

ORDER

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION**

MGFA, LLC,)
Plaintiff,)
)
v.) **No. 10 L 4451**
)
THOMAS P. FITZGERALD, CAROL C.) Honorable Thomas R. Mulroy
FITZGERALD, and JAMES K. JEDYNAK,)
Defendants.)

OPINION AND ORDER

Background

On April 14, 2010, MGFA, LLC, which is an entity formed by Brian Mahoney (herein: "Plaintiff") to pursue collection on a guarantee which is the subject of this lawsuit, filed a one count Verified Complaint alleging breach of contract against Defendants Thomas Fitzgerald, Carol Fitzgerald and James Jedynak, in that Defendants failed to pay on their guarantee. Although Plaintiff is technically an entity, when "Plaintiff" is used herein it refers to the individual, Brian Mahoney as well as to MGFA. On June 18, 2010, Defendants Thomas and Carol Fitzgerald filed their Appearances and were granted leave to file their responsive pleading. On July 19, 2010, a default judgment was entered against Defendant Jedynak on the guarantee in the amount of \$937,350.00 which was later amended and increased to \$1,787,349.50 to include the amount of unpaid equity, attorneys' fees, costs, and expenses.

The Fitzgerald Defendants filed their Verified Answer and Affirmative Defenses on October 27, 2010 and on November 24, 2010 plaintiff filed his Verified Answer to defendants' Affirmative Answers. Trial was held on November 30th, December 1st and 2nd, and December 5th through 7th, 2011.

FINDINGS OF FACT

Plaintiff is suing Defendants, Tom and Carol Fitzgerald, for breach of contract to enforce an \$850,000 guarantee which he claims they signed. On March 22, 2010, Plaintiff purchased from Venture Equities Management, Inc. (“VEMI”) a guaranty agreement (“guaranty”) that purported to be executed by Brian Mahoney and Defendants James K. Jedynak, Thomas P. Fitzgerald and Carol C. Fitzgerald. (Plaintiff Exhibit 12B.) The guarantee, which went through five drafts, is alleged to have been signed by Plaintiff, Jedynak, and Defendants in favor of the lender, VEMI. The guaranty was part of a transaction which closed in November, 2002 involving a project known as the Green At Grant Park. (PX 12A.). Defendants Thomas and Carol Fitzgerald, who are husband and wife, each had a 25% equity stake in Green Concessions, LLC. (SEF ¶ 8, *see also* PX 37, Operating Agreement for Green at Grant Park, LLC, p. 22, FITZ000940.) VEMI was represented in the negotiations by Alexander Lourie and Robert Chernoff of the law firm Barak Farazzano while The Green At Grant Park was represented by Thomas Brett of the firm of Ungaretti & Harris.

When the original investment went sour, Plaintiff negotiated a settlement with the lender and purchased the guarantee. He brought suit to collect on it against Jedynak and Defendants. Jedynak defaulted in the case and judgment was entered against him. Defendants took the case to trial.

During the negotiations for the project, the parties went through five numbered drafts of the guarantee before they arrived at version-5, the final draft. Plaintiff attached version-5 to his complaint which has a separate, disputed signature page containing copies of Defendants’ signatures. Plaintiff claims Defendants faxed this signature page to him on November 19, 2002 and that the next day, before the guarantee was finalized, Defendants faxed the same signature page to Thomas Brett, counsel for the Green At Grant Park. Plaintiff agrees that the signature page at issue was from version-2 of the draft guarantee which had been materially altered from the original version-2 by adding Defendant Carol Fitzgerald’s name. There are no original signatures on the guarantee; all Defendants’ signatures are faxed copies.

Although the guarantee attached to the complaint is version-5, the parties agree that only version-4 and not version-5 was signed.

Defendants contend they never saw version-4 or version-5 and never signed either one. They claim the signature page is a forgery in that Carol's name was added without her permission or knowledge and that Defendants never executed the signature page to any guarantee and never faxed a signed signature page for a guarantee to Plaintiff or to Brett. There are no original signed copies of the guarantee.

