CASE TRANSLATION: **SPAIN**

Case citation:

Audiencia Provincial de Lleida, Sección 2ª, Sentencia 74/2021 de 29 Ene. 2021, Rec. 158/2020
(Provincial Court of Lleida, 2nd Section, Judgment 74/2021 of 29 Jan. 2021, Rec. 158/2020)

Name and level of the court: Provincial Court of Lleida

Date of decision: 29 January 2021

Spain; electronic signature; DocuSign system; credit agreement; private documents; proof of signature; burden of proof; certification of signature; qualified certificate; legally recognised digital signature certification entity

Speaker: Alberto Guilanya Foix

Judgment No.: 74/2021

Appeal No.: 158/2020

Jurisdiction: CIVIL

ECLI: ES:APL:2021:54

Lack of proof that it was the defendant who signed the credit agreement using the DocuSign system.

LOAN. Claim for the amount of the loan. Dismissal of the claim. Lack of proof that it was the defendant who signed the contract. It is not an electronic signature based on a recognised certificate created by a legally recognised digital signature certification entity. The operative process is that the document is sent to an e-mail address and the person who receives it signs it manually and returns it to the signature company, but there is no certification of who has signed it, as the signature is a manual autographed signature and not based on a personal digital signature certificate.

Therefore, it is a simple private document whose signature (manual but not electronic) has not been recognised. The plaintiff bears the burden of proof of the veracity of the signature, as it was for the plaintiff to prove that the signature was true.

The AP Lleida overturned the lower court ruling and absolved the defendant from paying the amount claimed as the lender had failed to prove that the signature on the contract was its own.

Section No 02 of the Provincial Court of Lleida. Civil
Canyeret Street, 1 - Lleida - C.P.: 25007

TEL.: 973705820
FAX: 973700281
EMAIL:aps2.lleida@xij.gencat.cat
N.I.G.: 2504042120188184799
Appeal 158/2020 –C

Subject: Ordinary Proceedings

Court of origin: Civil Section. Juzgado de Primera Instáncia e Instrucción nº 1 de DIRECCION000 (UPSD)

Originating Proceedings: Ordinary Proceedings

470/2018

Appellant/Applicant: Adelaida

Procurator: Ares Jene Zaldumbide

Lawyer: Josep Maria Pocino Moga

Respondent: Investcapital Malta Ltd

Procurador/a: Carmen Gloria Clavera Corral

Lawyer: Alvaro Maria Aguilar Talavera

Judgment Nº 74/2021

President:

Ilmo. Sr. Albert Guilanyà i Foix

Judges:

Ilma. Sra. Ana Cristina Sainz Pereda

Ilma. Sra. Beatriz Terrer Baquero

Lleida, 29 January 2021

Rapporteur: Albert Guilanyà i Foix

FACTUAL BACKGROUND

FIRST.- The case files for ordinary proceedings 470/2018 have been received from the Civil Section. Juzgado de Primera Instáncia e Instrucción nº 1 de DIRECCION000 (UPSD) in order to resolve the appeal lodged by Procuradora ARES JENE ZALDUMBIDE, in the name and on behalf of Adelaida against the Judgment dated 30/10/2019 and in which Procuradora CARMEN GLORIA CLAVERA CORRAL, in the name and on behalf of INVESTCAPITAL MALTA LTD appears as respondent.

SECOND.- The content of the judgment against which the appeal has been lodged is as follows:

> 'That I AMEND the claim brought by INVESTCAPITAL, MALTA LTD against Ms. Adelaida and, consequently, I ORDER Ms. Adelaida to pay to INVESTCAPITAL, MALTA LTD, as a consequence of the breach of the payment obligation, the sum of 6,352.09 €, plus the interest of article 576 LEC [...]'.

THIRD.- The appeal was admitted and processed in accordance with the procedural rules for this type of appeal. A date was set for the deliberation, voting and ruling which took place on 29/01/2021.

FOURTH - The essential procedural rules applicable to the case have been observed in the processing of this procedure.

Judge Albert Guilanyà i Foix was appointed rapporteur.

LEGAL BASIS

FIRST.- The appellant appeals against the first instance judgment, alleging an error in the assessment of the evidence in relation to the signature on the contract, which the appellant insists is false and that, furthermore, it is not an electronic signature but a forged manual one. It also insists that the default and remunerative interest is exorbitant.

The respondent opposes the appeal and requests full confirmation of the judgment under appeal.

SECOND.- The appeal lodged by the appellant is based fundamentally on denying the authenticity of the initial respondent's signature and, therefore, her obligation to respond to the claim made against her.

If we examine the judgment under appeal, we see that the judge infers that the signature corresponds to the respondent from the fact that two days after the contract was electronically signed, the money now claimed was paid into an account of which the spouses were co-owners. And this despite the fact that the judgment itself states that, after the appellant requested DocuSign to verify the signature of both spouses, DocuSign did not provide any information in this regard.

