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THE REPERCUSSIONS OF THE NON-SUSPENSORY EFFECT OF THE APPEAL FROM THE PERSPECTIVE OF SERBIAN COURTS[1]

Abstract

The appeal, as a regular legal remedy, has a significant feature - the fact that a timely appeal prevents the judgment from becoming legally effective in the part challenged by the appeal. The latest civil procedure reform in Serbia, implemented in 2011, significantly changed the consequences of the appeal in procedures considering small claim disputes. In small claims - monetary claims limited to amount of 300 Euros or less, a timely appeal does not postpone the legal effectiveness of the judgment (nonsuspensory effect of the appeal). In this paper, the author analyzes the causes, as well as the consequences of this legal solution. While reason for this can be explained by the tendency toward efficiency in the procedure, the (harmful) effects of this provision, caused by judicial misinterpretations, is still to be perceived.

Key words: *appeal, small claims, legal effectiveness, suspensory effect of the appeal.*

Introduction

The general civil procedure is a set of legal rules under which courts shall hear and decide disputes over the personal rights, as well as the family, labor, commercial, property and other civil law disputes.

Most disputes are decided upon the rules of standard procedure. However, certain disputes demand special rules, due to different legal or political reasons. Some of the special proceedings are stipulated in material law (divorce procedure, annulment of marriage, determining maternity and paternity, parental care, maintenance, anti-discrimination procedure) and other are stipulated in Civil Procedure Act[2] (issue of

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[2] Civil Procedure Act, Official Gazette of Serbia No. 72/2011, 49/2013 - decision of Constitutional court, 74/2013 - decision of Constitutional court and 55/2014, hereinafter CPA Serbia.

payment order, procedures in small claim disputes, procedure in litigation for trespass, etc)[3].

The focus of this paper is on the special regime of appeal concerning the procedure in small claim disputes, and not all small claim disputes, but the ones in which the principal sum does not exceed the amount in Dinars equivalent to 300 EUR, or 1000 EUR if the case refers to the entrepreneur or legal entity.

1. Small claim procedure

According to Art. 468 of CPA, small claim disputes are those where claims do not exceed the amount in dinars equivalent to 3000 Euros, calculated by mean exchange rate of the National Bank of Serbia on the day of filing the complaint. Small claim disputes also include those disputes where the claim is not referring to the pecuniary debt, and the plaintiff stated that he or she would accept to receive a pecuniary amount not exceeding the specified amount, instead of the performance of the particular claim. Small claim disputes shall also include those disputes where the claim is not a pecuniary amount but the surrender of an object whose value, as stated in the complaint, does not exceed the specified amount[4].

In the proceedings pertaining to commercial disputes, small claim disputes shall be those pertaining to claims of pecuniary amount not exceeding the amount in Dinars equivalent to 30000 EUR, calculated by mean exchange rate of the National bank of Serbia on the day of filing the complaint. Small claim disputes shall also include those disputes whereby the claim does not relate to a pecuniary amount, and the plaintiff declares in the complaint that he or she, instead of satisfaction of the claim, consents to receiving a particular pecuniary amount not exceeding the specified amount. Small claim disputes will also include those disputes whereby the main claim is not a pecuniary amount but surrender of movable item, as declared in the complaint by the plaintiff, is not exceeding the specified amount.

Disputes pertaining to real property, labor relations and trespassing are not deemed to be small claim disputes within the meaning of the provisions of the CPA.

The stipulation of procedure in small claims is well - known in the history of Serbian civil procedure. The Austrian concept of small claims procedure was present in Kingdom of Yugoslavia until the end of World War II. However, in social system afterwards it was unacceptable to make difference between small and large disputes, as all of them were equally important (Saveska, 1983: 52, cited according to Knežević, 2012: 388). Nevertheless, Serbian Civil Procedure Act introduced the provisions regarding procedure in small claim disputes in 1972. The procedure has always been simplified, in order to make proceedings faster and less complicated.

[3] The third category are the procedures in front of state courts concerning the procedure before non-state courts (e.g. arbitration) Stanković, 2010: 70 - 71.

[4] The legal theory is unanimous in the attitude that the censorship is inappropriately high, having in mind economic situation in Serbia (Knežević, 2012: 398; Bodiroga, 2015: 654).

