

[Cite as *Integrated Payments Sys., Inc. v. A&M 87th, Inc.*, 2009-Ohio-2715.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 91454 and 91473

INTEGRATED PAYMENT SYSTEMS, INC.

PLAINTIFF-APPELLEE

vs.

A&M 87TH INC., (AKA A&M, INC.,
DBA A&M CITGO), ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED IN PART,
REVERSED IN PART AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-486841

BEFORE: Blackmon, J., Rocco, P.J., and Dyke, J.
RELEASED: June 11, 2009
JOURNALIZED:

-i-

ATTORNEYS FOR APPELLANTS

Paul W. Flowers
Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113

Alan S. Levine
David L. Levine
Levine & Levine
55 Public Square, Suite 1200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Jerome W. Cook
Glenn D. Southworth
Erin K. Walsh
McDonald Hopkins LLC
600 Superior Avenue, East, Suite 2100
Cleveland, Ohio 44114

For Saad Oil, Inc., et al.

Jaye M. Schlachet
55 Public Square, Suite 1300
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} In this consolidated appeal, we will refer to the parties by the locations of the respective gas stations.¹ Appellant Burton Citgo and appellant Lakeshore Citgo appeal the trial court's decision granting appellee Integrated Payment Systems, Inc. ("Western Union"), a judgment against them jointly and severally for monies owed to Western Union. Appellant Burton Citgo assigns the following errors for our review:

"I. The trial judge erred, as a matter of law, in denying defendant-appellants' motion for directed verdict."

"II. The trial judge erred, as a matter of law, in determining that an award of attorney fees and litigation expenses was owed to plaintiff-appellee."

"III. As a matter of law, any attorney fees and litigation expenses that were due were erroneously applied jointly and severally against defendant-appellants."

"IV. A further error at law was committed when the attachment order was imposed against an entity which plaintiff now claims was non-existent."

{¶ 2} Appellant Lakeshore Citgo assigns the following errors for our review:

"I. The trial court erred when failing to grant defendant Sofien Saad's motion for a directed verdict, pursuant to Civ.R. 50(A)(4), where there was no evidence whatsoever permitting the Court to find a piercing of the corporate veil, which it never found, yet finding Sofien Saad personally liable for corporate debt."

¹Appellant Lakeshore Citgo, formerly known as Saad Oil, Inc. and Cleveland Oil, Inc. is solely owned by Sofien Saad. Appellant Burton Citgo is presently owned by Muhammed Muntaser; it is known as A&M 87th Inc., aka A&M Citgo and A&M, Inc. Prior to February 12, 2002, it was co-owned by Sofien Saad.

“II. The trial court erred when failing to grant defendant Sofien Saad’s motion for a directed verdict, pursuant to Civ.R. 50(A)(4), where the evidence irrefutably demonstrated Sofien Saad never ratified the wrongful acts of his brother, Saad Saad, likewise Cleveland Oil, Inc. and Saad Oil, Inc. did not ratify Saad Saad’s acts.”

“III. The trial court erred when failing to grant defendant Sofien Saad’s motion for a directed verdict, pursuant to Civ.R. 50(A)(4), when the court ignored the ‘two innocent party rule.’”

“IV. The trial court improperly awarded plaintiff attorney fees against Cleveland Oil, Inc. and Sofien Saad, in violation of the ‘American Rule’ and awarded fees without legal justification.”

“V. The trial court committed prejudicial error and abused its discretion when it denied Sofien Saad’s appropriate motion for a continuance of the trial.”

{¶ 3} Having reviewed the record and pertinent law, we affirm the trial court’s decision against: Lakeshore Citgo, its successors and assigns; Sofien Saad and Saad Saad, individually; Saad Oil, Inc.; and Cleveland Oil, Inc. We reverse the judgment against Burton Citgo, A&M 87th Inc. aka A&M Citgo and A&M Inc., its successors and assigns. We enter judgment for A&M 87th Inc. aka A&M Citgo and A&M, Inc., its successors and assigns. The apposite facts follow.

