

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

HOLLIS H. MALIN, JR. and)	
LINDA D. MALIN)	
)	
Plaintiffs,)	
)	
v.)	No. 3:11-CV-554
)	
JP MORGAN CHASE BANK, N.A., as)	
successor in interest CHASE HOME ,)	
FINANCE,)	
)	
Defendant.)	

PLAINTIFFS’ RESPONSE BRIEF TO DEFENDANT’S MOTION
TO MODIFY SCHEDULING ORDER AND TO EXCLUDE
PLAINTIFFS’ PURPORTED EXPERT WITNESSES

Come plaintiffs, through counsel, and file this responsive brief in opposition to defendant’s motion to modify the scheduling order and to exclude plaintiffs’ purported expert witnesses and shows as follows.

While plaintiffs oppose defendant’s attempts to exclude the testimony of Dr. James Kelley and Adam Malin, plaintiffs do not object to the court modifying the scheduling order.

I. Relevant Facts

Defendant claims it holds plaintiffs’ original promissory note endorsed in blank and therefore is entitled to foreclose on the deed of trust securing the promissory note.

Plaintiffs claim the purported original promissory note is actually a computer fabrication or forgery and therefore the defendant is not entitled to enforce the deed of trust securing the promissory note.

Plaintiffs are construing defendant's present motion to amend the scheduling order as also a motion to exclude the testimony of Dr. James Kelley and Adam Malin, and this is plaintiffs' responsive brief.

II. Issues

There exist computer programs such as Adobe Photoshop, Illustrator and GIMP that have photographic processing software with a number of "tools" that can be used to generate or invent a copy of any particular document so it appears to be an original document.

It is commercially available. It is not complicated science.

What can be done in Adobe Photoshop, Illustrator, GIMP and other photographic processing software is well known and utilized. It simply is a matter of what can be done with the existing tools in the computer software program and what cannot be done. It is a matter of fact not opinion.

The issue in this case is if these photographic processing software "tools" were used in this case to generate or create a copy of plaintiffs' promissory note to appear to be the original promissory note. Simply magnifying a fabricated document reveals or uncovers use of these "tools". Another method of observation is examining a fabricated document in ultraviolet and infrared.

Were these documents fabricated using a computer program, and are the purported original documents authentic or are they fabrications?

III. Law and Argument

Federal Rule of Evidence 702, provides:

"A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.”

A. Doctor Kelley

(1) Knowledge, Skill, Experience, Training or Education

Dr. Kelley has knowledge of the use of photographic processing software in Adobe Photoshop, Illustrator and GIMP, and the “tools” used to generate or invent a copy of any particular document to appear to be an original document.

Exhibit 1 to Dr. Kelley’s January 14, 2013, declaration is his curriculum vitae. (D.E. 32, Attachment 1) He has 30 years of experience in developing computer systems and software. He has a bachelors degree, master in electrical engineering and a PhD in computer and electrical engineering.

Dr. Kelley has experience in the very same type transactions that is *very* similar to plaintiffs’ transaction with defendant. In his own transaction, his own purported original document was fabricated. (Kelley Depo pp. 12-13,170-172; D.E. 65, Attachment 1)

Dr. Kelley identifies examples of such photographic processes from the purported original promissory note. For the examination of a scanned copy of the purported original promissory note, Dr.Kelley found pixallation, background enhancement, the inconsistent use of retouching tools to remove pixallation, laser printer residue, inconsistent signatures and layering, among other things. (D.E. 32, Attachment 1)

After examining the purported original promissory note, Dr. Kelley found, **on the purported original** promissory note, laser trails, lighting effects and directional spotlights which

require “intervention by a human.” He found that the purported original signatures were printed on a laser printer, among other things. (D.E. 65, Attachment 1)

Defendant cites Dracz v. American General Life Insurance Company, 426 F.Supp.2d 1373 (M.D. Ga. 2006),

The Dracz case is distinguishable.

The question in Dracz was whether a box wash checked.

Also, the court noted in footnote 11 that this expert’s opinion “clearly did not support” the plaintiff’s legal theories. The expert’s sequence of events in the purported alteration of contract was illogical in the court’s mind.

In this case, Dr. Kelley discovered evidence reflecting the use of software to alter the appearance of a document. There is no contradiction between what Dr. Kelley finds and plaintiffs’ theory of computer fabrication.

Another distinguishing fact is the Georgia court, in footnote 12, did not believe this expert was a “full-time document examiner” because “...Mr. Baggett has stated that he is also a psychologist, a hypnotherapist, a psychotherapist and a graphologist...”

In footnote 15, the Georgia court also noted that this expert had no relevant experience.

“...This work consisted of comparing checks for forgeries and did not involve ‘sequencing,’ which is a key issue in the instant case...”

Dr. Kelley had specific experience or “work” in this case’s very issues of computer fabrication. Dr. Kelley had been involved in his very own case where computer fabrication had been found by this same defendant in this case. (Kelley Depo pp. 12-13,170-172; D.E. 65, Attachment 1)

In Havenfiled Corporation v. H&R Block, Inc., 509 F.2d 1263 (8th Circuit, 1974), the

court holds:

“...It is important that expert witnesses have some experience in transactions that are as similar as possible to the transactions upon which they are being asked to comment...”

Dr. Kelley has that experience.

Another distinguishing fact in Dracz is the Georgia court described this expert’s qualifications as “clearly paltry” when compared to another expert in a different reported case. This expert’s qualifications were also noted by the Georgia court to be “suspect.”