Unless otherwise is specified by Civil Procedure Act, procedures in small claims disputes shall be conducted before lower courts of first instance[5]. In the small claims procedure a preparatory hearing should not be held. Certain theoretics criticized this provision, claiming it seems illogical. It is said that it would be more appropriate to make preparatory hearing a norm, and "reduce the main hearing and lower the boundary between the two hearings". Otherwise, the access to justice could be reduced, the main hearing could be prolonged and settlement could be hindered (Nyland, 2016: 73).

Judgment or a ruling by which small claim dispute is ended may be challenged only on the grounds of certain substantial violations of civil procedure referred to in Article 374, paragraph 2 CPA rules and incorrect application of substantive law (Art. 479. CPA)[6]. Parties may file an appeal against the first instance judgment or a ruling within time limit of eight days. The time limit for an appeal shall be calculated to commence from the date of announcement of either judgment or a ruling, and if the service of either judgment or a ruling was effected, the time limit shall be calculated to commence from the date of its service.

No review is permitted against a decision of the court of second instance (Art. 479. CPA).

2. The appeal in the small claim procedure

However, one provision refers only to certain type of small claim disputes, the one in which the claim does not exceed the amount in Dinars equivalent to 300 EUR.

According to Article 368 CPA, an appeal submitted against the first instance judgment whereby the person is obligated to pay off the principal sum which does not exceed the amount in Dinars equivalent to 300 EUR, calculated by mean exchange rate of the National bank of Serbia on the day of filing the complaint, or whereby the entrepreneur or legal entity is obligated to pay off the principal sum which does not exceed the amount in Dinars equivalent to 1000 EUR, does not postpone the execution of the judgment.

As it is known, there are few features common for the appeal in civil law (continental) legal systems. Appeal is a general legal remedy, unlimited regarding the grounds for challenging, devolutive and suspensive, and has to be filed within legal time limit. It is often appointed on a dual effect of the appeal: they suspend the effect of the decision

[5] About the collision of this norm (Art. 471. CPA) with the norm considering the jurisdiction of Higher courts (Art. 23. of Act on Court Organization, Official Gazette of Serbia No. 116/2008, 104/2009, 101/2010, 31/2011 - another act, 78/2011 - another act, 101/2011, 101/2013, 106/2015, 40/2015 - another act, 13/2016, 108/2016 and 113/2017, in more details: Bodiroga, 2015: 657 - 658).

[6] The limitation of grounds for appeal are considered to be the landmark of small claim disputes procedure. However, it has been strongly criticized from the perspective of constitutionality, censorship and *iura novit curia* concept (Knežević, 2012: 393 - 401).

and the superior court will be seized of the matter[7] (Wittuhn, Stucken, Turowski, 2007:287)

Nevertheless, some of the effects of the appeal can be suspended. As shown, suspensory effect of the appeal is one of them.

There are two ways to set the exception on suspensory effect of the appeal. The first one is to stipulate the rule in the law (*ex lege* exception), such as the quoted norm in Serbian CPA or the similar one in the Croatian Civil Procedure Act, deleted in the meantime (former Article 348.a CPA Croatia[8]). The other one is to leave the decision to the discretion of the judge, as it is prescribed in Art. 437. 2. of Civil procedure Act Croatia or Art. 22. of Anti-Discrimination Act Croatia[9] (Dika, 2010: 110 - 111).

The Croatian Civil Procedure Act contained provision similar to Serbian one until 2013. This provision was, however, challenged in front of Constitutional Court, but the procedure was terminated due to the fact that the controversial provision was deleted from CPA[10]. However, the regulation alike was stipulated in Croatian Enforcement Act, but was later also deleted.o

On the European Union level, a European Small Claim Procedure is established by Regulation (EC) No 861/2007[11]. In the Article 23, it is stipulated that where a party has challenged a judgment given in the European Small Claims Procedure or where such a challenge is still possible, or where a party has made an application for review within the meaning of Article 18, the court or tribunal with jurisdiction or the competent authority in the Member State of enforcement may, upon application by the party against whom enforcement is sought:(a) limit the enforcement proceedings to protective measures; (b) make enforcement conditional on the provision of such security as it shall determine; or (c) under exceptional circumstances, stay the enforcement proceedings[12].