We must remember that, in matters of evidence, the basic principle of the burden of proof is enshrined in art. 217 LEC according to which the burden of proof of obligations lies with the party claiming compliance, so that the appellant must prove the facts that constitute his claim, and the respondent the facts that prevent or that weaken legal effectiveness of such facts. This general principle on the burden of proof has to be examined in each specific case according to the availability or ease of proof of each of the parties, depending on the best availability to prove, greater proximity to the source of proof or knowledge of it (art. 217. 7 LEC), in such a way that each party, whether appellant or respondent, is required, in the demonstration of the facts on which it supports its position, to show reasonable diligence according to their proximity or the ease with which they can be

accredited (SSTS 29-10-1987, 18-11-1988, 15-11-1991, 13-2-1992 and 6-4-1994).

On the other hand, with regard to private documents and their probative value, it is settled case law that the rule contained in art. 1.225 CC does not prevent giving due relevance to an unacknowledged private document, combining its value with the remaining elements of proof and, thus, the STS of 2-4-1994 states that 'the lack of acknowledgement in the process of a private document does not deprive it of value at all and it can be taken into consideration, weighing its degree of credibility in view of the circumstances of the debate (SS 11 May 1987, 20 April 1989, 11 October 1991, 23 June and 16 November 1992, 4 December 1993, among many others)', and in the same sense the STS of 25-3-1999 adds that 'the principle of the burden of proof established in article 1.214 of the Civil Code 1 allows judges to assess the evidential material incorporated into the process by each party and its evaluation as a whole, which means that documentary evidence, as an evidential instrument, is included in this judicial power in relation to the other evidence produced. Unacknowledged private documents should not for that reason be completely excluded from the evidence, as they have their own value and can be taken into consideration by weighing their degree of credibility in view of the circumstances of the debate (SS of 27-1 , 8-3 and 8-5-1996).'

The same criteria are maintained in the SSTS of 25 January 2000, 22-11-2004 and 23-2-2006, in the sense that the lack of acknowledgement of a private document by the party who is prejudiced does not deprive it of the evidential value assigned to it by article 1.225 of the Civil Code and this precept does not prevent a private document from being given due relevance, even if it has not been acknowledged, combining its content with the other elements of judgment.

According to the regulation established in art. 326 -2 of the LEC, when the authenticity of a private document is contested, the person who has presented it may request the expert to compare letters or propose any other means of proof that is useful and relevant for the purpose, and when its authenticity cannot be deduced or no proof has been proposed, the court will assess it according to the rules of sound criticism. In accordance with this rule (in relation to art. 405 and 427 of the LEC) the procedural burden of recognising or denying the authenticity of a private document is imposed on the opposing party to that which provides it, and when its authenticity is challenged, the party who submits it in evidence may propose the test that it considers relevant to accredit its authenticity.

Article 326-3 in its wording prior to the reform of the LEC by final provision 2 of the recent Law 6/2020, of 11 November , stated that 3. 'When the party that is interested in the effectiveness of an electronic document requires it or its authenticity is challenged, the procedure shall be in accordance with the provisions of article 3 of the Ley de Firma Electrónica'. Article 3 of the Ley de Firma Electrónica states in paragraph 3 that '3. A qualified electronic signature is an advanced electronic signature based on a qualified certificate and generated by means of a secure signature-creation device'.

Paragraph 8 of the aforementioned provision states that:

> '8. The medium on which the electronically signed data are contained shall be admissible as documentary evidence in court. If the authenticity of the qualified electronic signature with which the data included in the electronic document has been signed is contested, it shall be verified that it is an advanced electronic signature based on a qualified certificate, that it meets all the requirements and conditions established in this Law for this type of certificate, and that the signature has been generated by means of a secure electronic signature creation device.
>
> The burden of carrying out the aforementioned checks shall correspond to the person who has submitted the electronic document signed with a qualified electronic signature. If said verifications are positive, the authenticity of the qualified electronic signature with which said electronic document has been signed shall be presumed, and the costs, expenses and fees arising from the verification shall be borne exclusively by the person who has lodged the challenge.'

Be that as it may, it must be remembered that the core of the issue here focuses on determining whether or not the signature, in this case carried out under the DocuSign system, which is an electronic signature platform that allows contracts to be sent and signed electronically, can be considered a digital signature and, if so, whether or not it is correct and can be said to have been executed by the appellant.

With regard to whether or not it is a digital signature, it should be remembered that with the DocuSign system, documents are sent to an e-mail address where the recipient signs them manually and returns them to the signing company. There is no evidence that whoever has signed is the person who asserts that they have done so, and in this case it is also stated in the certification issued by DocuSign that with respect to Sra Adelaida's e-mail, there is no account authentication, the only possible verification being the IP address that the server assigns to a specific device (either computer or smartphone) from which the signed document has been sent and which in this case coincides in both, so that it has either been sent from the same device or from different devices connected to the same wifi. Nothing else can be extracted from this document.