The evidence presented a confusing reconstruction of the events relating to the hurried closing of the transaction, with many missing facts and much inconsistency.

Document Identification Number

The guarantee was negotiated by counsel for the Green At Grant Park, Ungaretti & Harris and by Barack Ferrazzano who represented the lender. The document was drafted by Brett and went through five iterations with each having a number inserted by the computer which identified the document and which draft it was. The document was numbered 548591 and each later version was identified by a number following a hyphen, for instance, version one was 548591-1. This number code at the bottom of each Ungaretti & Harris document represents the document number from the firm's computer system. When a new version of a document was created in its computer system, it received a continuing sequential number separated from the document number by a dash. (TR 432-433).

The significance of placing a document number on a document is for retrieval/identification purposes. The reason to create sequential document numbers to represent different document versions is to reflect changes made throughout the document so that those negotiating the document can compare different versions and determine the changes that were made. (TR 432-433).

When creating a new version of a document using Ungaretti & Harris' computer system, the user had to save the document as another version. If one went into the document and made changes, the computer system would not automatically save the changes as a new version; the user had to save the changes as a *new version*.

(TR 434) This numbering system is intended to preserve the integrity of the document, allows one to track a document through its drafts while it is being negotiated and insures that the negotiators are working from the most recent draft.

The first draft of the guarantee (version-1) was signed by Defendant Thomas Fitzgerald and the original of his signature was placed into evidence. Carol Fitzgerald is not named in version 1 and did not sign it. The guarantee went through four more drafts during which its terms changed substantially.

Important Dates

Plaintiff had the burden to prove breach of contract and thus had to prove that Defendants executed the disputed signature page of the guarantee which is at the heart of this case. There is no disagreement that none of the guarantors signed version-5 which is attached to the complaint, which has been sued on, and which made substantial changes from version-4. Instead, the trial evidence focused on whether the Fitzgerald Defendants signed version-4. Plaintiff contended that he emailed *version-4* to Defendants in blank and they returned, by fax, a *version-2* signature page which had been altered from the original to add Carol Fitzgerald's name as a guarantor signatory. Plaintiff also contended that the following day, Defendants faxed this same version-2 signature page to Brett, The Green At Grant Park's lawyer who attached it to the guarantee which Plaintiff is suing to enforce against Defendants.

Defendants persistently and consistently contended that they never signed version-4 or version-5 of the guarantee and that the version-2 signature page which is at issue here is a forgery, in that it was altered to include Carol's signature line and copies of their signatures without their knowledge.

In 2002, Plaintiff engaged Brett to represent The Green At Grant Park which was a business transaction involving a recreation facility at Grant Park in Chicago. Brett had an attorney client relationship with the Green at Grant Park and signed an engagement letter with Plaintiff to form the company. Currently he represents Plaintiff in other matters.

ORDER

There were many details, particulars, and documents put into evidence during this six day trial. A great deal of circumstantial and direct evidence was adduced and argued. The evidence demonstrated that the noteworthy dates in this case are those immediately preceding the closing of the transaction and the disbursement of funds for the guarantors' benefit. This is the time during which Plaintiff contends Defendants executed the disputed signature page and faxed it to him and then to Brett. This was the time of negotiation, exchanging of drafts, the changing of certain terms of the guarantee and the addition of Defendant Thomas Fitzgerald's wife, Carol, on the guarantee for the first time. Carol had a role in the Green At Grant Park, but was never named as a guarantor on this document prior to version-4.

November 5, 2002

Thomas Brett prepared version-1 of the guarantee which named Wanxiang America Corporation as the investor in the Grant Park Project. ("WAC") (DX 1, TR 248). Carol Fitzgerald is not listed as a party or as a signatory on version-1.

