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STATE OF SÃO PAULO
JUDICIARY BRANCH
COURT OF JUSTICE
FOURTH CHAMBER OF PRIVATE LAW

INTERLOCUTORY APPEAL Nº 472.738-4
DATE: 29/09/2006
DISTRICT: SÃO PAULO
VOTE Nº: 10448
APPELLANT: RENATO AUFIERO MALZONI FILHO e DANIELLA CICARELLI LEMOS
APPELLEE: INTERNET GROUP DO BRASIL LTDA., ORGANIZAÇÕES GLOBO DE COMUNICAÇÃO and YOUTUBE INC.
RAPPORTEUR: APPEALS COURT JUDGE ÊNIO SANTARELLI ZULIANI (4th CHAMBER OF PRIVATE LAW)

Request for an advanced sentence for violation of the right to image, privacy, intimacy and honor of persons photographed and filmed in loving positions in Spanish sand and sea - adequate prohibitory injunction to cease the expositions of the films and photographs in websites, as the presumption of lack of consent for the publishing [article 273, of the Code of Civil Procedure] - Interpretation of article 461, of the Code of Civil Procedure and 12 and 21, of the Civil Code -- Provision, with daily fine of R$ 250.000,00, to inhibit transgressions to the command of abstention.

Viewed.

The claimers, RENATO AUFIERO MALZONI FILHO and DANIELLA CICARELLI LEMOS submitted a prohibition action with the purpose of suspending the exhibition of films and photos of them, which were captured without consent [illegally] in a moment of leisure at the Tarifa beach, in the Spanish Coast, by a paparazzi and that are being posted in websites of the claimed parties [INTERNET GROUP DO BRASIL LTDA., ORGANIZAÇÕES GLOBO DE COMUNICAÇÃO e YOUTUBE INC.].

The claimants affirm that it's occurring a violation to the rights of personality [intimacy, privacy, image], which authorizes to affirm the violation of articles 220, paragraph 1 and 5, of the Federal Constitution and articles 12 and 21 of the Civil Code and do not agree to the rejection of the advanced prohibition, arguing that the fact that the images were captured in a public place [beach] does not authorize the unconsented publicity, as it is being verified.

Decision.

It's necessary to study, initially, the possibility of granting advanced injunction, due to the strong opposition to this type of measure, in virtue of article 5, item LV, of the FC. Evidently that It would be recommendable to summon the claimed parties to respond, which would guarantee

the security of the judicial decision to be uttered. What happens is that the right of the involved requires an emergency injunction, characterizing a situation in which the precautions of summoning would aggravate the risk of damage [periculum in mora]. In this context, it is viable to accept the injunction, even without the summoning of the required parties.

Subsequently, it is worth highlighting the importance of the rights of personality in the current stage of the Law. The right to image, before the Civil Code, was protected due to the efforts of doctrinators, like CARLOS ALBERTO BITTAR, who has always defended the concept of protection of intimacy and of the portrayed image, even if dealing with famous people, like artists, who equally do not deserve to testify aggressions of their images in sex magazines, of pornography and illustrations of improper texts [Os Direitos da Personalidade, 2ª edition, Forense Universitária, 1995, p. 91].

Furthermore, on this circumstance and due to the fact that the issue affects a known person, like Daniela Cicarelli, it is worth measuring if the information that is being transmitted characterizes an adequate usefulness of knowledge, that is, if it is good for society to insist in the transmission of the video in which the two commit excesses by the sea. It does not sound reasonable to suppose that the publishing fulfills functions of citizenship; on the contrary, satisfies the morbid curiosity, sources to gossip and the "desire to know what is from others, without content or socially justifiable usefulness" [GILBERTO HADDAD JABUR, " A dignidade e o rompimento da privacidade" , in Direito à Privacidade, Idéias e Letras, 2005, p. 99].

There is no public reason that justifies the continuity of access. The advanced injunction was repealed under the basis that there was not an illicit act in capturing images of beach goers who kiss and exchange bold caresses in public, a circumstance that would exclude the offense to the "right to image or disrespect to honor, intimacy or privacy of the authors". Respecting the conviction of the illustrious Magistrate, this was a case to honor the authors.