In conjunction with Art. 368 CPA, Act on Enforcement and Security Interest[13] stipulated that writ of execution is also rendered when the judicial decision has not become final, or when administrative decision has not become final, if the law stipulates that an appeal or other legal remedy shall not stay their enforcement (Art. 43. Par. 4). This is the exception from the rule that judicial decision[14] stating a

[7] However, the devolutive effect of the appeal can also be suspended (Rosu, 2014: 205-215).

[8] Civil Procedure Act, Official Gazette of Croatia No. 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 123/08, 57/11, 148/11, 25/13, 89/14.

[9] Anti-Discrimination Act, Official Gazette of Croatia No. 85/08, 112/12.

[10] U-I-2447/2012, 18.6.2014.

[11] OJ L 199, 31.7.2007, p. 1–22.

[12] European Union in Small Claim Procedure in more details in: Čolović, 2010: 9 - 17.

[13] Act on Enforcement and Security Interest, Official Gazette of Serbia No. 106/2015, 106/2016 - authentic interpretation and 113/2017 - authentic interpretation.

[14] Judgment, writ and any other decision rendered in the proceedings before court, domestic arbitral tribunal and the Court of Honor of the Chamber of Commerce, are deemed to be the

consideration or act shall become enforceable if it has become final and if the time period for voluntary compliance has expired. A judicial decision stipulating a condition for compliance becomes enforceable upon effectuation of such condition. A judicial decision stating omission or sufferance becomes enforceable when it becomes final, if not stipulated otherwise therein. Enforceability of administrative decision is assessed according to the rules of administrative procedure, and enforceability of a notary public document that has the power of the enforcement document - according to the law regulating public notary services (Art. 43. Par. 1, 2 and 3 of Act on Enforcement and Security Interest).

The Article 43. Par. 4 of Act on Enforcement and Security Interest is also recognized and confirmed in jurisprudence - The execution can be also rendered based on the judicial decision which has not become final if the law stipulates that an appeal or other legal remedy shall not stay their enforcement, and if the time limit for the voluntary execution has expired[15] (Ruling of Commercial Appellate Court Iž 373/2016, brought 1.12.2016)[16].

A judgment ordering a party to perform an act shall also specify the time limit within which the party must perform such act. Unless a law on a particular subject regulates otherwise, the time limit for performance of an act is fifteen days. However, a longer time limit may be specified for performance of acts that do not involve cash payments. In disputes involving checks and bills of exchange such time limit shall be eight days. The time limit for performance of an act shall start running on the first day after a copy of the judgment is served on the party who has been ordered to perform an act (Art. 345. CPA Serbia).

There are two reasons for specifying time limit. The party who is obliged to perform an act is, until the judgment, sure that he/she has no duties towards the other party, and expects the positive verdict. That is why this party needs extra time to prepare itself to perform an act. Secondly, if the party is willing to perform the act voluntary, it decreases the number of conducted enforcement procedures (Keča, Knežević: 2015, 52 - 53).

judicial decision, while a settlement concluded before a court, domestic arbitral tribunal or Court of Honor of the Chamber of Commerce is be deemed to be the court settlement. Writ or conclusion imposed in the administrative procedure are deemed to be the administrative decision, while a settlement concluded in administrative procedure is deemed to be the administrative settlement (Art. 42. of the Law on Enforcement and Security interest).

[15] The voluntary compliance period runs from the date on which the judicial decision is served on the enforcement debtor, unless otherwise provided for by law (Art. 43. Par. 1 Law on Enforcement and Security Interest).

[16] The importance of the period set for the voluntary performance of the act is also highlighted in the decision of the Constitutional Court of Serbia Už-9130/2013.

The attitude that the time limit has to expire before the enforcement even in the procedures where the appeal has non-suspensory effect is unquestionable in the law theory (Keča, Knežević: 2015, 62).

3. Case study

The paper is inspired by the conduct of the court and the public enforcement officer in the case II - 1044/18 of Basic court, Niš.

The subject of the dispute was the payment of pecuniary damage based on unpaid severance pay. The dispute value was 8 040 dinars, which is equivalent to 68 Euros approximately[17].The court adopted the plaintiff's claim. The costs of the trial were 7 900 dinars, almost as the value of the dispute itself. The defendant did not response to the complaint, so the court adopted the default judgment. The time limit set in the decision was 15 days. However, on 14th day, the plaintiff approached the court with the enforcement motion. In his motion, he appointed the public enforcement officer who he had chosen to carry out the enforcement. The court, however, did not pay attention to the time limit for voluntary performance of the defendant.