Brett also prepared version-2 which changed the name of the investor from Wanxiang America Corporation to Venture Equities Management, Inc. ("VEMI"). (DX 3A). Carol Fitzgerald was not listed as a party or as a signatory on version-2 and consequently, that version did not have a signature line for Carol Fitzgerald. (Defense Exhibit 3). *See* DX 3, 3A; PX 71; TR 541-545).

Brett emailed version-2 to Plaintiff in a Microsoft Word document. (DX 3A). The recipient of a document transmitted via email in Microsoft Word was able to make changes to the document. (TR 434-435, 278).

Defendants did not receive version-2 in any fashion and only the negotiating lawyers and Plaintiff received a Word Version of version-2. (DX 3A; PX 71; TR 528-529).

November 7, 2002,

Brett emailed Plaintiff and asked him whether he had any feedback on version-2 and Brett did not recall receiving any comments from Plaintiff on this draft. (DX 3A; DX 3B; TR 529-530).

November 8, 2002

Brett emailed version-2 only to Plaintiff and did not send it to any of the other guarantors. Plaintiff, inexplicitly, did not send version-2 to Defendants, yet this is the version he claims they signed and faxed to him weeks later. Defendants corroborated Plaintiff and testified that they never had or saw version-2 of the guarantee and never saw its signature page. Neither the negotiating lawyers nor any witness testified that Defendants were ever given a version-2 signature page in any format.

November 13, 2002,

Ungaretti & Harris prepared version-3 and, again Carol Fitzgerald was not included as a party or a signatory. (DX 4).

November 18, 2002

Plaintiff and Brett testified that Brett emailed version-4 to Plaintiff the evening of November 18, before Brett sent it to Barak Ferrazzano for review and approval. Plaintiff testified that he no longer had a copy of this email and it was not produced at trial. Version-4 made the major change of adding Carol Fitzgerald as a guarantor for the first time in any of the drafts. Plaintiff testified that Brett asked him to obtain the guarantors' signatures on version-4.

November 19, 2002

However the computer numbering system shows that Brett created version-4 the next day, November 19, at 11:13 A.M. (DX 7) (TR 248, 569). On November 19 at 11:13 A.M. the DeltaView comparison showed the change from version-3 to version-4 on Ungaretti's computer. (TR 524-525; DX 50, Chernoff TR 55-56).

Plaintiff maintains he received version-4 in the evening of November 18 from Brett, before it was drafted. Plaintiff testified he emailed Brett's *version-4* to Defendants the next day, November 19. He testified he did not keep a copy of that email and it was not produced at trial. Plaintiff testified that Defendants, in return, faxed him a signed *version-2* signature page on November 19, 2002 at 8:34 AM. Plaintiff testified that he was out of town that day, but when he returned to the office he placed the signature page in his files without looking at it and did not send it to

ORDER

Brett. This version-2 signature page had been altered from the original version-2 (which did not include Carol) and added a signature line for Carol Fitzgerald. There is no dispute that this version-2 signature page was altered in this way. All the witness denied any knowledge of altering version-2 by adding Carol's name and denied knowledge of how it came about. Defendants deny they ever received version-4 from anyone, deny they ever received a version-2 signature page and deny that they ever faxed a version-2 signature page to anyone.

Hours later on November 19 at 11:32 AM, Brett finally emailed version-4 to Barak Ferrazzano for review and approval. Carol's name had been added to this version at Plaintiff's direction.

Chernoff testified that as of November 19 at 6:00PM the parties were still negotiating the terms of the guarantee and thus, it had not been finalized. On November 19, 2002, at 6:00 P.M., Brett and Chernoff made further edits to version-4. (DX 9 and 9A).

On November 19 at 7:07 P.M., Brett faxed Plaintiff and James Jedynak a version-4 signature page but did not send it to Defendants. (DX 10) (TR 843-844). Plaintiff testified that Defendants had signed version-2 of the signature page at 8:34AM, hours before *version-4 had been drafted* with Carol's name included.