{¶ 4} Appellee Western Union is in the business of, among other things, selling money orders to consumers through express money order trust agents. In the beginning, Muhammed Muntaser and Sofien Saad each owned 50% of Burton Citgo. Sofien Saad actively managed the gas station, while Muhammed Muntaser was a silent partner, who received \$3,000 per month.

{¶ 5} Sofien Saad also wholly owned Lakeshore Citgo. Originally, the second gas station was operated under the name Saad Oil, Inc., which eventually became Cleveland Oil, Inc. Sofien Saad's, younger brother, Saad Saad actively managed both gas stations.

{¶ 6} On or about April 26, 2001, Michael Headley, then director of marketing for Western Union, met with Saad Saad regarding the establishment of express money order trust agencies for the two gas stations. At the time, Saad Saad represented that his name was Asad Saad. In actuality, Asad Saad was the father of Sofien and Saad. Saad Saad also represented that he wholly owned both gas stations. In addition, Saad Saad, then age thirty-four, represented that his birthday was October 15, 1946. Headley never verified any of Saad Saad's representations.

{¶ 7} Ultimately, documents for Money Order Trust Agreements and Money Order Personal Indemnity and Guarantees were prepared for both gas stations. In Headley's presence, Saad signed the instrument in the name of his father, Asad Saad, and witnessed the documents as Saad Saad. As a result, a money order machine was delivered to each gas station and both locations began offering money orders for sale.

{¶ 8} On or about February 12, 2002, Muhammed Muntaser purchased Sofien Saad's interest in the Burton Citgo, thus becoming its sole shareholder.

Thereafter, Muhammed Muntaser's son, Muntaser Muntaser, ("Victor"),² began actively managing the gas station.

{¶ 9} On November 19, 2002, Western Union sued both Burton Citgo and Lakeshore Citgo. The complaint alleged, among other things, breach of trust agreement, breach of fiduciary duty, and conversion.

{¶ 10} As against Burton Citgo, the complaint specifically alleged that during the period of September 30, 2002 through October 6, 2002, Burton Citgo issued Western Union money orders for personal or corporate purposes without receiving contemporaneous payments and failed to remit trust funds according to the agreement. The complaint specifically alleged that Burton Citgo failed to remit approximately \$87,313.55 in money order trust funds.

{¶ 11} As against Lakeshore Citgo, the complaint specifically alleged that during the period of November 12, 2001 through November 18, 2001, Lakeshore Citgo issued Western Union money orders for personal or corporate purposes without receiving contemporaneous payments and failed to remit trust funds according to the agreement. The complaint alleged that Lakeshore Citgo failed to remit approximately \$23,992.31 in money order trust funds.

{¶ 12} The trial court granted Western Union's motion for order of attachment without notice of hearing and imposed the order the same day against the named defendants. Burton Citgo filed its answer, denying involvement and filed a third-party

²At trial, Muntaser Muntaser testified that everyone refers to him as Victor.

complaint against Sofien Saad. Burton Citgo also sought indemnification from Sofien Saad for any damages that were determined to be due.

{¶ 13} On May 2, 2003, Western Union amended its complaint to name A&M 87th Inc., also known as A&M Citgo and A&M, Inc., as the lead defendant.³ In the amended complaint, Western Union also joined Sofien Saad, Saad Saad, and Cleveland Oil as defendants. In addition, Western Union alleged that new party defendant Saad Saad falsely represented to Western Union that he was Asad Saad, that he was the sole owner and president and was an authorized representative of both Burton Citgo and Lakeshore Citgo.

{¶ 14} Further, the amended complaint alleged that Saad Saad forged the name of his father, Asad Saad, to the Personal Indemnity and Guaranty Agreements

{¶ 15} in order to defraud and mislead Western Union with respect to the true credit worthiness of the gas stations. Finally, Western Union alleged the defendants Asad Saad, Sofien Saad, either individually or on behalf the companies, consented to or acquiesced to Saad Saad's fraudulent activities and also ratified said activities.

{¶ 16} Thereafter, all defendants, except Saad Saad, answered Western Union's amended complaint. On November 26, 2004, a default judgment was entered against Saad Saad.

