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No. 1-12-2885

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FRED CHAMANARA,)	Appeal from the
Plaintiff-Appellant,)	Circuit Court of
)	Cook County, Illinois,
v.)	County Department,
)	Law Division.
)	
BAHMAN DJAHANGUIRI, a/k/a BOB)	No. 10 L 1162
DJAHANGUIRI,)	
)	Honorable
Defendant-Appellee.)	James E. Sullivan,
)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's holding that the stock purchase agreement allegedly entered into by the plaintiff and the defendant was void *ab initio*, as a result of fraud in the execution, was not against the manifest weight of the evidence.

¶ 2 This cause arises from a complaint filed by the plaintiff, Fred Chamanara, against the defendant, Bahman Djahanguiri, seeking specific performance of a stock purchase agreement allegedly entered into with the defendant. After a bench trial, the circuit court found that the contract was void *ab initio* because there was fraud in the execution, *i.e.*, the defendant had been

tricked by the plaintiff into signing the stock purchase agreement while believing it to be something else. The plaintiff now appeals, contending that the circuit court's holding was against the manifest weight of the evidence. For the reasons that follow, we affirm.

¶ 3

I. BACKGROUND

¶ 4 The record reveals the following undisputed facts and procedural history. The seventy-year-old plaintiff and the defendant have been friends and ongoing business partners since the late 1970s. The defendant is the owner, director and sole shareholder of a corporation, S.R.M.B., Inc., (hereinafter S.R.M.B.) whose exclusive purpose is to lease two commercial properties at 1206-1212 North State Street in Chicago, Illinois, on behalf of the owner Northern Trust. Under its lease agreement with Northern Trust, S.R.M.B. is obligated to pay Northern Trust rent on the spaces regardless of whether those spaces are occupied. In June 2009, the tenant for 1212 North State Street was forced to vacate the premises as a result of a zoning mistake, and S.R.M.B. was left to pay the real estate taxes and the rent for both 1206 and 1212 North State Street. At that time, the plaintiff was renting 1206 North State Street from S.R.M.B. When S.R.M.B. fell behind on its rent payments for 1212 North State Street, Northern Trust initiated eviction proceedings. To help the defendant, the plaintiff loaned S.R.M.B. \$100,000 to be paid back by an allotted portion of the rent payment S.R.M.B. received from the plaintiff on 1206 North State Street.

¶ 5 However, S.R.M.B. continued to have difficulty paying its rent and finding a new tenant for 1212 North State Street because its master lease on both the 1206 and 1212 North State Street properties was to expire in three years. Northern Trust refused to renegotiate the master lease

without assurances. To help the defendant, on January 19, 2010, the plaintiff signed a letter of intent showing an interest in becoming a tenant of 1212 North State Street. At the same time, on January 28, 2010, the plaintiff and the defendant established a legal entity called State Parkway Restaurant Group LLC, so as to obtain a liquor license for 1212 North State Street and lease it with less difficulty. The plaintiff then paid the March 2010 rent for 1212 North State Street to S.R.M.B. as tenant. Somewhere between February 5, 2010 and February 20, 2010, the plaintiff and the defendant renegotiated S.R.M.B.'s master lease with Northern Trust to extend the lease for 1206-1212 North State Street through 2020. Both the defendant and the plaintiff signed the revised master lease along with a personal guaranty for that lease.

¶ 6 Somewhere between January and March 2010, the plaintiff and the defendant began discussing a stock purchase agreement under which the plaintiff would become a 50% shareholder of S.R.M.B. and would pay the rent, tax escrow, and expenses for S.R.M.B. until a tenant for 1212 North State Street could be found. The parties dispute whether any such agreement was ever reached, and whether a written agreement to that effect was validly signed.

¶ 7 A. The Initiation of the Lawsuit

¶ 8 On October 12, 2012, the plaintiff filed a four-count complaint in circuit court against the defendant alleging, *inter alia*, a breach of the stock purchase agreement and seeking specific performance as a remedy. According to the complaint, on February 1, 2010, the plaintiff and the defendant entered into the stock purchase agreement so as to formalize their preexisting business relationship with respect to both 1206 and 1212 North State Street. The complaint alleged that the stock purchase agreement entered into by the parties made the plaintiff an equal shareholder

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in S.R.M.B., and required the defendant to open up a joint S.R.M.B. bank account for all deposits relating to 1206-1212 North State Street. The complaint further alleged that under the stock purchase agreement, the plaintiff was given equal corporate rights with respect to 1212 North State Street. According to the complaint on June 1, 2010, the defendant subleased the property at 1212 North State Street to a third party as well as executed an asset purchase agreement with that same third party for the sale of all S.R.M.B. assets, without informing the plaintiff. Since then, the defendant has not paid the plaintiff any proceeds from 1212 North State Street, nor begun the process of formalizing their shareholder partnership agreement with respect to that property. Accordingly, in his complaint, the plaintiff sought specific performance of the stock purchase agreement.

¶ 9 On January 20, 2011, the defendant filed his answer denying the allegations in the complaint, and raising several affirmative defenses, including, relevant to this appeal, fraud in the execution of the stock purchase agreement. In his answer, the defendant alleged that he never signed any agreement pertaining to 1212 North State Street. He explained that between February 1, 2010 and March 2010, he and the plaintiff had discussed entering into a corporate partnership in 1206-1212 North State Street, but that they could not come to an agreement. Around that same time, in April 2010, the plaintiff proposed that the parties enter into a written agreement solely to formalize their informal partnership with respect to 1206 North State Street. The defendant drew up a written agreement to that effect and on August 29, 2010, the parties met at the plaintiff's home to discuss it. According to the answer, the defendant signed two documents, believing that they were identical copies of the same agreement pertaining solely to 1206 North

State Street. The defendant was not aware that he was actually signing the stock purchase agreement with respect to both 1206 and 1212 North State Street. The defendant alleged in his answer that the plaintiff either switched the agreements or attached the signature page from the 1206 North State Street agreement to the stock purchase agreement. Accordingly, the defendant argued that since the contract was obtained by fraud, it was unenforceable.