The right to image suffers, unarguably, of dispositions. It is not absolute, although of potestative character [only the owner can dispose of it, before consentment] it loses before the preponderant public interest. A person cannot oppose, for instance, that their image-portrait is included as part of a public scenario, like when they are photographed attending a public event, of a popular party, of a sports event, etc. Some secrets of a notorious person can be recounted and no filmes, with the necessary discretion, in biographical works, as points, in Italy, LUIGI GAUDINO [La responsabilità extracontrattuale, Giuffrè, Milano; 1994, p 248]: " sarà cioè lecita la narrazione della biografia, nom già la traspozione cinematográfica di e episodi della sfera intima di una persona riproposti esclusivamente per appagare la curiosità altrui" .

Nonetheless, as warns the Professor MARIA HELENA DINIZ [" Direito à imagem e sua tutela" , in Estudos de Direito de Autor, Forense Universitária, 2002, p. 101], this restriction is illegal when the person's figure is not detached with insistence, since the object of the license is of publishing a scene in which the image of the person is an integrating part [secondary]; here, however, what is verified is the exploration of the images of the people on the beach and not the contrary. In Italy, the sentence that made liable the famous television channel RAI, for reproducing the ridiculous image of a football fan, recorded in the stadium "precisamente con un dito infilato nella boca" became well known [GIOVANNA VISITINI, Trattato breve della responsabilità civile, Cedam, Milano; 2005, p. 468].

The situation of Renato and Daniella is way worse than the one of the italian caught with a finger in his mouth.

The precedent of the honorable STJ [Resp. 595.600 SC, DJ de 13.9.2004] should not be ignored, through which an indemnity for moral damage was rejected for the publishing of the portrait of a lady who was sunbathing topless on the beach. However, we should equally not forget, that a similar case was judged in a different way by the Portuguese STJ, when it recognized the fault for the publication of the photo of a woman "almost completely naked (topless) on the beach of Meco, considered one of the places in which nudity is practised in more intensity, number and preference, even if this person is admittedly a fervorous adept of nudity" [nota 818, de p. 324, da obra de CAPELO DE SOUSA - O Direito Geral de Personalidade, Coimbra; 1995].

What results is that there is no uniformity on this important variable of the contemporary law. It is not permitted to affirm, in a categorical manner, in the beginning of the conflict, that the young people who were protagonists of these hot scenes do not have the right to preserve moral values, as the one to prevent the access to these videos by thousands of internet users, as it embarasses and disturbs the life of the involved, as reported on the records. And, when in doubt about the prepondering right, "the privilege always has to be of the private life. For an obvious reason: this right, if impaired, will never be recomposed in an specific manner: on the contrary, the exercise of the right to information will always be possible afterwards, even if the news does not have the same impact" [SÉRGIO CRUZ ARENHART, A tutela inibitória da vida privada, RT, 2000, p. 95].

In the appreciated case, according to the records, the exposition of the image of the authors is of the depreciative kind, with offense to the safeguard and reserve, as those are films transmitted with strong sexual appeal and obscene sense. In this situation, ADRIANO DE CUPIS reminds us, the consent of the person, with the exposure of image harmful to the honor, is mandatory to be express and specific [Os Direitos da Personalidade, Lisboa, 1961, p. 140], the concept that applies to the hypothesis, since, even if they did not prohibit the paparazzi's indiscretion, as it was raised, there should be an agreement between them for the publishing of the intimate moves, as they depose against the safeguard to privacy.

The paparazzi are known for the aggressive way in which they act in the capturing of images, informs REGINA SAHM [Direito à imagem no direito civil contemporâneo, Atlas, 2002, p. 207], which characterizes the illegality of their actions [voyeurism]. To deny the advanced injunction would be like giving an award for the acting of these professionals that do not ask for authorization for their films and photos and, mainly, to legalize the scandal and sensationalism disseminated by the communication mediums, without a permit from the people involved.