{¶ 17} On December 3, 2007, after numerous continuances, a bench trial commenced. At trial, Saad Saad testified that he contacted a Western Union agent

and indicated that he wanted to sell money orders at the gas stations. According to Saad Saad, he met with Western Union agent Michael Headley and originally gave his correct name, but was not credit worthy. Saad Saad then gave his father's name, social security number, and birth date.

{¶ 18} Saad Saad admitted that he represented to Headley that he was president of the companies, that he forged his father's signature on the trust agreements, and then witnessed the signature under his name. Saad Saad testified that he forged his father's name and witnessed the signature in the presence of Headley.

{¶ 19} Saad Saad testified that shortly thereafter, money order machines were delivered to each gas station. He began selling money orders to the public, but also began issuing money orders to pay personal and business expenses for the gas stations. Saad Saad stated that after a few months of failing to remit funds to Western Union, the money order machine at the Lakeshore Citgo was repossessed. Saad Saad stated that after the Lakeshore Citgo's machine was repossessed, he began using the machine assigned to the Burton Citgo to pay personal and business expenses.

{¶ 20} Saad Saad maintained that he took all the aforementioned actions without his brother's knowledge and authority. He further maintained that the debts incurred as a result of the improper use of the machines rightly belong to him.

³Western Union did not sue Muhammed Muntaser individually.

{¶ 21} Sofien Saad, who physically did not appear for trial, testified by way of his deposition, which was read in court. According to Sofien Saad, he never authorized his brother to get the money order machines and had actually advised him against getting the machines. Further, Sofien Saad stated that he never authorized his brother to pay personal or store expenses through the money order machines and maintained that he did not know that the payments had occurred.

{¶ 22} Finally, Sofien Saad stated that prior to selling his half interest in the Burton Citgo and taking over full management of the Lakeshore Citgo, he only went into each gas station once a week. Sofien Saad admitted that he had seen the money order machines, but believed that Saad Saad had contracted for them in his own name.

{¶ 23} Western Union's Michael Headley testified at trial and confirmed that he met with Saad Saad regarding the money order machines. According to Headley, Saad Saad introduced himself as Asad Saad and gave his birthday as October 15, 1946. Headley stated that he did not ask for any identification.

{¶ 24} Headley testified that he could not recall whether a credit application for the machines in the name of Saad Saad was ever denied. Headley testified that he could not explain how Saad Saad could have signed his father's name and also witnessed the signature.

{¶ 25} At trial, Muhammed Muntaser testified that prior to February 12, 2002, the date he purchased Sofien Saad's interest, he was a silent partner at Burton

Citgo. Muntaser testified that Sofien Saad was responsible for the active management of the gas station and paid him \$3,000 a month. Muntaser testified that as long as Sofien Saad paid him \$3,000 each month, he did not concern himself with the day-to-day operation of the gas station.

{¶ 26} Muntaser further testified that while he was a silent partner, he only went to the Burton Citgo gas station once a month. Muntaser stated that he did not become aware of the money order machines and attendant issues until after he bought Sofien Saad's interest in the station.

{¶ 27} Muntaser's son, Victor Muntaser, testified that he began managing the Burton Citgo the day after his father bought out Sofien Saad's interest. Victor testified that while conducting an inventory prior to the purchase, he noticed a money order machine under a counter and inquired of Sofien Saad about its status. Victor testified that Sofien Saad indicated that he was taking the machine with him and advised him that he would need to submit his own application to Western Union if he wanted to sell money orders.

{¶ 28} Victor testified that he considered submitting an application to sell money orders, but decided against it after several employees indicated that the gas station sold only about one money order a week. Victor testified that after taking over the gas station no money orders were sold at the location.

{¶ 29} Victor testified that shortly after taking over Burton Citgo, he received a box containing blank money orders. He immediately contacted Western Union, who

indicated that the blank money orders should have been shipped to the Lakeshore Citgo. Victor testified that he informed Western Union that his father was now the sole owner of the Burton Citgo and that money orders were no longer being sold. Victor testified that Western Union advised him that Sofien Saad would pick up the box containing the blank money orders. Victor stated that about a week later, Sofien Saad's girlfriend picked up the box.

{¶ 30} Victor testified that approximately a month later, he received another box containing blank money orders. Once again, he contacted Western Union, who again advised him that the box should have been shipped to the Lakeshore Citgo gas station. Victor testified that Western Union assured him that the situation would be resolved.

