

RAPPI decision - Brazil

Process No.: 0217374-71.2022.8.19.0001

Type of Movement: Judgment

Description:

This is a public civil action filed by the PUBLIC PROSECUTOR OF THE STATE OF RIO DE JANEIRO against RAPPI INTERMEDIÇÃO DE NEGÓCIOS LTDA. The plaintiff claims, in summary, that Civil Inquiry No. 575/22 was initiated by the 3rd Public Prosecutor's Office for Collective Protection of Consumer and Taxpayer Rights of the Capital, based on information provided by the INCA (National Cancer Institute), in which possible irregularities regarding the "sale of tobacco products and electronic smoking devices on online sales platforms" were reported, including the platform RAPPI, the current defendant.

On pages 03/34, the initial petition was presented, along with the respective documents on pages 35/303. On page 307, the request for injunction was denied, as the plaintiff's allegations would require evidentiary procedures to be confirmed. On pages 312/313, it is noted that the acknowledgment of receipt (AR) was added to the records on 09/21/2022, without, however, the defendant presenting a defense within the legal deadline. On pages 315/337, there is a statement from the Association for Tobacco Control, Health Promotion, and Human Rights - ACT Health Promotion/ACT, as amicus curiae (documents on pages 338/421). On pages 449/502, an opinion was issued by jurists João Lopes Guimarães Júnior and Ronaldo Porto Macedo Júnior, at the request of the aforementioned Tobacco Control Association, regarding the legal responsibilities of companies that promote or engage in e-commerce through online sales platforms (Mercado Livre, Americanas.com, iFood, James, Rappi, etc.) in cases where products whose sale (especially by postal mail) or advertising through electronic means is prohibited are offered or sold, even if the actual transaction is carried out by third parties advertising on their platforms. On page 509, the prosecutor requested the admission of the aforementioned association in the present collective action as amicus curiae. On page 511, a ruling was issued granting the request for admission in this collective action as amicus curiae. On pages 520/521, the Public Prosecutor requested the citation of the defendant at a different address. On page 524, a ruling granted the new request for citation. On pages 544/545, the plaintiff requested the default judgment of the defendant, given that, despite the approval of the citation at a different address from the initial petition, the AR was returned as marked with a nonexistent address. On pages 548/550, the judgment was of dismissal. On pages 556/579, the plaintiff appealed, requesting the annulment of the contested judgment and, alternatively, requested that the effects of default described

in Article 344 of the Code of Civil Procedure be applied to the case, and that the requests made in the initial petition be granted (pages 580/584). On page 591, the decision not to notify the defendant to present a response to the appeal, due to the effects of default. On pages 599/608, an opinion from the 4th Prosecutor's Office for Collective Protection requested the transfer of jurisdiction to one of the Specialized Chambers of Private Law, with the consequent referral to the Prosecutor's Office for Collective Protection with authority to act in the case. On page 611, an interim decision by the Rapporteur of the 2nd Chamber of Public Law granted the request of the Prosecutor's Office, declining jurisdiction as requested. On pages 620/636, an opinion from the 12th Prosecutor's Office requested the annulment of the judgment, with the case being returned to the lower court for the production of evidence. The case was included in the virtual docket (page 643). It was later removed from the virtual docket and included in the in-person docket (page 650). The ruling annulled the first-degree judgment, granting the appellant's appeal, i.e., the Public Prosecutor (pages 653/660). Statements from the prosecutor and production of evidence (pages 675/821 and 827/832).

REPORT

I MOVE TO DECIDE.

At the outset, there is no doubt that in the present case, it is appropriate to render a summary judgment, pursuant to Article 355, Item II of the Code of Civil Procedure, due to the default declared in the case records. Following this, it is clear that the central issue in the case is whether the defendant is liable as an intermediary in the consumer relationship, specifically in the sale of products known as Electronic Smoking Devices (ESDs). Regarding this matter, these products, also known as electronic cigarettes, e-cigarettes, among others, have been prohibited from being sold, imported, or advertised in Brazil since the issuance by ANVISA of Resolution RDC No. 46, dated August 28, 2009. Furthermore, according to the administrative process attached by the Public Prosecutor on page 710, it is evident that the scenario has changed since the issuance of the aforementioned Resolution by ANVISA, as at the time, the supply and demand for electronic cigarettes in the national consumer market were decentralized. Therefore, ANVISA's action was merely preventive. However, nowadays, with the exponential increase in the commercialization and consumption of ESDs, these products are sold by different types of businesses, making consumers vulnerable, given the appearance of legality promoted by regular establishments, which consequently requires an immediate and protective government response to mitigate the damages resulting from the illegal supply of these products. In other words, regular stores, tobacco shops, and websites are