¶ 10 B. The Bench Trial

¶ 11 After discovery, the parties proceeded with a bench trial, at which the following evidence was adduced.

¶ 12 1. The Plaintiff

¶ 13 The plaintiff first testified that he is the owner of three restaurants in Chicago and that he has known the defendant for over 50 years, because they went to high school together in Iran. The plaintiff testified that he and the defendant have also been business partners for many years. According to the plaintiff, prior to 2000, the defendant owned Lautrec Corporation (hereinafter Lautrec), which was a restaurant that operated out of 1206 North State Street. In 2000, the plaintiff purchased all of Lautrec's shares from the defendant. Even though the plaintiff purchased Lautrec, the defendant's company, S.R.M.B. continued to manage the lease on 1206 North State Street on behalf of Northern Trust. Therefore, to continue operating Lautrec from those premises, the plaintiff continued to rent the property from the defendant.

¶ 14 The plaintiff averred that in 2005, he entered into a stock purchase agreement with John Sullivan (hereinafter Sullivan) from the McFadden group in New York, and sold him all of the Lautrec shares. Under the terms of that agreement, Sullivan (as the new owner of Lautrec) made

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monthly payments to the plaintiff. The plaintiff in turn used those monies to pay the monthly rent and real estate tax payments on the property to S.R.M.B. The defendant, through S.R.M.B. then paid the master rent payment to the owner, Northern Trust. The plaintiff admitted that the payments Sullivan made to him were \$6,000 greater than the payments the plaintiff was required to make to S.R.M.B. According to the plaintiff, the defendant was aware of these terms and did not object.

¶ 15 The plaintiff next testified that up until that point, he had never leased or managed the property at 1212 North State Street. According to the plaintiff, sometime in November 2009, when S.R.M.B. began to fall behind on its rent payments to Northern Trust for 1212 North State Street, the plaintiff advanced the defendant \$100,000 to be paid back by an allotted portion of the rent payments that the plaintiff owed S.R.M.B. on the 1206 North State Street lease. The plaintiff testified that he was aware that Northern Trust refused to extend its master lease for 1206-1212 North State Street to S.R.M.B. without a personal guarantor. The plaintiff therefore told the defendant that he would act as personal guarantor in return for "a 50/50 percent share in S.R.M.B." According to the plaintiff, the defendant agreed to these terms, and a written contract was drawn up by the defendant's attorney, Donald L. Homyk (hereinafter Homyk). As a result, on February 1, 2010, the plaintiff signed the personal guarantee on S.R.M.B.'s lease with Northern Trust. Soon thereafter, S.R.M.B.'s lease for 1206-1212 North State Street was extended through 2020.

¶ 16 The plaintiff testified that he was not represented by counsel in negotiating the stock

purchase contract, but agreed that the defendant's attorney, Homyk, would draft it.¹ The plaintiff could not recall how many drafts they looked at before agreeing on a final copy, but averred that he first saw a written draft sometime in November 2009.² The plaintiff testified that he had no personal communications with Homyk but that instead he received a copy of the final stock purchase agreement from the defendant, who physically brought it to him before they signed it.

¶ 17 The plaintiff testified that he could not recall when and where the stock purchase agreement was actually signed. He stated, however, that "to the best of his recollection," no one else was present.

¶ 18 The plaintiff testified that he neither coerced nor forced the defendant to sign the stock purchase agreement against his will. In addition, although he admitted that he is an accomplished high stakes poker player, he adamantly denied having tricked the defendant into signing the agreement by swapping out the signature page of the stock purchase agreement with a page from another document that was familiar to the defendant. The plaintiff averred that he could not recall whether the defendant actually read the agreement in front of him before signing it; he stated, however, that it was the defendant who initially brought the agreement to him, so

¹On cross-examination, the plaintiff admitted that contrary to his testimony at trial, in his prior deposition testimony he stated that when it came to drafting the stock purchase agreement, he considered Homyk to be his attorney as well as the defendant's.

²The plaintiff admitted that his attorney, Togai Atac (hereinafter Atac) helped draft one of the versions of the stock purchase agreement, but testified that this was ultimately not the draft that they used.

that he assumed that the defendant knew and understood its contents.

¶ 19 The plaintiff next identified plaintiff's exhibit C, a copy of the final stock purchase agreement, allegedly executed by the plaintiff and the defendant on February 1, 2010. The plaintiff acknowledged that the agreement is six pages long, that the pages are marked numerically and that page six is the signature page. He identified the date on the first page of the contract, indicating that the agreement was entered into on February 1, 2010. The plaintiff acknowledged, however, that the document may not have been executed on that particular date. Rather, the plaintiff averred that this date was chosen because the plaintiff's personal guarantee to Northern Trust for S.R.M.B.'s lease of 1206-1212 North State Street was executed on February 1, 2010. According to the plaintiff because the stock purchase agreement related to that personal guaranty, it was fitting to use the same date.

¶ 20 On cross-examination, the plaintiff admitted that in 1984 he filed a very similar complaint against the defendant seeking to enforce an alleged oral agreement under which he invested money in Lautrec (then owned by the defendant) in exchange for an ownership interest in that corporation. The plaintiff acknowledged that the cause of action went to trial and that he lost.³

¶ 21 On cross-examination, the plaintiff acknowledged that during his deposition, taken in the

³On redirect examination, the plaintiff averred that in that case he filed the law suit against the defendant as a third party. The plaintiff claimed that the dispute was between the defendant and the plaintiff's old college roommate, Charlie Cannelli, and that he merely "took Cannelli's side in the matter." The plaintiff alleged that he was "more of an observer" than a litigant.

present case, on November 29, 2011, he stated that he had never been convicted of a crime, even though that was not true. The defense introduced into evidence documents establishing that sometime in 2009, the plaintiff was convicted of forgery in the Bahamas for lying on his customs form, and that he appealed that conviction and lost. When presented with this documentation, on cross-examination, the plaintiff admitted his conviction, but stated that he was not aware at the time of his deposition that it was a crime in the Bahamas not to report leaving the island with more than \$10,000. The plaintiff explained that he had been in the Bahamas to play poker and that even though he had \$144,000 strapped to his leg prior to his flight back to the mainland, in his customs form, he reported having only \$70 on his person. The plaintiff admitted that after he was searched and the money was found he was detained at the airport before the money was taken from him and he was returned to his hotel. The plaintiff also admitted that when he left the island he appealed his conviction and lost.