{¶ 31} Victor further testified that in June 2002, he noticed on the company's bank statement that the sum of \$712 had been deducted from the account. He contacted the bank, that indicated that Western Union initiated the deduction. When he contacted Western Union, they indicated that he was being charged for a money order machine. Victor testified that he reminded Western Union that Burton Citgo did not sell money orders.

{¶ 32} Victor testified that subsequent to the conversation, Western Union issued a partial refund of \$60, which represented a monthly service charge of \$15 and advised him that Sofien Saad would refund the balance. Victor testified that

shortly thereafter he learned that Western Union had frozen Burton Citgo's vendors bank account.

{¶ 33} At the close of the evidence, each defendant moved for a directed verdict. Thereafter, on January 10, 2008, the trial court issued a journal entry, which entered judgment against Cleveland Oil, formerly known as Saad Oil, Inc., doing business as Lakeshore Citgo, Saad Saad, and Sofien Saad. The trial court entered judgment against A&M 87th Inc., doing business as A&M Citgo and A&M, Inc.

{¶ 34} On March 4, 2008, the trial court awarded damages in favor of Western Union and against Cleveland Oil, formerly known as Saad Oil, Inc., doing business as Lakeshore Citgo, Saad Saad, and Sofien Saad in the principal amount of \$111,048.27, plus prejudgment interest in the amount of \$38,165.43, plus attachment bond premium of \$11,100.00, plus post-judgment interest and costs.

{¶ 35} The trial court awarded damages in favor of Western Union and against A&M 87th, Inc., doing business as A&M Citgo and A&M, Inc. in the principal amount of \$87,055.96 plus prejudgment interest in the amount of \$30,814.32, plus attachment bond premium in the amount of \$11,100.00, plus post-judgment interest.

{¶ 36} After a hearing on the matter, on April 24, 2008, the trial court awarded attorney fees to Western Union in the amount of \$135,043.89.

Directed Verdict

{¶ 37} We will address appellants’ assigned errors out of sequence and together where appropriate. In the instant appeal, both Burton Citgo and Lakeshore Citgo argue that the trial court erred in denying their respective motions for directed verdict.

{¶ 38} Under Civ.R. 50(A)(4), a motion for directed verdict should be granted when, after construing the evidence most strongly in favor of the party against whom the motion is directed, the reviewing court finds that reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to the non-moving party.⁴

{¶ 39} A motion for directed verdict raises the legal question of whether the plaintiff presented evidence legally sufficient to submit the case to the jury.⁵ When ruling on a motion for a directed verdict, the court must not consider the weight of the evidence or the credibility of the witnesses.⁶ “If there is substantial competent evidence to support the party against whom the motion is made, upon which evidence reasonable minds might reach different conclusions, the motion must be denied.”⁷

⁴*Wagner v. Midwestern Indemnity* (1998), 83 Ohio St.3d 287, 294.

⁵*Id.*

⁶*Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 679.

⁷*Id.*

{¶ 40} However, when the trial court after construing the evidence most strongly in favor of the non-moving party, finds that reasonable minds could reach but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court must grant the motion.⁸

Burton Citgo

{¶ 41} In the instant case, Western Union's claim against Burton Citgo is based on the breach of the Money Order Trust Agreements fraudulently procured by Saad Saad, while he actively managed both gas stations. Western Union's claim against Burton Citgo is premised on ratification of Saad Saad's fraudulent actions. However, the evidence at trial failed to establish ratification on the part of Burton Citgo or Muhammed Muntaser. Western Union admits that any money owed to it would have occurred after Muntaser became the sole owner of Burton Citgo. Consequently, Western Union would have to show some benefit to Burton Citgo and ratification by Muntaser.

{¶ 42} Ratification is effectuated where the principal, with full knowledge of the fact, conducts himself in a way that manifests his intention to approve an earlier act performed by his agent that did not bind him.⁹ The consequences of ratification are

⁸Civ.R. 50(A)(4).

