Legal Alert

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QUESTION: DO I HAVE AN ENFORCEABLE ELECTRONIC AGREEMENT WITH A VALID ELECTRONIC SIGNATURE, OR NOT?

ANSWER: WHEN SOMEONE DENIES THEY INTENDED TO SIGN AN ELECTRONIC DOCUMENT, IT CAN BE DIFFICULT TO ENFORCE AN ELECTRONIC AGREEMENT.

The problem in determining whether there is a valid electronic signature is similar to the age-old problem of proving that someone's signature is genuine when that party denies that he or she signed the document. With the written signature, you would need handwriting experts to prove the authenticity. When someone denies that they intended to sign an electronic document, proving the intent and authenticity can be even more challenging.

No, really! I didn't mean it!

Thomas Fair, an attorney, founded three companies that owned apartments in Arizona. J.B.B. Investments Partners, Ltd. v. Fair, 182 Cal.Rptr.3d 154 (Cal.App. 2014). Silvester Rabic and J.B.B. Investment Partners, Ltd. ("JBB") invested a total of $250,000 in Mr. Fair's companies. Mr. Rabic and JBB thought they had been defrauded by Mr. Fair. They sued.

The parties tried to settle the dispute. The attorney for Mr. Rabic and JBB sent Mr. Fair a settlement offer by email demanding that Mr. Fair stipulate to a judgment for $350,000. The email settlement offer said "WE require a YES or NO on this proposal; you need to say "I accept" . . . . Let me know your decision."

Mr. Fair sent an email from his mobile phone saying that the facts would not justify the claim of fraud against him, but went on to say: "So I agree." The plaintiffs' lawyer responded "Please be unambiguous, because I am about to file the complaint and ex parte papers unless we hear an unambiguous acceptance."

Plaintiffs filed the lawsuit against Fair and others the next day and emailed a copy of the complaint and ex parte application to Mr. Fair. After he received the copy of the complaint, Mr. Fair sent a message from his mobile phone: "I said I agree. Took wording right from [lawyer's] email. I agree." Mr. Rabic's lawyer responded by email: "This confirms full agreement . . ." Mr. Fair sent a text message: "I have accepted by phone and [email]. Stop proceeding. I said I accept which is same as 'agreed.'"

Mr. Fair admitted that he deliberately typed his name at the end of the email accepting the settlement. He said there was no deal, however, because plaintiffs' lawyers had put him under "severe duress" by their "threatening" communications. He asserted "there was no meeting of the minds" on the settlement.

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Was there an "Electronic Signature" or not?

The court quoted the Uniform Electronic Transactions Act ("UETA") as follows:

> "(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
> (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
> (c) If a law requires a record to be in writing, an electronic record satisfies the law.
> (d) If a law requires a signature, an electronic signature satisfies the law."

But the court also quoted from the UETA: "An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner . . . ." Moreover, an electronic signature is defined as "an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record."

The UETA only applies when parties consent to conduct the transaction by electronic means, however. The court said that Mr. Fair's printed name at the end of the email was not a signature because the settlement offer did not say that a printed name at the bottom of an email would be an electronic signature for purposes of the settlement agreement.

The court stated that any kind of signature, including electronic, needed to be placed on the document "with the intention of authenticating the writing." There was no evidence that Mr. Fair intended to sign the settlement agreement by electronic means "when he printed his name at the end of his e-mail," according to the court!

The court refused to enforce the settlement and the case had to start over.

If an electronic signature is any "sound, symbol, or process…adopted by a person with the intent to sign the record," why wasn't it an electronic signature when Mr. Fair deliberately printed his name at the end of the email? Because the court didn't think so!

What can we learn from the cases about the enforceability of electronic signatures?

Complicated electronic applications using "clickwrap," "browsewrap," or other complicated website arrangements will likely be enforceable electronic signatures, even if you need to click through three different screens to find the language to which your electronic signature agrees. Spencer Meyer v. Uber Technologies, Inc. (2d Cir., Docket Nos. 16-2750-cv, 16-2752-cv, decided 8/17/17.)

On the other hand, less sophisticated and less complicated electronic signatures, although more obvious to the reader, are less likely to be valid electronic transactions. The JBB v. Fair case shows the problem of trying to enforce less complicated and less sophisticated electronic signature processes.

If you wish to make sure that you have a valid electronic transaction, you should work with the computer nerds and lawyers to make sure you have a good and enforceable system.