¶ 22 The plaintiff was next cross-examined about the stock purchase agreement. He first stated that to the best of his recollection, he signed the stock purchase agreement on the same day that the defendant presented him with it. He also testified that he did not believe (but could not recall whether) there were different drafts of that agreement exchanged by the parties. When asked to identify a draft of the stock purchase agreement drafted by his own attorney, Atac, dated April 2010, the plaintiff admitted that there may have been drafts exchanged. The plaintiff could not explain the discrepancy between the fact that the stock purchase agreement that he was attempting to enforce, was allegedly signed on February 1, 2010, and the fact that he had his own attorney draft a new version of the said agreement three months later in April 2010. When

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questioned about the discrepancy he merely continued repeating that he could not recall when the actual stock purchase agreement was signed and that it was possible that after the agreement was signed in February 2010, he asked the defendant for another agreement, which would have explained Atac's draft.

¶ 23 The plaintiff was next asked to identify defense exhibit No. 7, which comprised of a series of voicemails that he left on the defendant's answering machine in August 2010.⁴ The first voicemail, dated August 14, 2010, at 5:26 p.m. states:

"Bahman [the defendant] I don't know why you aren't answering my calls, this agreement that Don [Homyk] is writing, tell him for sure to add that *** of course we won't tell anything to the landlord but ask Don [Homyk] to mention the fact that I have no responsibility for 1212 [North State Street] in the agreement. You have made a 200% guarantee for 1212 [North State Street] and I even go further than that and I say that I have made the 100% guarantee for 1206 [North State Street] and you have made the 100% guarantee for 1212 [North State Street]. This is to be understood."

The second voicemail was left on the answering machine, only a few hours later, at 10 p.m. and states:

"Bahman [the defendant], Its Fruydon [the plaintiff]. Please add another thing to it; I made a gift to you from 2000 to 2013 while the responsibility was for both sides [of the North State Street properties]. But from 2013 on, I wouldn't have any responsibility for 1212 [North State Street]. Am I right or not? Give me a call."

⁴The voicemails were translated from Farsi to English.

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The plaintiff left the final voicemail on the defendant's answering machine on September 2, 2010 at 8:06 p.m. That voicemail states:

"*** I've called you twice but you didn't pick up my call. I've got a lawyer for this issue and this is the last time that I'm calling you. If you don't call me back the lawyer will follow up this issue and I will sue you. So call me if you don't want me to sue you and Don Homyk."

¶ 24 When questioned about the aforementioned voicemails, the plaintiff admitted that those messages reveal that in April 2010, he repeatedly told the defendant that he did not want any responsibility for 1212 North State Street. He stated, however, that this did not mean that he did not want 50% partnership in the property and explained that to him "responsibility" meant incurred expenses, while partnership meant the sharing of profits.

¶ 25 When next questioned about the agreement pertaining solely to 1206 North State Street, the plaintiff repeatedly averred that he could not recall whether he ever saw, let alone signed such an agreement. When presented with exhibit No. 8, comprising of this agreement, he said that he did could not recall seeing it before. The plaintiff could also not recall whether he ever saw an agreement with yellow highlighting on it.

¶ 26 During cross-examination, the plaintiff also averred that he could not remember whether the defendant came to his house on August 29, 2010. He could not remember if he received an email from the defendant the following day (August 30, 2010) asking him why he had not delivered a signed original copy of the agreement for 1206 North State Street to the defendant, when he promised that he would. The plaintiff explained that he could not have used email to

send anything to the defendant as he only knew how to receive and not send emails.

¶ 27 The plaintiff was next asked to compare plaintiff's exhibit C (the stock purchase agreement) and defense exhibit No. 8 (the agreement solely with respect to 1206 North State Street). He acknowledged that there were only two minor differences in the signature pages of those two documents, namely that one said page 4 and the other page 6 at the bottom, and that one stated "as of date" and the other "effective as of date" in the body, prior to the signatures.

¶ 28 2. Karen Cwaygel

¶ 29 Karen Cwaygel next testified that she is the defendant's certified public accountant (CPA) and close friend. For over ten years, she has helped the defendant with both accounting and administrative matters concerning S.R.M.B., including obtaining information relevant to the master lease negotiations with Northern Trust. Cwaygel testified that in the fall of 2009, Northern Trust initiated a law suit against the defendant because he owed them back rent. She acknowledged that the lawsuit was dropped and a new master lease renegotiated with Northern Trust because the plaintiff agreed to be a personal guarantor on that lease. Cwaygel, however, averred that she was not aware of any oral or written agreement between the plaintiff and the defendant in regards to what the plaintiff expected from the defendant in return for acting as the personal guarantor.

¶ 30 Cwaygel next testified that on August 14, 2010, the defendant, who was in California, telephoned her and asked her to deliver a copy of a draft agreement relating only to 1206 North State Street to the plaintiff. At that time, the plaintiff owned a restaurant named Bijan and she was asked to deliver the document there and inform whoever was in the front that the plaintiff

would pick it up later. Prior to taking the agreement to the restaurant, upon the defendant's instructions, Cwaygel highlighted certain portions of that agreement. Once at the restaurant, she left the documents with the host and instructed him to give them to the plaintiff. On cross-examination, Cwaygel admitted that she had no personal knowledge as to whether that document was actually delivered to the plaintiff.

¶ 31 3. Donald L. Homyk

¶ 32 Donald L. Homyk next testified that he is the defendant's attorney. Homyk explained that he graduated with a bachelor's degree from Yale University in 1977, and with a J.D. from Northwestern University Law School in 1981. Prior to opening up his own practice, over the years, Homyk worked at several Chicago law firms including: Sidley & Austin; Silets & Martin; and Cahill, Christian & Kunkel.

