

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG, Individually, and
FACEBOOK, INC.

Defendants.

Civil Action No. : 1:10-cv-00569-RJA

**BRIEF IN RESPONSE TO
COURT'S ORDER DOC. NO. 272**

MEMORANDUM

Plaintiff respectfully submits this brief to assist the Court with the consideration of the effect of Federal Rule of Evidence 1008 (F.R.E.) on Defendant's stated intention to file a motion to dismiss for fraud in this case alleging that the Ceglia-Zuckerberg Contract is fraudulent. See Doc. No. 272.

The defendants have repeatedly threatened the filing of a motion to dismiss on fraud. Their announced bases have been three:

1. The paper contract between Ceglia and Zuckerberg is a fraud; and
2. The emails exchanged between Ceglia and Zuckerberg attached to Ceglia's papers filed in this court are frauds: and
3. Ceglia has either destroyed or concealed evidence, i.e. USB storage devices and files contained thereon relevant to this case.

Two questions emerge from the court's recent order asking the parties to consider the effect of F.R.E. 1008 on the Defendants' anticipated motion to dismiss: One, does F.R.E. 1008 apply to the above issues the Defendants have broadcast will be the bases of their motion to dismiss on fraud? Two, if F.R.E. 1008 does apply to those bases, are Defendants permitted, in a motion to dismiss on fraud, to ask the court to grant that motion after making a finding selecting Defendants' or Plaintiff's proffered evidence as more reliable?

Based upon the case law and factual circumstances of this matter, the answer to the first question is yes, F.R.E. 1008 does apply to Defendants' oft-stated bases for seeking a dismissal on fraud of Ceglia's claims. For the same reasons, the answer to the second question is no, asking the court to decide whose evidence is more reliable or is entitled to more weight is inappropriate under F.R.E. 1008 and the cases interpreting that rule.

RESTYLED FEDERAL RULES OF EVIDENCE

The federal rules were restyled by the U.S. Supreme Court and submitted to Congress in April of 2011. They became effective December 1, 2011. The restyled rules apply to all pending proceedings "insofar as just and practicable." Exhibit A.

Rule 1008. Functions of the Court and Jury

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether:

- (a) an asserted writing, recording, or photograph ever existed**
- (b) another one produced at the trial or hearing is the original; or**

(c) other evidence of content accurately reflects the content.

CASE LAW APPLYING F.R.E. 1008

There are a small number of cases applying F.R.E. 1008. All agree that the rule applies to circumstances like those in this case. All agree that the application of the rule to such disputed evidence mandates presenting such disputes to the jury and not the judge whether by motion or otherwise.

In *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 810 F.Supp. 1420 (D. Del., 1992) the court “specifically address[ed] which requirements of Rules 1002 and 1004 are to be apportioned to the court and which are to be apportioned to the finder of fact.” It did so by analyzing F.R.E. 1008.

The court cited to a “leading treatise on Evidence” which “stresses that the question of whether or not a party has offered sufficient evidence to prove the contents of a lost writing is a matter for the **trier of fact to decide.**” *Id.* Emphasis added.

By way of example, the court held “[t]he opponent (of the party offering the secondary evidence) may attack the sufficiency of the secondary evidence including the credibility of the witness. This attack, however, goes not to admissibility but to the weight of the evidence and is a matter for the trier of fact to decide.” *Jack B. Weinstein*, Evidence ¶100401. *Remington* at 1423. This analysis tracks the Defendants attack on the Ceglia-Zuckerberg email exchanges.

In *Remington*, “all relevant evidence” had been presented to the Court. However, “[i]t is this drawing of conclusions that creates a triable issue of fact” the court ruled.

The court denied a summary judgment motion following its F.R.E. 1008 analysis finding that it would be improper for the court to decide that the evidence presented by either party “as a matter of law...could only support one conclusion.” *Id.* In Ceglia’s case, even if the Defendants submit an expert report challenging the age of the ink on the Ceglia-Zuckerberg contract it does not substantiate that that the evidence in the case “could only support one conclusion.” Mr. Ceglia’s declarations and the Plaintiff’s existing expert reports rebut such a conclusion making an issue, under F.R.E. 1008, suitable for a trier of fact. This is also without consideration that Plaintiff’s experts are poised to provide overwhelming evidence that the so called ink aging method Defendants’ experts’ have relied on to claim they could “age” the ink has never been accepted by any court, is not verifiable, has not been subjected to peer review, has been widely questioned internationally and is not used by any government agency.

In *U.S.A v. Hatfield*, 685 F.Supp.2d 318 (E.D.N.Y., 2010), the court held that when one party “argu[es] that the [a disputed document] ‘is a fraudulent document,’ the [party] is expressly denying that an authentic original...ever existed.” That position mirrors the Defendants’ position regarding the Ceglia-Zuckerberg Facebook contract and the Ceglia-Zuckerberg email exchanges. The court held that such an argument “precluded the Court from barring the [disputed document’s] admission.”