This being the case, we are not properly speaking in the presence of an electronic signature based on a qualified certificate created by a legally recognised digital signature certification entity. In this case, we insist that the operation is that the document is sent to a post office and returned signed, but without certifying, beyond this data, who has signed it, as the signature is manual, autographed and not based on a personal digital signature certificate. Therefore, paragraph 3 of article 326.3 of the LEC in relation to article 3 of the Ley de Firma Electrónica is not applicable, and if it were, it would not have been accredited that the signatory was the respondent's (article 8 of the LFE).

In this case we have a simple private document whose signature (manual and not electronic) has not been recognised, where no expert evidence has been attempted to prove that it corresponded to the respondent, and this despite the fact that from the beginning of the proceedings this falsity has been maintained and that the respondent had, it is assumed, the wife's DNI (Documento Nacional de Identidad, National Identity Document), at least the number stated in the contract that was sent to her. This ID card was provided with the response to the claim and it does not take an expert to see that the signature on it is nothing like the one on the document of consent.

Certainly this should not prevent the document from being assessed according to sound criticism, but it should also be noted that in this case, apart from the fact that the basis of the opposition was precisely this falsehood, all that is said is that the money was paid into an account co-owned by the husband and wife (and also by the two minor children) and this was two days after the alleged signature. This seems to us to be insufficient to prove the veracity of the signature, and therefore of the document granting consent to the credit operation, as there is no evidence that, for example, she has disposed of the money paid in, nor has it been proved what movements took place in that account, in which there were also two other account holders.

Therefore, we understand that we are faced with a lack of proof, which means that the respondent (INVESTCAPITAL, MALTA LTD) should have been the one to support it, as it was for the respondent to prove that the signature was true, or at least that the wife was aware of the transaction or had made use of the money. None of this has happened, so the appeal must be upheld.

THIRD - The upholding of the appeal determines that the costs of the first instance proceedings should be imposed on the respondent (INVESTCAPITAL, MALTA LTD), without any declaration of the costs of this appeal.

IN VIEW OF the aforementioned legal precepts and others of general application, the following is hereby handed down

JUDGMENT

That we AMEND the appeal lodged by the lawyer Jené against the judgment of 30 October 2019 of the Court of First Instance 1 of DIRECCION000, which we REVERSE and in its place we DISMISS the appellant (Sra. Adelaida) from the claims of the plaintiff (INVESTCAPITAL, MALTA LTD), who is ordered to pay

the costs of the first instance. There is no order as to the costs of this appeal.

Mode of appeal: appeal in cassation in the cases of art. 477.2 LEC and extraordinary appeal FOR PROCEDURAL INFRINGEMENT (rule 1.3 of the DF 16ª LEC before the Supreme Court (art.466 LEC) provided that the legal and jurisprudential requirements established are fulfilled.

An appeal in cassation may also be lodged in relation to Catalan Civil Law in the cases set out in art. 3 of Llei 4/2012, del 5 de març , del recurs de cassació en matèria de dret civil a Catalunya.

The appeal(s) is/are filed by means of a written document that must be submitted to this judicial body within TWENTY days from the day following the date of notification. In addition, the deposit referred to in DA 15 of the LOPJ reformed by LO 1/2009, of 3 November must be made in the Deposits and Consignments account of this judicial body.

Thus by this our judgment, we pronounce, order and sign it.

The Magistrates:

The interested parties are hereby informed that their personal data have been incorporated into the case file of this Judicial Office, where they will be kept confidentially and solely for the fulfilment of the work entrusted to it, under the safeguard and responsibility of the same, where they will be treated with the utmost diligence.

They are informed that the data contained in these documents are reserved or confidential, that the use that may be made of them must be exclusively limited to the scope of the process, that their transmission or communication by any means or procedure is prohibited and that they must be processed exclusively for the purposes of the Administration of Justice, without prejudice to the civil and criminal liabilities that may arise from an illegitimate use of the same (EU Regulation 2016/679 of the European Parliament and of the Council and Organic Law 3/2018, of 6 December, on the protection of personal data and guarantee of digital rights).

INFORMATION FOR USERS OF THE ADMINISTRATION OF JUSTICE:

In application of Order JUS/394/2020, issued on the occasion of the situation that has arisen due to COVID-19:

- Attention to the public at any judicial or public prosecutor's office will be provided by telephone or via the email address provided for this purpose, as detailed above, in all cases in compliance with the provisions of Organic Law 3/2018, of 5 December, on the Protection of Personal Data and guarantee of digital rights.

- For those cases in which it is essential to go to the court or public prosecutor's office, it will be necessary to obtain the corresponding appointment beforehand.

- Users accessing the judicial building by appointment must have and wear their own masks and use disinfectant gel on their hands.

Source of the original case in Spanish extracted from: laleydigital.laleynext.es

Translated by Claudia Morgado Marti, Associate lawyer in Cuatrecasas Gonçalves Pereira SLP, Barcelona, Spain