¶ 33 Homyk stated that he first met the plaintiff when he joined the firm of Silets & Martin in 1984, and was asked to represent the defendant in a law suit initiated by the plaintiff and alleging that because the plaintiff had provided substantial monies in excess of \$100,000 as capital contributions to the defendant's corporation, Lautrec, the plaintiff was entitled to a proportionate shareholder interest based upon those contributions. According to Homyk, after a bench trial in that cause, the circuit court ruled against the plaintiff, finding that the alleged contributions were in fact repayments of loans that the defendant had advanced to the plaintiff to cover his gambling expenses.

¶ 34 Between 1987 and 2009, Homyk represented the defendant in several business interests and was aware that the defendant continued to have a business relationship, as well as friendship,

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with the plaintiff. However, Homyk did not physically see the plaintiff again until January 2010. In mid-2009, he was hired by the defendant to negotiate the master leasehold on 1206-1212 North State Street between S.R.M.B. and Northern Trust, as well as to defend S.R.M.B. in the eviction proceedings initiated by Northern Trust to obtain back rent payment for 1212 North State Street. On January 26, 2010, the defendant set up a meeting with the plaintiff at the plaintiff's restaurant, Bijan, to discuss any future business relationship the two would have with respect to 1206-1212 North State Street. Homyk was invited to the meeting. At the meeting, Homyk witnessed the plaintiff and the defendant discussing the plaintiff acting as a personal guarantor on the leases for 1206-1212 North State Street.

¶ 35 The following day, January 27, 2010, there was a pretrial conference at the circuit court in Northern Trust's eviction proceedings against S.R.M.B., and both the plaintiff and the defendant were present. According to Homyk, at that pretrial conference, the plaintiff indicated to the trial judge that he would act as personal guarantor on the lease and stated that he would pay \$100,000 that S.R.M.B. owed in back taxes.

¶ 36 Homyk next testified that on February 5, 2010, he sent the defendant an email, attaching a personal guarantee drafted by Northern Trust's attorneys to be signed by the plaintiff. Homyk testified that the plaintiff did not know how to use email, and that it was his understanding that the defendant would forward the personal guarantee to the plaintiff for signature. According to Homyk sometime in the next two weeks, the plaintiff must have signed the personal guarantee, because on February 20, 2010, Homyk sent an email to Northern Trust's attorneys attaching the

signed personal guarantee.⁵

¶ 37 Homyk testified that on March 18, and March 26, 2010, he had several telephone conversations with the plaintiff regarding the nature of his future business relationship with the defendant. As a result of those conversations, on March 29, 2010, Homyk drafted the first version of the stock purchase agreement relating to 1206-1212 North State Street. That same day, Homyk revised the agreement numerous times at the request of the defendant, who was forwarding the drafts to the plaintiff. Later that evening, Homyk sent the defendant an email, attaching what he termed the "final final final" draft of the stock purchase agreement. It was Homyk's understanding that the defendant would forward this draft to the plaintiff so they could discuss it.

¶ 38 Homyk was subsequently asked to revise the agreement again to incorporate certain provisions. As a result on April 1, 2010, he sent the defendant an email attaching the revised stock purchase agreement, again with the understanding that it would be forwarded to the plaintiff. Homyk identified this draft agreement in court as plaintiff's exhibit C (the agreement that the plaintiff was attempting to enforce). He testified that the substance of the provisions in paragraphs 1 through 3 of that agreement were the same as those in his March 2010 draft. Specifically, paragraph 1 of that agreement provided that the plaintiff and the defendant would be 50% equal shareholders in S.R.M.B.; paragraph 2 contained provisions detailing the allocation of rents and payments with respect to 1206 North State Street; and paragraph 3 contained provisions detailing the allocation of rents and payments with respect to 1212 North State Street.

⁵The personal guarantee was signed by both the plaintiff and the defendant.

¶ 39 Homyk averred that the next day, April 2, 2010, he planned to meet the plaintiff and the defendant at a restaurant owned by the defendant. He brought along a copy of the revised stock purchase agreement so that they could discuss it in person, but by the time he arrived, the plaintiff had already left.

¶ 40 Homyk testified that later that month, the defendant telephoned him to inform him that the plaintiff was dissatisfied with all of Homyk's drafts, and that he actually "tore up" Homyk's April 1, draft. The defendant told Homyk that the plaintiff had his own attorney, Atac, draft a stock purchase agreement. Homyk asked the defendant to summarize the substance of that agreement over the telephone and the defendant explained that according to its terms, the plaintiff did not intend to pay anything for S.R.M.B.'s stock, but rather would have the sole consideration for the stock and shareholder interest to be "future services." The defendant told Homyk he did not like this draft, and Homyk advised him not to sign anything but to just continue discussions with the plaintiff.⁶

¶ 41 Homyk testified that on April 28, 2010, he telephoned the plaintiff to inquire about the status of the agreement. Homyk was aware that the plaintiff had paid the rent on 1212 North State Street for March 2010, and that the defendant had asked him to pay 50% of the rent payment for April, but that the plaintiff had refused. Over the telephone, the plaintiff told Homyk that there was no tenant in 1212 North State Street and that if they did not get a tenant in soon, there would never be one. The plaintiff also complained to Homyk that the defendant

⁶Homyk admitted that he did not see a physical copy of Atac's stock purchase agreement draft until sometime in May 2010.

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expected him to pay for everything, and that he did not "want that headache." The plaintiff finally told Homyk that he "did not want anything to do with" 1212 North State Street.

¶ 42 According to Homyk, in the next couple of months, April, May, June and July, the parties did not mutually execute any agreement with respect to 1206-1212 North State Street.

¶ 43 Homyk averred that he was busy with other clients and matters, when on August 9, 2010, he received an email from the defendant attaching the agreement pertaining solely to 1206 North State Street. When Homyk telephoned the defendant to ask him what this agreement was all about, the defendant told him that he drafted the agreement because the plaintiff did not want anything to do with 1212 North State Street but wanted to memorialize their relationship only with respect to 1206 North State Street. According to that agreement the two would have a 50/50 share of the proceeds from 1206 North State Street.

¶ 44 Homyk testified that he was aware that on August 14, 2010, the defendant had his CPA, Cwaygel, deliver a copy of this agreement to the plaintiff. Homyk was also aware that at the defendant's request, Cwaygel had highlighted certain portions of the agreement that pertained to the 50% share of all proceeds for 1206 North State Street.

