties provided by the law or established by the syndic judge, is met. Among the attributions is the one stated in art. 24 letter i) of the old Insolvency Law, namely the sale of the debtor's possessions. The liquidator did not fulfill the measures provided by the law, the consequence being the annulment of the tender documents. Consequently, the failure to comply with the measures provided by the law – the unlawful act – consists in the violation of the power granted by art. 24 letter i) through the procedure of selling in violation of the law, which attracted the annulment.

The Liquidator filed an answer in which he claimed that the appeal is ill unfounded. He pointed out that his measure of exclusion of the Bank from the auction was taken in accordance with the provisions of art. 21 of the old Insolvency Law, given that the bidders had to pay the guarantee according to the specifications (on behalf of the debtor), and the appellant wrongfully paid to the liquidator's account. The Bank challenged the exclusion measure and the court ordered its cancellation by a final decision.

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In order for him to be held liable, the three conditions of the tort liability[5], namely the existence of a faulty action, the damages occurred and the causal relation between the first two must be met cumulatively. In the case, a measure was taken in accordance with the law, a measure that can be confirmed or denied by the court. The liquidator's liability cannot be the consequence of a measure that he ordered, nor is the syndic-judge applying the procedure according to art. 5 of the Law no. 85 of 2006.

The provisions invoked by the Bank are not applicable as there is no fault in the performance of the duties. The action was brought in bad faith and can even be considered an attempt to unjust enrichment, as the proceeds of the sale of the good at auction were distributed to the creditors, including the Bank, so the later wants to collect profit from both the debtors and the liquidator.

The Galati Court of Appeal allowed the appeal and partially reversed the sentence of the court below, but granted the Bank a smaller amount of money than it claimed.

For easier understanding of the court's legal reasoning, we will recall that art. 304^1 of the 1865 Civil Procedure Code (under which the case was heard) granted to the court the power to rehear the case.

The Bank's legal action was filed based on the assertion that the tort may result although the liquidator committed a lawful act under its jurisdiction. In the case, the alleged fact was the measure taken by the liquidator to exclude the Bank from participation in the auction. Both parties agreed and the court held that the liquidator has the legal power to sell the debtor's assets – according to art. 25 letter i) of the Law no.85 of 2006, currently art. 64 letter. i) of the Law No. 85 of 2014. Therefore, the liquidator can check the compliance with the sale rules and may decide to exclude any tenderer from the procedure.

However, the exclusion measure cannot be taken in any condition (only as a form of expression of the liquidator's will), but it must be in accordance with the law. In order to ensure this compliance, the measure is censored by the court. In the case, the measure, although permitted by law (as an abstract act), was irrevocably abusive, and was annulled by the court (as a concrete act). In other words, under the appearance of legality, the liquidator committed an abuse, an illegal act.

[5] The arguments are presented as stated by the parties, but the liability conditions are in number of four, as we already pointed out at no. 2; see also G.Boroi, L.Stănciulescu, *Instituții de drept civil în reglementarea noului Cod civil*, Editura Hamangiu, București, 2012, pp.239-255; C.Stătescu, C.Bîrsan, *Drept civil. Teoria generală a obligațiilor*, ediția a 9-a, Editura Hamangiu, Bucureşti, 2008, pp.183-184.

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Generally, any tort creates the obligation to compensate for the damages (according to art. 1349 of the Civil Code – Law no. 287 of 2009[6], previously provided by art. 998-999 of the Civil Code of 1864). This civil (patrimony) liability occurs regardless of whether the person has committed an act or has refrained from committing one that he/she should have done (abstaining).

Art. 22 par. 4, and art. 24 par. 1 of the old Insolvency Law regulates a special form of tort liability but, by separate regulation, the solution of liability for both action and abstention has not been changed. Therefore, by the "failure to perform the duties of the liquidator", the law means both the abstention and the realization of an act that has only the appearance of legality, being in fact unlawful.

It is worth underlining the comparison made by the liquidator between his actions and those of the syndic-judge. He pointed out that, as the syndic-judge fails to answer for its judgments reversed by the court of appeal, neither the liquidator should do so in respect of the acts committed during the proceedings. He, therefore, claimed an alleged immunity similar to that of the judge.

The argument is ill founded because the syndic-judge, as judge, is responsible for all the sentences he passes. His liability is patrimonial, according to art. 96 par. 2 of the Law no.303 of 2004 on the statute of judges and prosecutors[7], when the judge sit in bad faith or with serious negligence. We observe the similarity of regulation, as for both the liquidator and the magistrate, the guilt can take the form of bad faith or negligence. So, the liquidator is also responsible for all the acts he commits.

In order to upheld that the liquidator committed tort, the court checked if the legal conditions have been fulfilled. The condition of existence of an illegal act is fulfilled because the decision that declared the Bank's exclusion from the bidding procedure to be illegal is final; therefore, the misconduct is the exclusion measure itself.

