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National Case Law System

No. 90/2009

Office: Civil Appeals Tribunal 5T

JUDGMENT No. 90/2009

CIVIL COURT OF APPEALS – FIFTH SHIFT

Opining Minister: Dr. Beatriz Fiorentino

Signing Ministers: Dr. Sandra Presa, Dr. Luis MaríaSimón, Sr. Beatriz Fiorentino

Dissenting Minister:

IUE: 2-25422/2009

Montevideo, August 21, 2009

WHEREAS:

For final judgment on appeal, these cases, titled: "CARDONA, Luisa y otros C/ SUMMUN MEDICINA PRIVADA S.A. – Acción de Amparo –" IUE: 2-25422/2009 brought before the Tribunal given the appeal filed by the defendant against the judgment issued by the Honorable Judge (Acting) of the First Civil Chamber of Shift 11, Hon. Mónica Pereira.

RESULTING IN:

Given the referenced pronouncement, the plaintiff filed a writ for the protection of fundamental rights (*amparo*), without a special judgment for fees. The defendant filed an appeal against this *amparo*, holding that the judgment that was issued: a) did not declare a clear expiration of the statute of limitations, as it should have, because the term of 30 days from the moment that the plaintiffs had had knowledge of the harmful act had passed; b) the plaintiffs did not use other means of protection, such as resorting to the Office of Consumer Defense of MSP to obtain a pronouncement that "Neocate" is included in the FTM – Annex IV; c) that the record does not have proof that this nutritional supplement that is effectively included in said Annex and that, as a result, SUMMUN is obligated to provide it under the mode of tickets and d) then, there is no unlawfulness whatsoever, and much less, a manifest one.

Once the appeal was substantiated, the records were received by the Tribunal on August 19 and we agreed on a judgment, issued on this date and time.

WHEREAS:

I) In the case, the plaintiffs, representing their minor child Francesca Ramírez Cardona, affiliated to SUMMUN MEDICIAN PRIVADA (hereinafter, SUMMUN), file a suit of *amparo*, seeking, via the Farmasummun ticked system under Plan QIX, provision to their baby of the product "Neocate" as she cannot ingest cow or soy milk.

II) The Chamber shall revoke the appealed judgment, as they consider the harm articulated by the claimant.

III) According to Gelsi Bidart "an amparo attempts to provide an immediate procedural guarantee; its generic purpose is to avoid or suppress a manifestly unlawful violation of a fundamental right. To obtain, in the shortest possible time, elimination or suppression of the referenced unlawfulness that has been caused or is in a process of being consummated" (L.J.U., section doctrine "The process of amparo in the Uruguayan Constitution").

Viera notes that the entire institution of *amparo* is dominated by a need to act without delay, with urgency, as long as a harm exists or an objective and current threat that corresponds to unequivocal sings of imminence of a legal harm ("La ley de amparo", Idea, 1989, p. 17).

The situation of *amparo* is created any time that we consider that the requirements referenced by ord. 1 of art. 1 of Law No. 16,011 are concurrently satisfied.

Once the coexistence of these requirements is confirmed and, provided that the plaintiff does not claim any of the acts referenced by letters A through C of said rule, the judge must check if the conditioning established by the legislator in art. 2 does not exist.

IV) The defense of expiration of the statute of limitations, repeated within the subject of damages, is fair. The claim was filed when the statute of limitations had expired, pursuant to art. 4, subparagraph 2 of Law No. 16,011. The fact that the harmful conduct is an omission does not preclude the statute of limitations from running with respect to the claim.

The text of the referenced legal provision, of unequivocal intelligence, sets an undeniable obstacle against any doctrinal or jurisprudential interpretation, that improperly disregards the extinguishment of the power to act due to expiration of the statute of limitations, founding its situation on the impossibility of setting a dies a quo of the statute of limitations, since article 4, subparagraph 2 emphatically enshrines a term of extinguishment in "all cases", without excluding the omission.

The Tribunal has indicated: "There is no claim that the continued nature of the omission imputed to the defendant precludes a declaration that the statute of limitations has expired, since the harmful matter invoked has not ceased and thus, it is not feasible for one to compute the term of the statue of limitations.

The Chamber holds case law that indicates that an initial harmful affectation enables a jurisdictional claim, because one can claim compensation for damages caused from the time that existence of the omission is known, and its harmful effects.

The circumstance that the act lasts over time does not lead to the analogy to a hypothesis of continuous crime, rather, to the immediate unlawfulness of permanent effects with a harmful effect that remains in time and where its occurrence is established at the initial moment of existence and causation of harm, regardless of the fact that these can last, increase, decrease or even cease (According to – among others – judgments Nos. 185/94, 62/98 and 19/99"(Cite to judgment No. 257/2002).

As the Tribunal held in its prior panel, "the reasons to set a term for filing an action of *amparo*, lie on the exceptional nature of the remedy. The solution is the same for all cases, whether it is an act, fact or omission, the cause of a violation of rights and liberties that are expressly or implicitly recognized by the Constitution." "…As noted by Sayagués, the institution of amparo only acts upon the failure of other procedural mechanisms to effectively resolve the situation. If the affected party abandons the amparo during a prolonged period of time, it is worth conjecturing that one could resort to the other proceedings and that one does not need to use the exceptional and very urgent route of the *amparo*. If one wishes to use this action, the harmed party must be diligent" (Pursuant to judgment No. 185/94).

