

## UNSUCCESSFUL PRECAUTIONARY MEASURES IN A CASE OF CONSTRUCTION

Comes to our law firm for legal advice a promoting company who had concluded a contract for work by which the contractor agreed to restore a building and transform it into nine apartments.

As a consequence of some disagreements related to the final price of the contract and the last receipt issued by the contractor, our client received a request for precautionary measures. In particular, the contractor requests a preventive seizure of two registered properties of our client's property for an approximate value of 200.000 euros. In its request the contractor alleged that the precautionary measures fulfilled the legal prerequisites required by the Spanish civil procedure law (LEC):

- The absence of a less damaging measure (art. 726 LEC): the measure cannot be replaced by another measure equally effective as the proposed one and less damaging for the promoting company.
- The appearance of legal standing or *fomus boni iuris* (art. 728.2 LEC): the applicant who requests a precautionary measure, in this case, the contractor, has to argue that the precautionary measure is aimed to guarantee the effectiveness of the judicial protection that may be conceded in a possible affirmative judgment. We have to consider that in this case the judge will not rule on the grounds of the matter at issue.
- Risk deriving from the procedural delay or *periculum in mora* (art. 728.1 LEC): the precautionary measure may only be decided when the applicant justifies that there is a high possibility that during the ordinary trial the defendant realizes any type of activity that could endanger the effectiveness of a future affirmative judgement.
- Lastly, the law requires an economic allowance or compensation (art. 728 LEC), in the case that the precautionary measures cause any damage to the estate of the defendant, in this case, our client.

Even though the application for precautionary measures was made *in audita parte*, that is to say that, our client would not have the chance to object to the request. The judge, before making any decision, summoned the parties to a hearing, according to the art. 734 LEC.

In the hearing, and in defense of our client, we argued that the legal requirements to adopt the precautionary measures were missing.

- Firstly, there is no *fomus boni iuris* because the amount by which the contractor requested the preventive seizure was not stated in the original budget and it was not accepted by the project management nor the promoting company, a condition that was required by the contract.

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- Secondly, the condition of *periculum in mora* is not met because the contractor could not prove the insolvency of the promoting company, as the sale of the apartments of the refurbished building does not lead to any insolvency. In defense of our client, we showed evidence that our client has additional assets apart from the refurbished building.
- Thirdly and lastly, the applicant contributed with an allowance of 500 euros, an amount that we considered not fair enough as it would not be able to cover the damages caused to the promoting company by the seizure of two registered properties, whose value is much higher than the offered one.

During the hearing, once we contested the request for precautionary measures against our client, the applicant tried to provide evidence under the art. 265.3 LEC which establishes that the plaintiff will be able to submit proof relating to grounds of the case, whose interest or relevance has only become evident as a result of the allegations made by the defendant in his response to the lawsuit.

We argued that it applies to this case the art. 732.2 LEC, according to which the possibility for the applicant to submit evidence shall preclude with the application for precautionary measures. That is to say that the application shall be accompanied by the supporting evidence of the prerequisites allowing the adoption of the precautionary measures. The Court agreed with us and blocked any possibility for the applicant to submit any other new evidence.

We, in turn, submitted as evidence some documents that supported the solvency of our client, such as the deed of capital increase or the corporation tax declaration. We also provided a preliminary report of an architect expert, to show the Court that the prerequisite of *fomus boni iuris* is not met. This proof was decisive to the Court's decision.

Once the hearing finished, the judge decided by edict to deny the application of the precautionary measures. Firstly, the judge considered that it was not possible to prejudge the *fomus boni iuris*, as it should be further analyzed on the grounds of the matter at issue in the plenary session.

Besides, according to the Court, the prerequisite *periculum in mora* is not met either, being false, what the applicant argued, that the promoting company is insolvent and is currently liquidating its assets. Lastly, even though the edict denied the application of the precautionary measures, the Court considered that the compensation of 500 euros contributed by the applicant was not enough.

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