⁹*Chase Bank of Ohio v. Mentor Food Mart* (June 28, 1991), 11th Dist. No. 90-L-14-055, citing *Meyer v. Klensch* (1961), 114 Ohio App. 4; *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 274.

the same as if the original act had been authorized.¹⁰ Thus, it is well settled that full knowledge of the unauthorized act and of all material matters related to it is essential to a valid ratification.¹¹

{¶ 43} Here, the undisputed testimony at trial established that Saad Saad fraudulently entered into the contract with Western Union for the money order machines while Muhammed Muntaser was a silent partner and not active in the day-to-day operation of the gas station. Muhammed Muntaser testified that while he was a silent partner, he only went into the gas station once a month and that as long as Sofien Saad paid him \$3,000 per month, he did not concern himself with the day-to-day operation. Muntaser testified that he had no knowledge of the money order machines.

{¶ 44} It is undisputed that Muntaser knew nothing about the machines during his time as a silent partner; accordingly, he could not have ratified Saad Saad's fraudulent and unauthorized actions. Nor does Muntaser's action after acquiring full control of the gas station establish ratification of Saad Saad's actions.

{¶ 45} First, Victor Muntaser testified that he noticed the money order machine while conducting inventory prior to his father purchasing the remaining interest in

¹⁰Id. See also Restatement of the Law 2d, Agency (1984), Section 82, Comment b.

¹¹*Burns v. Prudential Secs., Inc.*, 167 Ohio App.3d 809, 2006-Ohio-3550, citing *Master Commodities, Inc. v. Texas Cattle Mgmt. Co.* (10th Cir. 1978), 586 F.2d 1352, 1359-1360.

Burton Citgo. Victor testified that after he inquired about the machine, Sofien Saad took the machine with him to the Lakeshore Citgo.

{¶ 46} Second, after Muntaser became the sole owner of Burton Citgo and began receiving blank money orders from Western Union, Victor immediately notified Western Union that Burton Citgo did not sell money orders. The Burton Citgo received two such boxes and both times Victor immediately notified Western Union, who indicated that the boxes should have been sent to Lakeshore Citgo.

{¶ 47} Third, when Victor discovered that Burton Citgo's bank account was being debited for a monthly service charge, he immediately contacted Western Union, who refunded the charge. Victor also notified Western Union when he discovered that \$712 was deducted from the company's account and Western Union advised him that Sofien Saad would issue a refund.

{¶ 48} We conclude that none of the above actions taken while Muntaser was a silent partner or after he became sole owner of Burton Citgo are indicative of ratification of Saad Saad's fraudulent actions. Although the evidence established Muntaser's lack of knowledge, his subsequent actions amounted to a repudiation of Saad Saad's fraudulent actions. Ratification may sometimes be implied where the corporation fails to repudiate an unauthorized contract within a reasonable period of time.¹² Here, the evidence established that Victor immediately notified Western

¹²*Campbell v. Hospitality Motor Inns, Inc.* (1986), 24 Ohio St.3d 54.

Union that Burton Citgo did not sell money orders when he received the first box of blank money orders.

{¶ 49} Moreover, Burton Citgo did not derive a benefit from the fraudulent activities. At trial, the following exchange took place:

“The Court: Let me back you up a little bit. Prior to the transfer of the machine, how much do you attribute as being monies generated out of the Burton store? Presupposing for purposes of argument, the day before on February 12, 2002, they discovered the machines when they did the inventory and it was out of there effective February 13th when the Muntaser family took it over, prior to that how much money is attribut-able to the Burton store?

“Mr. Cook: The benefit to the Burton store - - I would say, your Honor, I have no evidence that any of the money orders issued directly benefitted the Burton store.”¹³

{¶ 50} Here, Western Union clearly admitted that none of the money orders issued directly benefitted Burton Citgo.¹⁴ In addition, Burton Citgo’s lack of knowledge and subsequent actions, which was tantamount to repudiation of the fraudulent contract, clearly fails to establish ratification. As such, the trial court should have granted Burton Citgo’s motion for directed verdict. Accordingly, we sustain Burton Citgo’s first assigned error.

¹³Tr. 280-281.