The writ of execution based on enforceable document was delivered to the public enforcement officer, with a copy of the documents necessary to carry out enforcement. The public enforcement officer received the writ of execution on the 19th day of the judgment deliberation. The public execution officer adopted the conclusion to order the implementation of execution. The costs of the enforcement procedure were set to 6 633 dinars, approximately 55 Euros.

The debtor filed the appeal on the day 29th. In the appeal, he stated that the verdict was serviced to him on the day 19, the same exact day when the public enforcement officer has already received the writ of execution from the court. It comes out that the public enforcement officer adopted the conclusion on the very first day of the period set for the voluntary execution of the act. Not only that he received the writ on the day 23 (the 4th day of the period for voluntary execution), but the funds were transferred from the bank account two days before writ had come.

The debtor asked the court to repeal the writ of the Basic court and to rule the creditor to pay the costs of the appeal.

The appeal procedure is still in progress[18].

Whose behavior led to this situation?

A judgement shall not have the effect on the parties before the day when it is served to them (Art. 361. CPA). However, the plaintiff, later creditor, could be the one without any legal knowledge and without legal representation. For that reason, he coudn't be the one who should take care of the deadlines and procedural questions.

[17] Calculated via https://www.xe.com, Retrieved 14.6.2018.

[18] Even though it is not common to comment the decision which is not final, this one was tempting due to undoubtedly procedural reasons.

According to Article 47 of Act on Enforcement and Security Interest, enforcement document is suitable for rendering the writ of execution if it contains the information on the enforcement creditor, the enforcement debtor, the subject of the enforcement, the type and scope of fulfillment of the obligation. If the enforcement document does not state a time period for voluntary compliance, it amounts to eight days from the delivery of the enforcement document to the enforcement debtor.

So, the court was the one to judge whether the document has become enforceable. The specify (specific) of the situation that the appeal does not have suspensory effect has nothing to do with the rule that the time limit has to expire before the enforcement. There is not a clear rule that the judge should check whether the deadline for voluntary performance has expired, neither when the decision was serviced to the parties. The Art. 59 of Act on Enforcement and Security Interest prescribes that if the enforcement motion is filed with the court which decided in the first instance on the claim of the enforcement creditor, the enforcement document need not be enclosed, and if it is enclosed, a certificate of enforceability need not be included. Having that in mind, the proposal for the legislator could be that in the procedures where the amount of the principal sum does not exceed 300/1000 Euros, the court is obliged to check whether the time limit for voluntary performance of the act did expire.

As for the acting of the public enforcement officer, he had to behave in the accordance with the writ of execution issued by the court, so his responsibility is not the one we can discuss about.

What can the debtor do? He can file the appeal, in order to avoid paying legal cost of enforcement procedure. He can, also, file the appeal against the decision of the court of the first instance. If the court adopts the appeal, the debtor can file the motion for counter-enforcement, if all the conditions are fulfilled (Art. 115. Act on Enforcement and Security Interest).

Even though the purpose of this article was not to question the provision of nonsuspensory effect of the appeal itself, it is questionable whether this solution is suitable for Serbian legal system. The leak that exists in Law on Enforcement and Security Interest concerning the duty of the court to check the dates and the deadlines intensify this statement. It is often said that procedure in small claims is less complicated in order to make legal representation under the preparatory proceedings unnecessary and to allow parties to be fully or partially self-represented (Juul-Sandberg, 2016: 96, Nylund, 2016: 73). In my opinion, the purpose of self-representation can not be fulfilled by non-suspensory effects of appeal, because this effect can hardly be explained to the one without legal knowledge.

Conclusion

The new paragraph in the Serbian Civil Procedure Act, which refers to the appeal and its non-sunspensory effect in small claims procedure, presents the novelty in the Serbian civil procedure. It caused significant repercussions in jurisprudence, because of the leak concerning the duty of the court to check the dates of service of

the decision and the deadlines for voluntary performance of the act. It seems that the Act on Enforcement and Security Interest missed to follow all the changes in civil procedure in the area of small legal claims, and to foresee all the consequences. That is why this Act needs some changes, if the legislator remains on the stand that non-suspensory effect of the appeal is something that should remain in the Civil Procedure Act.

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