¶ 45 Homyk stated that in the next few days, he received several telephone calls from the plaintiff indicating that he needed urgent advice. When Homyk returned his call, the plaintiff told Homyk that he was happy with "the agreement with yellow highlighting" because it gave him 50% of all profits on 1206 North State Street. The plaintiff, told Homyk, however, that he wanted a separate agreement drafted with respect to 1212 North State Street. He told Homyk that while he did not want anything to do with managing 1212 North State Street, he nevertheless

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wanted a "very strongly worded provision" in whatever agreement they would sign with respect to that property that would "permit him to take over 1212 North State Street" in the event that they could not find a tenant for that property and S.R.M.B. could not pay the rent on its own. Homyk believed that such a provision was fair considering that the plaintiff was a personal guarantor on the property. He advised the plaintiff to discuss this proposed provision with the defendant.

¶ 46 As a result of his telephone conversation with the plaintiff, on August 24, 2010, Homyk drafted a new agreement pertaining solely to 1212 North State Street (including the provisions requested by the plaintiff) and sent it to the defendant for review. He advised the defendant to closely look at the second paragraph, which stated in part that if the defendant defaulted under the terms of the lease to Northern Trust, the defendant would be required "to immediately assign and transfer to the plaintiff in writing any and all tenant leasehold rights and interests to 1212 North State Street." Homyk attempted to telephone the plaintiff in the next couple of days to discuss the proposed agreement, but the plaintiff never returned his calls.

¶ 47 Homyk testified that he learned from the defendant that the plaintiff and the defendant were to meet on August 29, 2010. Homyk believed that he would be present at the meeting, but was ultimately not invited. Homyk admitted on cross-examination that he was looking forward to the parties reaching an agreement because he wanted payment for the services rendered to the plaintiff and the defendant in drafting the proposed agreements.

¶ 48 Homyk learned about what transpired at that meeting from the defendant, who telephoned him that evening, frantic. The defendant first told Homyk that the plaintiff was not going to pay

for any services rendered by Homyk. He then told Homyk that he went to the plaintiff's house intending to discuss the proposed agreement relating to 1212 North State Street. As a result, he brought with him several drafts of that agreement. The defendant told Homyk that the plaintiff had the yellow highlighted agreement on his coffee table, and that he was walking between rooms and that he was shuffling papers back and forth and was making the defendant nervous. The defendant was nervous because he was under some pressure to try to resolve the situation and finalize an agreement. He told Homyk that "at the end of the day, he signed something." The defendant told Homyk that after he signed the document, the plaintiff took it and did not sign it but told the defendant that he wanted his lawyers to look at it. The defendant kept repeating to Homyk that he had to get a copy of what he signed from the plaintiff as soon as possible.

¶ 49 Homyk averred that neither he nor the defendant heard from the plaintiff until September 21, 2010, when they were sent a letter by the plaintiff's attorney, Atoc, indicating that the plaintiff would be attempting to enforce the stock purchase agreement, allegedly executed by the parties on February 1, 2010. When Homyk read the attached agreement, he was baffled and infuriated at the plaintiff's suggestion that it could have been executed in February, since it was the agreement that Homyk had drafted sometime in late March 2010 and that he identified at trial as Exhibit C.

¶ 50 On cross-examination, Homyk admitted that in June 2010, he received a check from the plaintiff for legal services rendered in the Northern Trust proceedings. Homyk also acknowledged that from the moment that he first met with the plaintiff and the defendant in January 2010, and the plaintiff agreed to loan money to help the defendant retain his rights to 1212 North State Street, it was Homyk's understanding that the two were "entering into some sort

of relationship" with respect to both 1206 and 1212 North State Street. He explained, however, that throughout his representation, the parties never reached or formalized an agreement as to what this relationship should be.

¶ 51

4. The Defendant

¶ 52 The defendant next testified on his own behalf. He acknowledged that he is the single owner, director and shareholder of S.R.M.B., whose sole purpose is to rent out the properties at 1206-1212 North State Street on behalf of Northern Trust. The defendant testified that in the fall of 2009, he lost the tenant to 1212 North State Street because the Chicago zoning department mistakenly informed the tenant that only half of that property was zoned commercial. The defendant attempted to pay the rent on the property by himself, but soon ran out of money. When Northern Trust initiated a law suit against him, he hired Homyk to represent him in the matter.

¶ 53 The defendant admitted that at this time, the plaintiff loaned him \$100,000 to pay Northern Trust, while he attempted to negotiate the extension of the master lease on both of the properties. The defendant acknowledged that Northern Trust would not extend the master leasehold without a personal guarantor, and that he was having difficulties finding a tenant for 1212 North State Street because the master lease on both properties was to expire in three years. The defendant admitted that to help in the matter, he and the plaintiff agreed that the plaintiff would show interest in renting the 1212 North State Street property and then act as guarantor on the master leasehold. The defendant drafted a letter of intent, dated January 19, 2010, on behalf of the plaintiff, indicating that the plaintiff was interested in leasing the 1212 North State property. The plaintiff signed the letter, and the defendant showed it to Northern Trust. The

plaintiff also signed a personal guarantee with Northern Trust on February 1, 2010.

¶ 54 The defendant testified that the plaintiff did not ask for anything in return for acting as a personal guarantor. In fact, according to the defendant, the plaintiff did not ask for a 50% share of S.R.M.B. until after February 6, 2010, at least five days after he had already signed the personal guarantee. The defendant testified that their negotiations continued for the next several months.

¶ 55 The defendant averred that sometime in March 2010, he and the plaintiff approached the defendant's attorney, Homyk, and asked him to draw up a stock purchase agreement with respect to 1206-1212 North State Street. Homyk sent the defendant the first draft agreement on March 29, 2010, and the defendant gave it to the plaintiff. Throughout that day, the plaintiff asked for revisions and changes to the agreement and Homyk drew up several different drafts, all of which were rejected by the plaintiff. The final revised stock purchase agreement was drafted by Homyk on April 1, 2010. The defendant testified that he gave the plaintiff a copy of that draft a few days later in his restaurant, but that the plaintiff remained dissatisfied and asked for more changes. The defendant became upset and told the plaintiff that this would be the final version and that he would not agree to any more changes. The plaintiff then said that he would take the agreement with him and show it to his own attorneys.