On November 19 at 9:48 P.M., Plaintiff returned to Brett by fax the signature page from version-4. (DX 30).

It is undisputed that Defendants did not sign the version-4 signature page which Brett sent to Plaintiff and which included Carol Fitzgerald's name.

November 20, 2002

Counsel for the parties to the transaction had left version-4 and were now negotiating the terms of version-5 (the final version). On November 20, Brett had created version-5 and at 9:55AM emailed it to Chernoff. (TR 248) (DX 50, Chernoff TR 61-63).

Brett testified that on November 20 at 11:00 AM, Defendant Thomas Fitzgerald faxed him a copy of the same version-2 signature page which Plaintiff testified he had received from Defendants the day before. Defendants denied faxing this signature page to Brett.

ORDER

On November 20 at 11:41AM Brett emailed the final version-5 to Barak Ferrazzano with Carol Fitzgerald's name included.

Plaintiff testified he did not remember having any conversation with Defendant Thomas Fitzgerald before November 20 wherein he told Fitzgerald that Carol would be added as a guarantor. This is significant because Defendant Thomas Fitzgerald testified that in order to protect his finances from the volatile nature of his trading on the Chicago Board of Trade, all his assets had been placed in Carol's name. Carol's addition to a guarantee would have made a great impact on him and would have been a significant and material change in the nature and terms of the guarantee, since Carol's name was not listed on versions, 1, 2 or 3 of the guarantee drafts.

November 21, 2002

On November 21 at 10:19 A.M., Brett emailed version-5 to Plaintiff and asked him to get it signed by the other guarantors.

Later on November 21, Brett emailed the final closing documents to Plaintiff and asked whether Carol Fitzgerald should be added to the cross indemnification agreement which is related to the guarantee. It is noteworthy, that when Brett sent Plaintiff these final closing documents Plaintiff told Brett that Carol was *not* to be added to the cross indemnification agreement which agreement was to include all the guarantors.

November 22, 2002

The transaction was funded on November 22, 2002. Defendants claimed they never saw versions-2, 3, 4 or 5 of the guarantee before the deal closed. The parties agree that: 1) version-5 which is attached to the complaint was never signed by anyone; 2) Defendants were never given version-2 which Plaintiff claims they signed and returned to him and to the lawyer; and 3) version-2 was altered by someone unknown to add a signature line for Carol Fitzgerald and is thus a forgery.

The Demand

On November 28, 2007, Lourie sent a demand letter to Defendants Thomas and Carol Fitzgerald and to co-guarantors Brian Mahoney and James Jedynek stating that the "Trigger Date" for the guaranty had arrived, and demanded payment to

VEMI of the obligations under the guaranty. (PX 7, the “Lourie Dunning Letter”.) (SEF ¶ 10.). This letter gave rise to this litigation.

Decision

Nine years ago, in an attempt to close and fund this business transaction, Tom Brett, Ungaretti & Harris, and Robert Chernoff and Sandy Lourie of Barak Ferrazzano negotiated the guarantee at issue as well as many other agreements and documents in connection with the Green At Grant Park transaction. For instance, Defendants signed numerous documents, such as a Contract with Chicago Park District, a Guaranty of Chicago Park District Contract, Operating Agreement and Subscription Agreement and a Cross Indemnification Agreement, among others.

Plaintiff engaged Brett as counsel on behalf of the venture and Brett took the lead in drafting the documents and sent them to Chernoff, Lourie and to Plaintiff for review and approval. Brett and Lourie testified and Chernoff’s deposition transcript was put into evidence. The three lawyers were asked wide-ranging questions about the drafting of the guarantee, to whom they sent the various versions, the numbering system which tracked the versions and what they remembered about the details of this 2002 negotiation.