(2) Dr. Kelley’s Opinions Are Reliable

What is new or novel about these photographic processing software tools is their use to fabricate legal documents and offering the fabricated documents as originals. The software and tools and knowledge of their existence and utility is not new. It is this use that is new or novel.

On page 14, defendant criticizes Dr. Kelley’s opinion because he did not timely inspect the original promissory note.

“...James Kelley did not perform these examinations prior to the extended discovery deadline of March 8, 2013. (D.E. No. 46)...”

Dr. Kelley’s initial declaration of fabrication or forgery was based solely on a scanned copy of the promissory note, and Dr. Kelley stated he must examine the original documents.

(Kelley Depo. P. 31; D.E. 32, Attachment 1)

Dr. Kelley examined the purported original promissory note and deed of trust December 5, 2013. Dr. Kelley’s supplemental declaration was based upon the March 5, 2013, examination of the original note. (D.E. 63, Attachment 1)

Also, as described above, use of photographic processing software “tools” to fabricate documents is apparent by simply magnifying a document. It is a matter of fact.

(3) Sufficient Facts or Data;

Dr. Kelley's initial report is dated January 14, 2013, and it is based upon the examinations of scans of the "original documents". It is referenced as if set forth herein verbatim. (D.E. 32, Attachment 1)

On March 5, 2013, Dr. Kelley examined and inspected the purported original promissory note and deed of trust with a scanner and ultraviolet and infrared microscope. It is referenced as if set forth herein verbatim. (D.E. 63, Attachment 1)

Dr. Kelley inspected the purported original promissory note with a microscopes, scanners, printers and Photoshop, GIMP, Adobe Illustrator, Adobe Acrobat, among other things. (D.E. 63, Attachment 1)

(4) Reliable Principles and Methods

Dr. Kelley will opine the promissory note that defendant is asserting as the original is actually a fabrication that was generated by *simply* using photographic processing software, as is available in Adobe Illustrator, Photoshop and GIMP.

It is not in any sense unreliable science. Dr. Kelley will simply show the jury what can be done and what cannot be done in the photographic processing software. First, it is a matter of fact and not opinion. Based upon the tools being used and how the tools were used, Dr. Kelley will point out only a human being can be involved in such a process.

For instance: whether the document was printed on a laser printer can be determined easily without the services of a scientist. If a "lighting effect" was used, then the question is: Is this "lighting effect" tool readily available in Photoshop or GIMP, *etc.* This is not a matter of science. It is a matter of fact.

Additionally, the use of infrared and ultraviolet in document analysis is well established and accepted. It is used by the federal government, the banks and many others to determine if checks, money and other financial documents are real or just fabrications. This is well established practice of science.

Again, Dr. Kelley discovered evidence of use of several of these “tools” in the purported original promissory note as described above.

The novelty is that some person is using these photographic processing software tools to fabricate legal documents and espousing that they are original. The photographic processing software tools have existed for a time, and their existence is known.

Additionally, Dr. Kelley findings are drawn from both inspection of a scanned copy of the promissory note and the purported original promissory note.

Additionally, defendant incorrectly states that Dr. Kelley did not perform an examination of the original documents prior to the extended discovery deadline of March 8, 2013. Dr. Kelley performed his examination of the original documents on March 5, 2013, prior to the extended discovery deadline.

Defendant cites Wynach v. Beckman Instruments, Inc., 113 F.Supp.2d 1205, 1207, for a list of factors for the court to consider as indicative of an expert’s reliability. That list is “non-exhaustive”.

Dr. Kelley is simply noticing by means of magnification and inspection under ultraviolet and infrared on the purported original promissory note that certain known photographic processing software tools have been used to make the promissory note appear to be the original. He simply sees them and points them out.

It is not in any sense unreliable science. Dr. Kelley will simply show the jury what can be done and what cannot be done in the photographic processing software. First, it is a matter of fact and not opinion. Based upon the tools being used and how the tools were used, Dr. Kelley will point out only a human being can be involved in such a process.

B. Adam Malin

Adam Malin is not a science student. He is an art student. He is an artist. Art students are taught about and artists use photographic processing software and tools available to create documents and images.

He does not have to be a scientist to use the image processing programs commercially available.

Additionally, as plaintiffs previously asserted to defendant's motion to exclude testimony of Jason Smith, plaintiffs likewise assert Adam Malin is a fact witness and will not provide an opinion at trial that this purported original promissory note is a fabrication. He will testify about what he found in simply observing a scanned copy of the purported original promissory note.

IV. Summary

Whether the document was printed on a laser printer can be determined easily without the services of a scientist. If a "lighting effect" was used, then the question is: Is this "lighting effect" tool readily available in Photoshop, Adobe, GIMP, *etc*? This is not a matter of science . It is a matter of fact.

The use of infra red and ultraviolet in document analysis is well established and accepted. It is used by the federal government, the banks and many others to determine if checks , money

and other financial documents are real or just fabrications. This is well established practice of science.

Attention is drawn to CBS News and Dan Rather's attempt to use a forged document against George Bush during the 2000 election. A group demonstrated that Dan Rather's document was forged or fabricated.

Questions have been raised and remain that President Obama's birth certificate has a number of pointed out areas of inconsistencies and possible fabrication.

This court can take Judicial Notice of these incidents of fabricated or forged documents being asserted as accurate documents.

Respectfully submitted this 27th day of March, 2013.

/s/ J. Myers Morton BPR# 013357
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been furnished to the following by the Court's electronic system, email, mail addressed as follows:

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This 27th day of March, 2013.

/s/ J. Myers Morton