The court then cited favorably to F.R.E. 1008 for its holding. F.R.E. 1008 requires this result, the court reasoned, because “it is often true that these questions determine outcome” and “few would doubt that the jury should decide whether a written [document] existed for purposes of deciding the case on the merits.” citing to *Christopher B. Mueller and Laird C. Kirkpatrick*, 5 Fed. Evid. § 10:40 (3d ed.). “Consequently, the jury, and not the Court, must determine whether the [disputed document] is genuine.” See also *Hill v. City of Houston*, 235 F.3d 1339 (5th Cir. 2000) (unpublished) (given Rule 1008, “the question of whether exhibit eight is a fake or rather, authentic copy was a fact question which was properly submitted to the jury”); *Tinley v. Poly-Triplex Technologies, Inc.*, 07-CV-1136, 2009 WL 812150, *7 (D.Colo. Mar. 26, 2009) (permitting copy of agreement to be admitted into evidence, despite genuine questions concerning whether an original ever existed, because “evidence suggesting that the Tinley Agreement never existed, as well as the credibility of the parties’ testimony regarding the existence of the Tinley Agreement are questions for the jury to decide under Rule 1008”).

The court acknowledged that an “attack [on] the legitimacy of the [disputed document], and the credibility of any evidence...use[d] to try to substantiate it” would be permissible. But “these questions go to the weight, rather than the admissibility of the evidence.” citing *Tinley*, 2009 WL 812150 at *7. This perfectly mirrors Defendants’ anticipated attacks on the Ceglia Zuckerberg Facebook contract as well as Ceglia’s email exchanges with Zuckerberg.

In *Servants of Paraclete, Inc. v. Great American Ins.*, 857 F.Supp. 822 (D.N.M., 1994), a party filing a summary judgment did not dispute the existence of evidence contradicting their claim regarding the authenticity of a critical document. It argued that the contrary evidence was “insufficient as a matter of law.” The court disagreed. It reasoned that “[i]n order for the Court to grant...[the] motion for summary judgment...the Court would have to find that as a matter of law no reasonable fact finder could” find in the opposing party’s favor. It cited to F.R.E. 1008 concluding that “Plaintiff has come forward with sufficient evidence to raise a genuine issue of material fact as to whether it has shown the existence and terms of [the questioned document]....”

In *Fox v. Peck Iron and Metal Co., Inc.*, 25 B.R. 674 (Bankr.S.D.Cal., 1982) the “Court [was] faced with determining whether [an] exhibit [was] sufficiently authenticated to consider it in making findings of fact.” It referred to F.R.E. 1008 in holding that it is “for the jury, as the trier of fact, to make its own determination of the authenticity of [any] evidence and the weight which it believes it should be accorded.” Citing to *Alexander Dawson, Inc. v. N.L.R.B.*, 586 F.2d 1300, 1302 (9th Cir.1978); See Also *Zenith Radio Corp. v. Matsushita Elec. Ind. Co.*, 505 F.Supp. 1190, 1219 (E.Pa.1980).

**PLAINTIFF’S “ORIGINAL DOCUMENT” AND DEFENDANTS’ CLAIMED
OTHER ORIGINAL DOCUMENT**

Consistent with F.R.E. 1008 (b) Plaintiff has presented to this court and to the Defendants’ experts an **original document** - the Ceglia Zuckerberg contract

regarding Facebook. Plaintiff's experts have tested the Ceglia-Zuckerberg Facebook Contract and submitted declarations about their preliminary findings. Doc. Nos. 192 and 194. Those results confirm its authenticity. Defendants have not presented any expert findings contradicting Plaintiff's experts' findings. Defendants' counsel have **argued** that another document, a digital image attached to an email, is the original Ceglia-Zuckerberg contract. (aka by the Defendants' counsel as the "smoking gun.")

It is expected that any motion to dismiss on Fraud by Defendants will include expert reports challenging Plaintiff's experts' findings. In accordance with F.R.E. 1008(b) "the jury determines...any issue about whether" Plaintiff's original Ceglia-Zuckerberg Facebook Contract or "another one produced at the trial or hearing is the original...."

As part of a motion to dismiss on fraud after one-sided discovery, the rule seems to require the court to deny a dismissal on this basis because the necessary inquiry would invade the province of a jury.

PLAINTIFF'S ASSERTED WRITINGS i.e. EMAILS BETWEEN CEGLIA AND ZUCKERBERG

Consistent with F.R.E. 1008 (a) Plaintiff has asserted that a writing, i.e. email exchanges between Ceglia and Zuckerberg, support Ceglia's claim of a contract with Zuckerberg regarding Facebook. Ceglia has provided those emails in native format to Defendants. Plaintiff has subjected those emails to forensic testing confirming their authenticity. Doc. No. 226.

Defendants have consistently disputed whether these email exchanges ever existed and whether Ceglia's copies of those email exchanges are authentic.

It is expected that any motion to dismiss on Fraud by Defendants will include expert reports and/or declarations challenging Plaintiff's claim and that of his computer forensics expert regarding the authenticity of these emails.

In accordance with F.R.E. 1008(a) "the jury determines...any issue about whether" Plaintiff's "asserted writing" i.e. emails, ever existed as Defendants have and will presumably argue in their motion to dismiss on fraud. F.R.E. 1008(a) seems to require the court to deny a dismissal on this basis because the necessary inquiry into this "asserted writing" would invade the province of a jury.