In the flurry of emails and paper generated in November for the closing, there was necessarily some confusion exacerbated by the rush to close the deal and to disburse the funds. Months of discovery, hours of lawyers’ time, six court days of trial, the testimony of numerous witnesses and the introduction of hundreds of documents into evidence were devoted to reconstructing the events surrounding the closing and to resolving the issue of whether Defendants signed the guarantee with its altered signature page.

It was uncontested that Defendants were never given a version-2 signature page which Plaintiff claimed they signed. It was uncontested that the version-2 signature page was altered in a material and substantial way by adding Carol Fitzgerald’s name. This was especially important because Defendants’ assets were all in Carol’s name and she had never before been listed as a guarantor or had been asked to sign this guarantee. Plaintiff testified he received the version-4 signature

ORDER

page from Brett before Brett sent it to the other side for review and approval, but that important transmitting email is lost. Plaintiff testified he emailed the version-4 he received from Brett to Defendants but that Defendants inexplicably returned *version-2* by fax, which all agree was altered from the original to add Carol's name and which all agree Defendants never had in their possession. Further, it is notable that the other guarantors, including Plaintiff, signed the version-4 page they were sent by Brett.

Plaintiff was out of town and did not see the disputed signature page until November 20 or 21 when he returned. Plaintiff testified that when he first saw the signature page he placed it in his file and did not send it to Brett, who had asked him to get the signatures for the guarantee. He frankly testified: "I don't specifically recall reviewing the signature pages, the entire document." (Tr. p. 319). He further testified: "I can't testify that I absolutely saw the entire document which would include the signature pages." Plaintiff said the next time he saw the signature page was in 2007, five years later when he removed it from his file. He testified with equal candor that he was unable to recall whether he saw the signature page at that time either.

A chronology of the important days demonstrates the disorder and increases the questions:

- **November 18:** Plaintiff testifies Brett sends him version-4 adding Carol as a guarantor for the first time and Plaintiff emails it to Defendants for signature. This was done before version-4 was sent to Barak Ferazzano for approval.
- **November 19, 8:34AM:** Plaintiff testifies he receives by fax from Defendants a version-2 signed signature page which added Carol Fitzgerald's name a guarantor.
 - November 19, 11.32AM: Brett sends an email to Chernoff, attaching version-4 hours after Defendants had supposedly signed it.

- November 19, 6:00PM: the parties were still negotiating the guarantee with Chernoff sending Brett additional suggested changes.
- November 19, 7:00PM: Brett faxed the version-4 signature page to Plaintiff and Jedynak for their signature, ten hours after Defendants faxed their signature page to Plaintiff, according to Plaintiff's testimony.
- November 19, 9:48AM: Plaintiff returned by fax to Brett Plaintiff's own signed version-4 signature page
- **November 20, 11:00AM:** Brett testified that Defendant Thomas Fitzgerald faxed him the same signature page that Plaintiff said he received from Defendants on November 19 at 8:34AM.
 - November 20, 9:55AM Brett emails Chernoff version-5.
 - November 20 1:34PM: Chernoff emails Brett: "When do you expect to have the balance of your signature pages?"
- **November 21:** Brett emails Plaintiff version-5 and asks him to have it signed by the others.
 - November 21 8:45 AM: Brett wrote Chernoff "I should have signature pages back by tomorrow."

Credibility of the Witnesses

A great deal of circumstantial evidence was discovered and presented at trial and the case turned into a classic one of witness credibility. No one saw Defendants sign the document; they denied they signed it. All agree the version-2 signature page was altered from the original; no one knows who did it. There is no dispute that Defendants were never given version-2; all agree version-2 is the one Plaintiff claims Defendants signed. All agree the final version attached to the complaint and sued upon is version-5 and that it was never signed by anyone. The deal was closed and the funds were disbursed even though there were no original signatures on crucial

ORDER

documents. Important emails are missing and recollections have dimmed all things to be expected after the passage of nine years.