¶ 56 A few days later, the defendant was invited to the plaintiff's house, where the plaintiff presented him with a new stock purchase agreement drafted by his own attorney, Atac. The plaintiff told the defendant that this agreement was simpler, only three pages long and that his attorney was cheaper than Homyk. After reviewing the agreement, the defendant retorted that he

was not surprised that Atac was "cheaper" than Homyk since the first three paragraphs of his draft agreement were copied from Homyk's prior version. The defendant also testified that he rejected Atac's draft because under its provisions the plaintiff would pay for the S.R.M.B. stock only with "future services rendered". That day, the defendant left the plaintiff's home angry.

¶ 57 The defendant further testified that soon thereafter, sometime before April 7, 2010, he was again invited to the plaintiff's home. The plaintiff told him that because they had been life long friends, he wanted to be candid with him. The plaintiff said he "did not want to get involved with 1212 North State Street, and wanted the defendant to keep it." The plaintiff said he was happy with the current situation and wanted to be a partner only in 1206 North State Street.⁷

¶ 58 The defendant was not happy with these statements, because he believed that the plaintiff wanted to get out of the expenses that he had incurred in redecorating the 1212 North State Street property so as to be able to rent it to a new tenant. The defendant therefore presented the plaintiff with an itemized expense sheet. According to the defendant, the plaintiff agreed to continue paying half of some of those expenses, but refused to pay any future rent on 1212 North State Street.

¶ 59 The defendant testified that he and the plaintiff had no further discussions regarding their business relationship until August 2010. He explained that in the interim the plaintiff's brother

⁷ The plaintiff was referring to his lease on 1206 North State Street. According to the defendant, that lease was entered into orally and permitted the plaintiff to lease the premises to Sullivan, who would pay the plaintiff, who in turn would pay the defendant.

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(who was also a close friend of the defendant) died and the defendant did not want to pester the plaintiff with questions regarding money. The discussions, however, resumed in August. As a result of their previous conversations, during which the plaintiff had indicated that he only wanted to continue a partnership in 1206 North State Street, on August 11, 2010, the defendant, who was traveling in California, drafted an agreement (together with the help of his nephew who was a law student) pertaining solely to 1206 North State Street. He emailed a copy of that draft agreement to Homyk on August 13, 2010. He also emailed a copy to his own apartment in Chicago and asked Cwaygel to print it off, and highlight portions of it before delivering it to the plaintiff at Bijan.

¶ 60 The defendant testified that soon after he had the agreement delivered to the plaintiff, the plaintiff telephoned him demanding changes. The plaintiff continued to leave messages on the defendant's telephone, and the defendant became upset and just ignored his calls while in California.

¶ 61 When he returned to Chicago on August 25, 2010, the defendant resumed his conversations with the plaintiff. The plaintiff indicated both to him and Homyk that he might want a separate but similar agreement solely with respect to 1212 North State Street.

¶ 62 At the same time, the defendant received several telephone calls from Homyk who wanted to know when he would be paid by the plaintiff and the defendant for services rendered in drafting the multiple agreements. The defendant felt pressured and therefore agreed to meet with the plaintiff in his home on August 29, 2010.

¶ 63 The defendant went to the plaintiff's apartment around 9 p.m. The defendant brought

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with him two different drafts of an agreement pertaining solely to 1212 North State Street for the plaintiff to look at. The defendant was adamant that he did not take with him any draft of the stock purchase agreement. He explained that the last time he and the plaintiff discussed such a partnership was before April 3, 2010.

¶ 64 Once at the plaintiff's home, the defendant was seated at a coffee table upon which the plaintiff placed two documents, which the defendant believed to be identical copies of the agreement pertaining only to 1206 North State Street. When the defendant attempted to present the plaintiff with the two draft of the 1212 North State Street agreement he had brought with him, the plaintiff began screaming because he had already told the defendant that "he did not want any responsibility with 1212 North State Street." The defendant testified that his hand was shaking because the plaintiff had never screamed like that at him before. After an argument, the defendant looked at the agreements on the coffee table and said, "Ok, let's sign it." He looked at the first agreement, saw yellow highlighting on it, read the portion with the highlighting (confirming that it was the agreement pertaining to 1206 North State Street) and signed it. The defendant then turned to the second document, which was already opened to the signature page, and believing it to be merely a copy of the same, signed it. The defendant testified that he did not read the second document before signing it because the plaintiff was screaming at him. The defendant testified that he then remembered that he forgot to date the document, so he went back to write in the date, but the plaintiff snatched the document from his hand, and asked him "what the hell" he was doing. The plaintiff told the defendant that he should not have written in an August date because the agreement stated that it was effective in March. The plaintiff then

grabbed the documents from the defendant and took them to the other room where he remained to "calm down." When he came back out, he told the defendant the he would have his attorneys review the document and bring it to him tomorrow. The defendant was very angry and just left.

¶ 65 The defendant averred that he became concerned when the plaintiff did not meet him the next day to give him a signed copy of the agreement, and he sent the plaintiff an email asking him to give him one of the two copies of the agreement that he had signed. The defendant also attached to his email a copy of an unsigned agreement for 1206 North State Street, which he believed he signed with the plaintiff. The defendant did not hear from the plaintiff again until he received a letter from the plaintiff's counsel on September 21, 2010, stating the plaintiff and the defendant had executed a stock purchase agreement on February 1, 2010, and attaching what purported to be a copy of that agreement. At trial, the defendant averred that he never intended to sign the stock purchase agreement and that he never did so knowingly.

¶ 66 On cross-examination, the defendant admitted that the plaintiff never threatened him on August 29, 2010. He also acknowledged that he did not look at the signature page of the second document when he signed it, but that if he had done so, he would have seen numeral 6 at the bottom of that page and would have known that it was not the agreement relating solely to 1206 North State Street, because that agreement had only 4 pages. The defendant explained, however, that he was not in a good position to see the document because he was sitting across from the coffee table and the plaintiff was holding the documents toward himself.