The condition that the liquidator be guilty is also fulfilled, as the Law no.85 of 2006 requires the author's bad faith (the intention) and the final decision uphold that the exclusion measure was abusive, so intentionally committed by the liquidator.

In regard of the damage, the appellant argued that it existed and was equal to the valuation price of the property sold. The Court of Appeal agreed with the existence of the damage, but stated that it cannot predict at what price it would have been sold the possession if the Bank and the other

[6] Republished in the Official Gazette of Romania no. 505 of 15 July 2011.
[7] Republished in the Official Gazette of Romania no. 826 of 13 September 2005.

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bidder (the adjudicator) participated together in the auction. But, in such case, the price should have been at least equal to the value offered by the bank (¾ of the valuation price of the property) and, in order to adjudicate, the actual adjudicator would have had to offer more. However, in the absence of the competitor, the adjudicator offered less, so there is a difference that constitutes the basis of the damage suffered by the Bank.

The Court did not accept the full valuation amount of the asset as the minimum value that could have been obtained by auctioning, subject to the participation of the Bank, since, in order to adjudicate, the actual adjudicator should have provided more than the Bank, therefore no more than ¾ of the valuation price, but not over the whole valuation price. Or, trying to make an estimate of the amount that would actually have been put into the auction brings us to assess the price at which the good would have been sold, had the Bank participated in the auction together with the other bidder, and thus to violate the authority of the previous judgment (which has determined that such an evaluation is not possible).

The Bank, trying to substantiate the amount of compensation claimed, also argued that the valuation price is even the market value of the good. In reality, market value is the least predictable of the values that can be assigned to a possession. For example, in the case, it could have been established only by conducting a competitive bidding (i.e. in the presence of at least 2 serious competitors, for example the Bank and the other bidder). Had it accepted the appellant's argument, the court would again have been in a position to estimate the price at which the good would have been sold in the absence of the abusive act of the liquidator, so it would have violate the previous judgment.

The court agreed that the damage was suffered exclusively by the Bank, although it was not the only creditor of the debtor, since it had a security related to the property and a claim greater than its valuation price, so the whole price was distributed to the Bank (according to art. 121 of the old Insolvency Law, now art.159 of the Law no.85 of 2014). Therefore, the Bank alone is entitled to the full amount of the damage.

In both situations – the hypothetical participation in the tender and the actual absence of the bid – the Bank had to bear, from the price obtained for the good, the selling and procedural expenses. In the case, these costs were assessed (by unqualified reports of the liquidator), so they were deducted from the previously recorded value of the loss. Only this last result is the actual damage suffered by the bank (and is lower than the claim in action).

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The legal doctrine[8] emphasizes that in order for the damage to be recovered, it must not have been covered yet, because reparation of the damage has the purpose to completely eliminate the effects of the tort and not to create a source of additional income. From this perspective, in the case, the most appropriate form of repair would have been to revert the successive transfers of the property sold and to return it to the debtor. However, an earlier claim in this respect had already been set against by the court, so there was no form of reparation for the damage.

The Court of Appeals also rejected the liquidator's argument that there was unjust enrichment of the Bank, since the compensation only covers that part of the loss (the possession) that could not be obtained by the Bank, due to abusive elimination from the auction, and not the part actually obtained (the price paid by the auctioneer minus the expenses).

The fourth condition – the causal relation between the action and the damage – was also fulfilled: the failure of the appellant to participate in the auction (as a result of the unlawful act committed by the liquidator) resulted in the adjudication of the building at a lower price than it would have been in the case of the Bank's participation (and the amount itself is the loss suffered by the court). The court concluded that the conditions for the liability of the liquidator were fulfilled, thus allowing the appeal and reversing the first instance judgment in that it granted to the Bank an amount of money – to be paid by the liquidator – but less than stated in the complaint.

In conclusion, the court decisions stated that the liquidator is subject to the tort law. But the existence of the liability of liquidator (and of the judicial administrator), based on art. 60 par. 2, 3 and art. 63, par. 1 of the Law no.85 of 2014, has an exceptional nature. The rule, explicitly introduced by art.57 par. 11 of the Insolvency Law, is that the insolvency practitioner, as body which applies the procedure, shall not be sanctioned or obliged to pay any legal costs, fines, damages or any other amount, by the court or by other authority, for facts or omissions imputable to the debtor. This provision aims to eliminate some previous hesitations and inconsistencies in the judicial practice. Therefore, careful consideration must be given to situations in which the insolvency practitioner is to be held liable and must be distinguished from the cases in which the patrimonial liability is borne by the debtor himself.

[8] C.Stătescu, C.Bîrsan, *op.cit.*, pp.198-201.

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