**DEFENDANTS' CLAIMED EVIDENCE OF CONTENT ACCURATELY
REFLECTING THE CONTENT OF THE CEGLIA ZUCKERBERG
FACEBOOK CONTRACT**

Consistent with F.R.E. 1008 (c) Plaintiff has asserted that "other evidence" of the content of the Ceglia-Zuckerberg Facebook Contract "accurately reflects [its] content." By way of example, at the December 13, 2011 hearing, Defense Counsel claimed a defense expert will opine that some part of the ballpoint pen ink on that contract is "less than two years old."

It is expected that any motion to dismiss on Fraud by Defendants will include expert reports and/or declarations asserting that some of the ballpoint ink on the Ceglia Zuckerberg Facebook Contract is less than two years old.

In accordance with F.R.E. 1008(c) "the jury determines...any issue about whether" Defendants' "other evidence of [the] content" of the contract "accurately

reflects the content” of the contract. F.R.E. 1008(c) seems to require the court to deny a dismissal on this basis because the necessary inquiry into this “other evidence of content” would invade the province of a jury. This is especially the case given Ceglia’s declarations that the contract was signed in 2003, the testing of the document itself by Plaintiff’s experts and other evidence supporting the authenticity of the contract.

**EXISTING COMPUTERS AND EVIDENCE AVAILABLE AND UN-
PRODUCED BEARS ON ALL OF THE ABOVE ISSUES**

Floating above these issues is the existence of Electronic Assets in the possession of Defendants (so called “originals” by Defendants) and copies of a range of Electronic Assets in the possession of a computer expert (Parmet and Associates) involved in the ConnectU case. The copies of Electronic Assets held by Parmet and Associates are not limited to computers used by Defendant Zuckerberg. On December 18, 2011, Plaintiff formally requested Defendants provide Plaintiff access to those “originals” **and** “copies” of all the above listed Electronic Assets *before* the filing of Defendant’s much advertised motion to dismiss. Defendants declined to offer such access before filing any motion to dismiss.

The Electronic Assets held by Parmet and Associates are not limited to computers used by Defendant Zuckerberg for electronic communications and hosting the facebook website while a freshman at Harvard. Doc. No. 232 at 19-21. Plaintiff has formally requested Defendants confirm that their preservation commitment includes All the Electronic Assets in the possession of Parmet and

Associates, not only those Electronic Assets attributed to Defendant Zuckerberg. In the event Defendants decline to so confirm, or believe they are without authority to so confirm, Plaintiff will approach the court to attempt to fashion a remedy.

The three main issues at the start of this brief which are controlled by F.R.E. 1008, are also involved in evidence to be found on the Electronic Assets Defendants have thus far declined to produce for acquisition by a computer forensic expert for Plaintiff.

DEFENDANTS' CLAIM TO HAVE THE REAL ORIGINAL OF THE CONTRACT

This claim involves not only the terms of the Ceglia-Zuckerberg Facebook contract but also the means, resources and methods used by whomever created the digital image contract the Defendants claim is an original. An obvious angle of inquiry into the Electronic Assets referenced above would be any activity on those assets that is consistent with the editing and creation of the digital image that Defendants claim is an authentic original. Further, a myriad of electronic communications on those Electronic Assets (Instant Messages, emails, blog posts and others) by Defendant Zuckerberg have obvious bearing on the authenticity of Plaintiff's paper contract and Defendants' digital image document. The same type of information also has obvious bearing on Defendants' other two anticipated points of argument, the authenticity of Ceglia's email exchanges with Zuckerberg and the degree to which challenges to the age of the ink on the contract weighs in favor of Defendants' motion to dismiss. For example, just one electronic communication by

Defendant Zuckerberg to anyone explicitly or implicitly referencing his Facebook contract with Ceglia would be relevant.

THE DEFENDANTS' PURSUIT OF USB STORAGE DEVICES

Defendants have pursued a list of USB devices they claim were attached to Ceglia's computer and his parents' computers. Among those devices, Defendants have only indicated that one of those devices may have had two files on it relevant to this case. Defendants have not offered evidence that those files have never been produced to them by other means. Plaintiff has, of course, countered that there are no files on any computer or USB device of any contract relating to this case. This conflict is again one that is properly resolved by a jury under F.R.E. 1008 as opposed to Defendants' anticipated request that the court referee the weight of this evidence instead of a jury. Additionally, as the court has pointed out, Defendants have made no showing that any relevant evidence would be found on any USB devices.

CONCLUSION

The above brief serves the interest of the court and this case by describing the case law and factual circumstances applicable to the use of F.R.E. 1008. The existing case law is universally in favor of a denial of Defendants's anticipated motion to dismiss on the stated bases. F.R.E. 1008 seems to preclude the court from invading the role of the jury to make determinations that the Defendants insist this court make and thereafter dismiss Ceglia's claim for fraud. The case law and rules do not permit the Defendants' to ask the court to assume that role.

Respectfully submitted,

/s/Dean Boland

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