¶ 67 After the parties rested, the trial court admitted into evidence several exhibits, including exhibit C, the stock purchase agreement, allegedly executed by the plaintiff and the defendant on

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February 1, 2010, and exhibit No. 8, the agreement containing the highlights, and pertaining solely to 1206 North State Street.

¶ 68 On June 22, 2010, the circuit court issued a written ruling, finding against the plaintiff. The court held that the defendant had succeeded in his burden of proof in establishing by clear and convincing evidence that there had been fraud in the execution of the stock purchase agreement. Accordingly, the court held that the agreement was void *ab initio*.

¶ 69 On July 23, 2012, the plaintiff filed a motion to reconsider arguing that because the defendant had the opportunity to read the document that he signed, he was precluded from asserting the affirmative defense of fraud in the execution. On September 12, 2012, the circuit court denied the plaintiff's motion, holding that the defense of fraud in the execution may be and was, here, supported by evidence suggesting a "surreptitious substitution." The plaintiff now appeals.

¶ 70

II. ANALYSIS

¶ 71 On appeal, the plaintiff contends that the trial court's judgment was against the manifest weight of the evidence. He contends that the defendant failed to establish by clear and convincing evidence that he was tricked into signing the stock purchase agreement believing it to be the agreement pertaining solely to 1206 North State Street. According to the plaintiff, the defendant failed to provide any evidence that when he went to the defendant's home on August 29, 2010, the plaintiff urged him or guided him to select one document rather than the other from the coffee table. What is more, the plaintiff argues that the defendant failed to establish that the plaintiff ever received the agreement pertaining solely to 1206 North State Street, so as to be able

to use it to trick the defendant into signing the stock purchase agreement. After a review of the record and for the following reasons, we disagree.

¶ 72 It is axiomatic that in determining whether a judgment is against the manifest weight of the evidence a reviewing court must examine the evidence introduced at trial and the inferences drawn therefrom in the light most favorable to the prevailing party. *Boll v. Chicago Park District*, 249 Ill. App. 3d 952, 957 (1992). What is more, in a bench trial, a reviewing court will respect the trial judge's role, and remember that as the trier of fact, he or she is in a superior position to judge the credibility of the witnesses and determine the weight to be given to their testimony. *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA*, 384 Ill. App.3d 849, 859 (2008) (citing *Buckner v. Causey*, 311 Ill. App. 3d 139, 144 (1999)). When contradictory testimony that could support conflicting conclusions is presented at the bench trial, the reviewing court will give deference to the trial judge's findings and will not disturb those findings unless a contrary finding is clearly apparent. *Chicago's Pizza, Inc.*, 384 Ill. App. 3d at 859 (citing *Buckner*, 311 Ill. App. 3d at 144). Accordingly, a reviewing court will find a judgment to be against the manifest weight of the evidence only when " 'the opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence.' " *Chicago's Pizza, Inc.*, 384 Ill. App. 3d at 859 (quoting *Judgment Services Corp. v. Sullivan*, 321 Ill. App. 3d 151, 154 (2001)); see also *Leonardi v. Loyola*, 168 Ill. 2d 83, 106 (1995); *First Baptist Church of Lombard v. Toll Highway Authority*, 301 Ill. App. 3d 533, 542 (1998).

¶ 73 In the present case, the plaintiff attempted to enforce a stock purchase agreement that he alleged was executed on February 1, 2010. In response, the defendant raised the affirmative

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defense of fraud in the execution.

¶ 74 In Illinois, the defense of fraud is generally "unavailable to avoid the effect of a written agreement where the complaining party could have discovered the fraud by reading the instrument, and was in fact afforded a full opportunity to do so." *Belleville National Bank v. Rose*, 119 Ill. App. 3d 56, 59 (1983). The rationale is that:

" 'One is under a duty to learn, or know, the contents of a written contract before he signs it, and is under a duty to determine the obligations, which he undertakes by the execution of a written agreement. [Citation.] And the law is that a party who signs an instrument relying upon representations as to its contents when he has had an opportunity to ascertain the truth by reading the instrument and has not availed himself of the opportunity, cannot be heard to say that he was deceived by misrepresentations. '"
Belleville National Bank, 119 Ill. App. 3d at 59 (quoting *Leon v. Max E. Miller and Sons, Inc.*, 23 Ill. App. 3d 694, 699-700 (1974).

¶ 75 However, there are exceptions to the rule, and a contract may be set aside if the party contesting the agreement establishes by clear and convincing evidence that there was fraud in the execution. *Belleville National Bank*, 119 Ill. App. 3d at 59; see also *Turzynski v. Libert*, 122 Ill. App. 2d 352, 358 (1970); see also *Wheeler-Dealer, Ltd. v. Christ*, 379 Ill. App. 3d 864 (2008). "Fraud in the execution of an instrument is practiced 'where the instrument is misread to the party signing it, or where there is a surreptitious substitution of one paper for another, or where by some other trick or device a party is made to sign an instrument which he did not intend to execute.' " *Belleville National Bank*, 119 Ill. App. 3d at 59 (quoting *Papke v. The G.H. Hammond*

Company, 192 Ill. 631, 635 (1901)); see also *Mt. Zion State Bank & Trust v. Weaver*, 226 Ill. App.3d 783, 787 (1992) ("When the fraud involves the execution of an instrument, the misrepresentations must be such as to induce the party allegedly defrauded to execute an instrument which he did not intend to execute."); see also *Mehta v. John Hancock Mut. Life Ins. Co.*, 153 Ill. App. 3d 145, 150 (1986) (defining fraud in the execution as "where the party was induced to execute the release not knowing it to be a release but believing it to be an instrument of a different character.") (citing *Rudolph v. Sante Fe Park Enterprises, Inc.*, 122 Ill. App. 3d 372, 374 (1984)). Accordingly, here, the defendant bore the burden to establish by clear and convincing evidence at trial that he was tricked into signing the stock purchase agreement while believing it to be something else.