involved, as in the case at hand. Moreover, the consumer, acting in good faith, who purchases an illegal product without any control over its composition and quality, is being misled about the legality of the product, creating an appearance of legality both through the offer in regular establishments and through the issuance of invoices, violating the principle of objective good faith. In this context, the defendant, as a service provider, should be subject to the "Risk Theory of Business," according to which anyone who engages in an activity, offering their services to society, is responsible for its quality and safety, bearing objective liability for any failures. Furthermore, the principle of objective good faith, enshrined in Article 422 of the Civil Code, which fulfills the idea of maintaining balance in business dealings, must be upheld in legal relations, in any sphere of business dealings, and in all its phases. In this regard, Enunciations Nos. 25 and 170, approved at the Civil Law Conferences, are relevant:

"Enunciation No. 25: Article 422 of the Civil Code does not preclude the judge from applying the principle of good faith in pre-contractual and post-contractual phases."

"Enunciation No. 170: Objective good faith must be observed by the parties during the preliminary negotiations and after the contract's execution, when such a requirement arises from the nature of the contract."

Additionally, this principle requires the utmost respect and cooperation between the parties in the consumer contract, and anyone who acts abusively, also known as acting in bad faith, should be penalized with sanctions provided for in consumer law itself, such as the nullification of the contract or the imposition of objective civil liability. Regarding this latter point, Article 14 of Law No. 8.078/90 (Consumer Protection Code) states:

"Article 14. The service provider is liable, regardless of fault, for the damages caused to consumers due to defects in the service provided, as well as for insufficient or inadequate information about the service's enjoyment and risks."

Furthermore, Minister Nancy Andrighi of the Superior Court of Justice, when ruling on REsp No. 1.879.503, discussed the application of the principle of objective good faith:

"SPECIAL APPEAL. ACTION FOR SPECIFIC PERFORMANCE AND DAMAGES. INSUFFICIENT REASONING. SÚM. 284/STF. ALLEGED OFFENSE TO CONSUMER RESOLUTION. NOT APPLICABLE. LACK OF PRIOR DISCUSSION. SÚM. 211/STJ. UNCHALLENGED GROUNDS. SÚM. 283/STF. DENIAL OF JURISDICTION. ABSENCE. DIVERGENT JURISPRUDENCE. DISSIDENCE NOT DEMONSTRATED. CONTRACT OF CORPORATE GROUP HEALTH PLAN. TERMINATION OF EMPLOYMENT RELATIONSHIP. RETENTION OF EX-EMPLOYEE AND SPOUSE AS BENEFICIARIES OF THE HEALTH PLAN FOR 10 YEARS. WRONGFUL EXCLUSION BY FORMER EMPLOYER. LIABILITY

FOR TRUST. ABUSE OF RIGHT. SUPPRESSIO. TRIAL: CPC/2015. 1. Action for specific performance and damages filed on 08/19/2013, from which the present special appeals were extracted, both filed on 08/30/2018, and assigned to the cabinet on 05/14/2020. 2. (...). Liability for trust constitutes one of the aspects of objective good faith, as a principle limiting the exercise of subjective rights, and prevents the abusive exercise of rights, which, in this case, is revealed as a form of abusive non-exercise of rights, exemplified by suppressio. 11. The abuse of rights - characterized here by suppressio - is qualified by the legislator as a form of unlawful act (Article 187 of the Civil Code of 2002), in which, in fact, there is no violation of a rule of conduct derived from the law, but rather an offense to its underlying value; the agent acts in strict legality, but offends the teleological element that sustains it, disregarding the ethical duty that aligns their conduct with the legal system. 12. An exceptional case where, by the generosity of the former employer, the ex-employee and their spouse, assuming full financial responsibility, remained linked to the health plan contract for a period far exceeding that provided for in Article 30, §1, of Law No. 9.656/1998, leading them to trust that they would not lose the benefit, such that their exclusion now, after 10 years, and when they are already of advanced age, becomes unfeasible under the principle of objective good faith. 13. Special appeal of BRADESCO SAÚDE S/A not recognized. Special appeal of UNIPAR - UNIÃO DE INDÚSTRIAS PETROQUÍMICAS S.A recognized in part and, to that extent, dismissed."

In this context, according to Flávio Tartuce (2022), it is interesting to conduct a practical analysis between the CDC (Consumer Protection Code) and the Civil Code, considering that many of the concepts in the 2022 Code have their roots in Law No. 8.078/1990. The 2002 Civil Code, in addition to protecting the contractual adherent as the weaker party in the relationship (Articles 423 and 424), enshrines many precepts already provided for in the protective law, such as the prohibition of abuse of rights and excessive burden, the value of objective good faith, the protection of trust, objective liability, the prohibition of unjust enrichment, among others, all in line with Enunciation No. 167 of the Federal Justice Council - CJF.