In the record, as stated by the plaintiff itself in filing the claim (and arises from the documentary evidence in the record), the plaintiffs knew that the defendant denied its obligation to provide the product Neocate under the Farmasummun ticket mode system– Plan QIX from the very first days of April of this year (p. 22).

Nonetheless, they adopted a passive conduct that does not evidence the urgent situation that the current claim supports, in which the plaintiff claims that there is a danger to the life of the minor child-urgency that is inherent to the institution of *amparo*.

However, there is no urgency in this particular situation, because, if there was one, a four month delay to resort to tribunals and seek the protection of the fundamental right said to be violated is not justified.

If an effective aggression or threat to harm the minor's right to health had existed, the claim should have been filed prior to the end of April.

And this did not occur.

Therefore, the plaintiff cannot invoke and file an action of *amparo* when it allowed four months to pass after the initial harmful affectation.

If the claim were admitted, we would be disregarding the reason of the institution [of *amparo*], enabling its use as a replacement, with the discrediting that this would entail for an excellent remedy for the protection of all recognized constitutional rights. This, in addition to the aggravating factor that the specific legal and essential requirements are not satisfied as the plaintiff ignored the requirements and the urgent situation clearly shows that the requirements that must underlie every amparo are missing in the concrete case.

V) Although a declaration of the expiration of the power to act, adversely seals the fate of the claim, equally analyzed from other angles, it also merits dismissal.

The plaintiffs base their claim on the statement that SUMMUN was obligated to provide the product "Neocate" because it was included in the FTM-Annex IV.

The procedural, documentary and report evidence in the record does not support their statements.

The plaintiffs have not satisfied their burden of proving their statements.

Neither the report of the Ministry of Public Health nor the declaration of Chemical Scientist Lucas Huguet, or Dr. Andrade's testimomy support their position. (p. 111/112 and 127)

They also failed to be diligent in the course of the proceedings (or before) as they did not resort to the MSP Consumer Defense Office of, which, in urgent cases or cases with facts similar to the instant case, answers concerns such as the plaintiffs' within 24 hours.

It they had had this answer, we would have an priceless element of proof to resolve the dispute because we would have received a precise answer regarding whether "Neocate" constitutes a formula included in the referenced Annex IV of if there is another or others that could satisfy the needs of the minor child and were provided by the defendant entity.

The counterparty requested that report as per the record, but it is not enclosed with the claims of the complaint, despite its uncertain and hardly illustrative nature.

The plaintiffs must carry with the unfavorable consequences of their own omission.

VI) Finally, two conducts of the plaintiff acquire dispositive relevance at the time of judging the instant case.

The first is the acceptance of SUMMUN's proposal to take responsibility of part of the cost of "Neocate".

Although the plaintiffs deny having used this bonus, they add certain information at p. 19 that demonstrates that they acquired it in Farmasummun.

Thus, their statement looks to have no evidentiary support, as per their own behavior attaching the invoices.

They have not explained the reason why they admitted the purchase in these conditions and today, reject it. The second referenced dispositive conduct, now endo-procedural, is that the plaintiff has been deliberately reticent in all that refers to explaining the reason why it did not feed the minor with maternal milk or another type of supplement that was tolerable for the baby; this omission cannot be admitted in these proceedings, given its summary nature, which requires incentives in the burdens of illustrating to jurisdictional bodies that they must act urgently.

Beyond the fact that the physical and mental importance of lactation for babies is public knowledge, to the point that a Global and National Day of Lactation exists, in the case, as per the technical reports included in the record, nourishment with mother's milk had a therapeutic nature. They never explained whether lactation exists, whether it was sufficient or not, to explain the imperious need for the requested supplement, and that only this supplement could replace the natural food provided by the mother.

The plaintiffs have also failed to be faithful to their own documents that they added (pp. 13 and 14) as they state that the attending physicians had told them that if they did not provide "Neocate" the child's life would be in danger. But none of the tables that have been incorporated show this diagnosis, even considering the private, un-authentic document issued in Colombia on letterhead of the Mexican physician (which lacks all probative value).

Finally, to allay any residual doubt, in the absence of evidence of the contract, it arises further that the family, in an artisanal manner and within their home, could supplement for the lack of the product with preparations obtained from blends of white and red meat and vegetables.

In sum, the claim was filed once the statute of limitations had expired, without proving the urgency that is proper to every *amparo*. There is another route that the plaintiffs could follow to determine whether the product that they require is or is not among the products that the defendant parties could provide. The plaintiffs have not justified that the petitioned concrete supplement necessarily must be provided nor that others do not fulfill a similar duty. They have not explained why

other therapeutic mechanisms at the reach of the plaintiffs have not been used, and statements have been made, contradicted by the evidence filed by the plaintiffs themselves and the efforts for illustration deployed by the counterparty.

We can hence conclude that, in addition to being untimely, the claim fails to show clear absence or inefficacy of other routes for protection, or the requirement to certify the manifest unlawfulness of the defendant's conduct; elements that, in the constitutional and legal regime of *amparo* determine that the instant case cannot prevail; and thus we believe that the judgment issued by the first instance is unfounded.

Given the foregoing foundation and cited rules, the Tribunal,

RULES

Revoke the appealed judgment and dismiss the instant claim, without a special judgment in costs or costs of the appeal.

We order that this file be remanded to the Tribunal below.

(H.F. $15,000 for the legal representation of the plaintiff).