¶ 76 In the present case, after a thorough review of the record, we find nothing manifestly erroneous in the trial court's holding that there was fraud in the execution. The record reveals that the defendant testified to some length about his visit to the plaintiff's home on August 29, 2010, where he believed that he was being asked to sign two identical copies of the agreement relating solely to 1206 North State Street. The defendant testified that he was seated at a low coffee table opposite from the plaintiff, with two documents facing the plaintiff, so that he did not have a clear view of the documents. The defendant read the first document and recognized it to be the agreement that he had prepared in early August 2010, regarding 1206 North State Street and that he had asked his CPA, Cwaygel, to highlight and deliver to the plaintiff. The defendant further testified that before he had an opportunity to review the second document, the plaintiff screamed at him and an argument ensued. The defendant was nervous and wanted to appease the

plaintiff, so he agreed to sign the documents, believing them both to be identical copies of the 1206 North State Street agreement. According to the defendant, once he signed the first document, the plaintiff, who continued to scream at him, quickly flipped the pages of the second document to the signature page and had the defendant sign it before "snatching it" away. When the defendant attempted to go back and add a date to that document, the plaintiff screamed at him again, grabbed the document from his hands and took it to another room. The defendant never saw either document again. When on the following day, he asked the plaintiff to send him an original copy of the document they had executed, he did not hear from the plaintiff until the initiation of this law suit. The defendant testified at trial that it was never his intent to sign the stock purchase agreement, and that he had no idea that the plaintiff would attempt to have him execute it since negotiations regarding any stock purchase had ceased months ago.

¶ 77 The defendant's version of events is supported by exhibits C and 8, an examination of which reveals that they are similar enough that if looked over in a hurry they could have been mistaken one for the other. Except for the date of execution, the front pages of the documents are identical. At first glance, the signature pages appear identical too. Each signature page contains only one sentence stating that the "IN WITNESS WHEREOF, the parties to the Agreement have executed this Agreement as of the date first shown above." However, Exhibit 18 adds a word to the phrase above, "effective" before "as of the date." In addition, the page numbering of the signature pages is different, with Exhibit C containing numeral 6 and Exhibit 18 numeral 4. The defendant testified that while he read Exhibit 18 (the document pertaining solely to 1206 North State Street), he did not have a chance to read Exhibit C (the stock purchase

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agreement); rather he only saw the front page of Exhibit C, which was upside down on the coffee table in front of him. In addition, the defendant explained that he did not see the page number on the signature page of Exhibit C, because if he had, he would have known that it was not Exhibit 18 (the agreement that he believed he was signing and pertaining solely to 1206 North State Street).

¶ 78 Moreover, the defendant's testimony regarding events precipitating the August 29, 2010 meeting is fully corroborated by the statements of both attorney Homyk and CPA Cwaygel. Homyk averred at trial that he drafted the first version of the stock purchase agreement for the defendant and the plaintiff on March 29, 2010. He drafted several more versions of that agreement, but the plaintiff was dissatisfied with all of them. According to Homyk, sometime after April 2010, the plaintiff "tore up" the final version of that agreement and indicated both to him and the defendant that he did not want any responsibility for 1212 North State Street. Homyk testified that subsequently in August 2010, the defendant alone drafted a separate agreement pertaining solely to 1206 North State Street to memorialize his relationship with the plaintiff regarding that property. The defendant, Homyk and Cwaygel all testified that the defendant had Cwaygel deliver that document to the plaintiff on August 14, 2010. Cwaygel testified that she highlighted the document, delivered it to the plaintiff's restaurant, Bijan, and made sure that the host understood that the plaintiff would come to collect it. Homyk testified that he was aware of this transaction and that he himself received a copy of this agreement. What is more, contrary to the plaintiff's assertion that there is no evidence that the plaintiff actually received this document, Homyk testified that he spoke to the plaintiff on the telephone soon

thereafter and learned that the plaintiff was satisfied with "the agreement with the highlighted portions."

¶ 79 Homyk also corroborated the defendant's testimony that it was never the defendant's intent to go to the plaintiff's apartment on August 29, 2010, to sign a stock purchase agreement relating to both 1206 and 1212 North State Street. Homyk testified that it was his understanding that the parties were meeting on that day to discuss an agreement pertaining solely to 1212 North State Street, and that the defendant was bringing several drafts of that agreement, which Homyk had recently drafted for the plaintiff to look at.

¶ 80 The record reveals that in opposition to the testimony offered by the defendant, Homy and Cwaygel, the plaintiff presented no evidence whatsoever to rebut the defendant's version of events. In fact, the plaintiff provided no testimony or evidence regarding what transpired in his apartment on August 29, 2010, or what his intent was in having that meeting. The plaintiff merely testified at trial, that he could not recall when the stock purchase agreement was executed. He also had no recollection of what transpired on August 29, 2010, or whether he and the defendant even met at his apartment on that day. What is more, although the stock purchase agreement that he was attempting to enforce was dated February 1, 2010, the plaintiff could not explain how it could have been executed on that date when Homyk testified that he did not draft any agreement, and particularly that version of the agreement, until March 29, 2010. The plaintiff could similarly offer no plausible explanation as to why he had his attorney, Atac, draft a separate stock purchase agreement in April 2010, three months after he had allegedly already executed a stock purchase agreement with the defendant. The plaintiff could also provided no

credible explanation for the several voice messages he left of the defendant's answering machine in August 2010, indicating that he did not want any "responsibility" for 1212 North State Street.

¶ 81 Under this record, we find no error in the trial court's conclusion that the defendant met his burden in establishing by clear and convincing evidence that the plaintiff tricked him into signing the stock purchase agreement by leading him to believe that the two documents on the coffee table were identical copies of the 1206 North State Street agreement, rather than two different agreements altogether. Accordingly, the trial court's holding that there was fraud in the execution and that the stock purchase agreement was therefore void *ab initio* is not against the manifest weight of the evidence. See *e.g.*, *Belleville National Bank*, 119 Ill. App. 3d at 59; see also *Papke v. The G.H. Hammond Company*, 192 Ill. at 635; see also *Mt. Zion State Bank*, 226 Ill. App. 3d at 787.

¶ 82

III. CONCLUSION

¶ 83 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 84 Affirmed.