The prohibitory injunction that is modeled on article 461 of the Code of Civil Process was introduced in the Brazilian system to circumvent the effects of the crisis of the process of [condemnatory] knowledge. The option for losses and damages [compensation injunction]does not always attend the immediate interests of the owners of the subjective right, so the delay on the resolution of the request might intensify or increase the damage that it is aimed to repair, impossibilitanting the ideology of the whole satisfaction of the damaged. So there's the necessity of banning, blocking the expectation of concretization of the imminent damage or hindering its

continuity. For LUIZ GUILHERME MARINONI, whose prediction of three years for the ending of a process is quite optimistic, affirms that: “if somebody fears that their right of image is violated, continues to be violated or is again violated, they cannot afford to wait the necessary time to the transit in trial of the punitive sentence” [Tutela inibitória, RT, 1998, p. 70].

The doctrine is unison when recognizing the utility of the prohibitory injunction in cases of offense to the right to image by the media, even because it is provisioned in article 12 and 21, of the Civil Code, being worth mentioning the works of EDUARDO TALAMINI [Tutela relativa aos deveres de fazer e de não fazer, RT, 2001, p. 440], that suggests the enforcement of fines to dissuade the offender. In the field of computing, the authorized doctrine of DEMÓCRITO RAMOS REINALDO FILHO [Responsabilidade por publicações na Internet, Forense, 2005, p. 149] and RICARDO LUIZ LORENZETTI [Comércio Eletrônico, RT, 2004, p. 435]. ELIMAR SZANIAWSKI afirmou [Direitos de personalidade e sua tutela, 2nd edition, RT, p. 2005] stand out:

“The victim will obtain by scope the ceasing of the violation execution by the Judiciary. The interdiction of the disturbance will be granted through a prohibition injunction, that aside from ceasing the current and continuous threat, removing the damaging effects that are generated and that are prolongated in time, having a preventive nature against possible new damages by the same author. The typical actions destined to preventively protect the victim of acts that threaten their right to personality consist in an advanced inhibitory action, in the action of combinatory precepts, of advanced injunction and the atypical precautionary measures, like search and apprehension and kidnaping”.

The postulants affirm that they did not authorize the photographs and filming, which is likely, a conclusion that is taken in face of the circumstances in which they were photographed and filmed. The Judge may enforce the article 335, of the Code of Civil Procedure, to understand that until evidences of the contrary, it is permitted to presumpt that they did not authorize that their moments of intimacy were disclosed through the whole world, as it is happening. There is a complaint by the involved that the massive dissemination of the scenes, on the pornographic and scandalous manner that is confirmed by the attached documents, is having a bad repercussion on their work environments, which is a reason to reinforce the prohibition that is granted, in origin, for the preservation of feelings and fundamental rights of the human dignity [article 1, item III, of the Federal Constitution].

It does not matter if it is true; the plaintiffs of the action want to preserve the rights protected by the Federal Constitution, in a way that the scenes of their private lives cannot be published anymore. The public interest is no more important than the evolution of the right to intimacy and privacy and that are being seriously and severely affected by the image exploitation.

The inhibiting injunction to be granted will prevent the required from allowing the access to the film and photographs, according to what was requested in items “a” and “c”, of the original action [page 40/41], the daily fine of R$ 250.000,00 arbitrated for each of the defendants in case of disobedience. It is necessary to open a paragraph to justify the decision of the fine that is predicted in article 461, paragraph 5, of the Code of Criminal Procedure.

Knowing that the video does not contain matters of social or public interest, there’s a strong tendency to be capitulated, in the end, as serious fault of those who published, without consent

of the portrayed and filmed, the intimate scenes that are reserved as private property. Therefore, and because the people involved are well-known, the exploitation of the images may have a mercantilist sense and connotation, which justifies measuring the penalty in the same proportion of the advantages that the requested aim to obtain with the dissemination, under penalty of turning the judicial providence innocuous.

By the exposed, the provision is given for the granting of the advanced injunction, without hearing the other party, in the model of the initial request, issuing with urgency the letter so that the First Degree Judge sends the communication for the defendants compliance with the abstention order, under penalty of daily fine of R$250.000,00 for each one, in case of transgression.