Defendants put into issue that they did not sign the guarantee and thus are not bound by it. Plaintiff has the burden to prove by a preponderance of the evidence that Defendants signed the guarantee Plaintiff seeks to enforce and thereby agreed to it. This case turns on the credibility of the witnesses which the Court was in a unique position to judge during the six days of trial. It reviewed and studied the documents, listened carefully to the testimony and measured countless issues relating to credibility. The Court asked questions of Plaintiff and Defendants while they were on the witness stand and observed Plaintiff and Defendants reaction and response to the witness testimony. Testifying is a stressful and unique occurrence and this court has observed thousands of witnesses under oath and applied that experience to this case. Some witnesses stammer or fidget, some are cool and straightforward, some overly rehearsed, while others are seemingly taken by surprise with each question. There are witnesses who are direct and frank on direct examination and then turn defensive and reticent on cross-examination. In determining credibility, the Court considered the strength of a witness' memory, the clarity with which he/she could recall events, as well as the witness' expression and gestures and, importantly, his/her motive, interest and bias.

Here Plaintiff and Defendants testified about a transaction which was very important in their lives and carried an emotional impact despite the passage of time. The Court paid careful attention to Plaintiff and Defendants while they testified and observed their reactions to the evidence. The Court considered all the documents as well as testimony from other witnesses when weighing the credibility of Plaintiff and Defendants. Based on the Court's observations, and considering the direct and circumstantial evidence it finds Defendants credible and believable when they testified that they did not sign the guarantee. Defendants' demeanor did not change from direct to cross-examination; they were not argumentative or defensive; they were clear and straightforward and believable on the essential issue in the case: did they sign the page attached to the guarantee? Defendants faced lengthy and strong cross examination and never waived, argued, lost their composure or became

ORDER

reluctant. Plaintiff's counsel, an experienced and effective lawyer, carefully questioned Defendants over several hours and Defendants held their ground, maintained their credibility and forcefully denied executing that disputed signature page. They answered each question as directly as they could and responded to each cross-examination point with clarity and honesty. They never looked to their lawyers or to one another for help when the going got tough. They maintained careful eye contact with the questioner and were aware and prompt with their answers.

The parties agree that the signature page was forged but who did it will not be resolved here. Plaintiff had the burden to show Defendants executed the page and although he tried diligently and used all the evidence available to him, he was unable to prove that by a preponderance of the evidence. He was hampered in his burden of proof by the many inconsistencies in the evidence and by missing pieces of verification such as the original documents, critical emails and by the failure of recollections of some of the witnesses as to crucial events.

Counsel for Plaintiff, Daniel Lynch and Amy J. Hansen of Lynch & Stern and Counsel for the Defense, Stephen C. Schulte and Jared L. Hasten of Winston & Strawn, were meticulous and thorough in their preparation and in their arguments; their written materials and conduct of the trial were superb; and they could not have worked harder to present their cases using all the evidence which could be discovered.

It may have been that the lender intended Defendants to be guarantors and it may have been that their signatures were overlooked and not obtained in the rush of the closing. It may have been that the original signatures or the original copies of Defendants' signatures were misplaced over these nine years. We do not know. We do know, that because of the passage of time, witnesses' memories dimmed or were faulty and important documents and emails simply could not be found, leaving gaps in the proof while Defendants' credible, unequivocal and unwavering testimony that they never signed version-4 or version-5 of the guarantee provided a stark contrast to the confusion raised by absent papers and perplexing and inconsistent recollections of others.

ORDER

ORDER

IT IS HEREBY ORDERED:

For the above and foregoing reasons, the Court finds that Defendants were credible and believable when they testified they did not sign the guarantee at issue and further finds Plaintiff failed in its burden of proof that Defendants breached the contract alleged in Count I of the Complaint. Therefore, judgment is entered in favor of Defendants and against Plaintiff on Count I of Plaintiff's complaint. This order is final and appealable.

_____, 2011

ENTER:

Judge