Failure to comply with the regulations governing the commercialization of products that compromise the health and safety of consumers calls for greater protection from the relevant government entities to combat the illegal practice. Regarding electronic smoking devices, Senacon asserts, on pages 712 and following:

"(...) the continuation of the current situation, in addition to violating the legal order, excessively jeopardizes the right to health, safety, information, and transparency of consumers who, due to the lack of transparency in the production chain, purchase products harmful to their health, with high potential for addiction, elevated levels of

toxicity, and whose long-term effects are unknown to health authorities. (...)

Therefore, it is imperative that the State intervene in this activity to protect consumers' rights and to ensure the integrity of the legal order, given the violation of the applicable regulations, which subjects offenders to the corresponding administrative sanctions.

ANVISA plays a recognized role in the health control of products, substances, and services of interest to public health and addresses the issue while observing the legal competence of other agencies. However, when the intervention's objective is directly related to the protection and promotion of citizens' health and safety, as in the case of the prohibition of electronic smoking devices, it is clear that it involves concurrent and complementary competencies with other state agencies. The National Tobacco Control Policy, for example, consists of various fronts and involves the coordination of interministerial bodies and regulatory agencies. According to the legislation on the matter, the following objectives of this policy can be listed: (i) protection against the risks of exposure to tobacco smoke, (ii) restriction of access to tobacco products, (iii) protection of youth, (iv) treatment and support for smokers through the approval of clinical protocols and therapeutic guidelines, (v) restriction of advertising and sponsorship of tobacco products, (vi) public awareness through educational actions, (vii) implementation of the Framework Convention for Tobacco Control (FCTC), issued by the World Health Organization (WHO), (viii) taxation of tobacco products, and finally, (ix) control and supervision of tobacco products."

Based on the results found, the Regulatory Impact Analysis (AIR) Report, approved by ANVISA's Board of Directors in July 2022, suggested maintaining the prohibition on the commercialization, importation, and advertising of ESDs, along with complementary non-regulatory measures appropriate to address the public health problem posed by these devices. Finally, collective moral damages will apply in this case, as the defendant's negligent conduct, involving the sale of explicitly prohibited products, was evident. Regarding this matter, Professor Flávio Tartuce (2022) highlights the understanding of scholar Marcos Dessaune:

"My thesis is that the supplier, by providing poor service, creating a potentially or actually harmful consumer issue, and evading the responsibility to resolve it spontaneously, quickly, and effectively, induces the consumer, who is in a state of need and vulnerability, to suffer an extrapatrimonial existential harm, which must be compensated in re ipsa by the supplier who caused it, regardless of fault. The productive deviation of the consumer, therefore, is a harmful event that does not fit within traditional jurisprudence, which considers it 'mere discomfort, annoyance, mishap, or normal inconvenience in the consumer's life.'" (DESSAUNE, Marcos. The advanced theory of the productive deviation of the consumer. The damage of wasted

time and altered life, cit., p. 32. Apud TARTUCE, Flávio; NEVES, Daniel Amorim A. Consumer Law Manual: Material and Procedural Law. Single Volume. GEN Group, 2022. P.208).

Therefore, considering all the evidence in the case, **I PARTIALLY GRANT THE REQUEST, condemning the defendant to remove, within 48 (forty-eight) hours, from all its virtual platforms, the offer of electronic cigarettes and equivalent products, including refills and similar items, in accordance with Law No. 9.294/96 and No. 8.078/90 (Consumer Protection Code), as well as ANVISA Resolution No. 46/2009, refraining from selling or allowing anyone else to sell such products through its digital platforms, under penalty of a daily fine of R\$ 10,000.00 (ten thousand reais) for delay in complying with the judgment. Additionally, with regard to the reparation for collective moral damages, I set the amount at R\$ 200,000.00 (two hundred thousand reais), with the initial date for monetary correction being the date of assessment (Súmula No. 362/STJ), and the default interest being the date of citation (Article 405 of the Civil Code), with the amount to be reverted to the Fund for the Restoration of Damaged Assets (Article 13 of Law No. 7.347/85). Furthermore, I condemn the defendant to pay all the legal costs, including attorney's fees, set at 10% (ten percent) of the case value, payable to the Legal Studies Center of the Prosecutor's Office of the State of Rio de Janeiro.**

After the case becomes final, it should be closed and archived.

P.R.I.