ÊNIO SANTARELLI ZULIANI
Rapporteur

DECLARATION OF DIVERGENT VOTE

Advanced injunction. Request for the removal of film exhibited in websites kept by the appellees by the fundamentals of violation of the right to privacy and image. Inadmissibility. Lack of evidence of likelihood if the film is truthful and only reflects the explicit scenes of kisses, hugs and caresses, featured by the model Daniela Cicarelli and her boyfriend on a public and popular beach on the Spanish coast. Right to image that has as an informing principle the very conduct of the protected, especially when treating with public people, not being juridically reasonable to envision the constitutional right completely separated from the first parameter that is provided by the conduct of those who did not have any care with their own image, intimacy and privacy. Absence of the risk of irreparable damage, as eventual violation can be translated in losses and damages. The presence of the Internet and the right to information that cannot be forgotten in the discussion of the important themes involved. Advanced injunction well rejected in first instance. Appeal not granted.

The appellants protested against the decision that denied the advanced injunction for the removal of the film containing the recording of loving scenes that they featured on the famous Tarifa beach, on the Spanish coast, putting forward that its maintenance hurts personality rights (privacy, image, intimacy) and violates the article 220, paragraph 1 and article 5, item X, of the Federal Constitution, as well as article 12 and 21 of the Civil Code of 2002, since the fact that it was done in a public place does not authorize the unconsented publicity.

The dignified Magistrate author of the aggravated decision denied the advanced injunction by the fundamental principle that the recording of images of beach goers in daring scenes of caresses and kisses in public does not constitute an illegal act capable of justifying the intended injunction.

The dignified Appeals Judge grants the advanced injunction by the primordial principle that, as the film were recorded in a public place, it hurts the right to image and privacy of the authors the dissemination without authorization, arguing extensively on the theme with the support in

doctrine and jurisprudence that he understands applicable to rights of privacy, image and intimacy.

I dare, with all due respect, to disagree of the understanding deduced by the dignified Appeals Court Judge Rapporteur.

I do it by remembering at first that my principles will have the care of not prematurely entering the analysis of the merits of the indemnity action, whose judgement should only be given in the sentencing, occasion in which the dignified Magistrate author of the appealed decision will have better and greater conditions to assess the relevant juridical motives that involve the problem.

In any way, when dealing with advancing of final injunction, it is unavoidable to proceed a bit on the merits, but only on the indispensable so that one can conclude by the evidence or not of likelihood of the allegations connected to the intended anticipation.

Very well.

I do not see the evidence of likelihood of the allegations that are destined to force the appellees to remove the film, in which is portrayed some minutes of recording containing the authors in a loving exchange of caresses, kisses and hugs that end in a sensual sea bathing, of their own electronic pages.

It is worth reminding that themes of right cannot be discussed under optics that are not absolutely contemporary to the times being lived, in which the speed of the Internet was added to the other social communication mediums and undeniably by the velocity, with great supremacy in terms of disseminating facts of general interest of the collectiveness. The World Wide Web that forms the Internet brings to light all the modernity of the new times, instantly showing the facts and public occurrences that happen anywhere on the planet, in the most perfect demonstration that the man has advanced in an inexorable way, in what refers to information, into the XXI Century.

The analysis of any fundamental right that does not consider this new communication medium will be inadequate as a way to translate the also new juridical feeling on any type of censoring connected to national companies that keep online pages, this wonderful network of computers that shortened all distances, that made the time pass to rapidly to the point that the morning breaking news are old by early afternoon, and in which the world, with its important and of general society interest facts, appears with one click on the computer screen of each citizen.

The ignoring of this reality may often lead to an absolutely innocuous judicial decision, almost surreal, because as everyone has already seen the images and read the news (even saving them on their personal computers), and that continue to be posted on countless other websites around the world, accessible to any Brazilian, a Brazilian provider is censored from keeping on their electronic page what everyone has already seen and that the whole world keeps showing.

In this new context, one cannot deliberate on the right to privacy or intimacy when the authors, despite being conscious of being public figures, especially the model Daniela Cicarelli (and who accompanies her evidently does not ignore this fact), are willing to feature scenes of explicit

sensuality in a public and popular location as the beach they were is, part of what is called Spanish riviera, situated on the Andaluzia Coast, in the district of Cádiz.

Public people, whose popularity normally attracts tourists and press professionals in general, particularly the well-known European paparazzi, cannot afford to appear in public places openly exposing their sensualities without having plain conscience that they are being watched, recorded and photographed, even because no one ignores, as the authors did not, that today any cell phone can record a video of several minutes with reasonable quality.