¹⁴This court notes that the facts of this case are irrelevant to any matters involving Burton Citgo between the years 1997 and February 12, 2002. Western Union admitted in its brief and during oral argument that no monies were generated at the Burton Citgo that is owed to it; however, monies owed to Western Union were generated from the money order machine once located at the Burton Store but moved to Lakeshore Citgo in February 2002 around the time that Muhammed Muntaser became the sole owner of Burton Citgo.

{¶ 51} Because of our disposition of Burton Citgo's first assigned error on the issue of ratification, the remaining assigned errors raised by Burton Citgo are moot.

Lakeshore Citgo

{¶ 52} Lakeshore Citgo's first four assigned errors raise issues regarding the trial court's denial of their motion for directed verdict. We conclude that Sofien Saad, as sole owner of Lakeshore, ratified his brother's fraudulent actions for several reasons.

{¶ 53} First, although Sofien Saad testified that he never authorized his brother to get the money order machines, the evidence indicates that he, unlike the Muntasers, possessed knowledge of their acquisition. Although Sofien Saad testified that he had advised his brother against getting the machines, he also testified that after Western Union delivered the machines, they began using it.¹⁵ Consequently, by acquiescing, Sofien Saad ratified the fraudulent contract.

{¶ 54} As previously noted, ratification is the affirmance by a person of a prior act that did not bind him but which was done or professedly done on his account whereby the act, as to some or all persons, is given effect as if it was originally authorized by him.¹⁶ Thus, Sofien Saad ratified Saad Saad's fraudulent contract because he had full knowledge of the facts and began conducting himself in a way

¹⁵Tr. 52.

¹⁶*Illinois Controls, Inc. v. Langham* (1994), 70 Ohio St.3d 512, 522.

which manifested his intention to approve Saad Saad's actions in utilizing the machines.¹⁷

{¶ 55} Second, not only did Sofien Saad possess knowledge of the machines, but knowingly benefitted from the machines. Sofien testified that Lakeshore Citgo generated revenues from the general sales of money orders. Sofien Saad also testified that money orders were issued to pay business debts and operating expenses of the gas station.¹⁸

{¶ 56} At trial, the evidence established that from September 2002 through October 13, 2002, Lakeshore Citgo issued approximately 338 money orders using the machine that Sofien Saad had taken with him after selling his interest in the Burton Citgo gas station. The evidence showed that Lakeshore Citgo issued these money orders without remitting the corresponding funds to Western Union.

{¶ 57} Further, the evidence established, through copies of money orders entered into evidence, that in a period of less than a month, Lakeshore Citgo issued money orders in the amount of \$27,401.91 to Countrywide, their gasoline supplier, issued money orders to pay the Cuyahoga County Treasurer, and issued money orders to pay numerous other creditors of Lakeshore Citgo.

¹⁷See *Bailey v. Midwestern Ent., Inc.* (1995), 103 Ohio App.3d 181; see, also, *Illinois Controls*, supra; *Testa v. Roberts* (1988), 44 Ohio App.3d 161, 165.

¹⁸Tr. 44.

{¶ 58} During this same period, Lakeshore Citgo also issued a money order in the amount of \$2,740 to Statler Arms, Inc. to pay for Sofien Saad’s rent. In addition, Lakeshore Citgo issued a money order in the amount of \$400 to Mercedes Benz of North Olmsted to pay for repairs to their mother’s automobile.

{¶ 59} Construing the evidence most strongly in favor of Lakeshore Citgo, reasonable minds can come only to the conclusion that Sofien Saad, as principal, ratified Saad Saad’s fraudulent conduct with knowledge of the facts and conducted himself in a way that manifested his intention to ratify Saad Saad’s actions in issuing the money orders without remitting corresponding funds to Western Union. Consequently, the trial court did not err when it denied Lakeshore Citgo’s motion for a directed verdict.

{¶ 60} Nonetheless, Lakeshore Citgo argues the trial court ignored the “two innocent party defense.” We are not persuaded.

{¶ 61} The two innocent party rule states that if one of two innocent parties must suffer a loss, the loss must be borne by the party who could have prevented the loss or the party who rendered the injury possible.¹⁹

{¶ 62} In the instant case, Lakeshore Citgo argues that Western Union’s agent, Headley, facilitated the events leading to their loss and Sofien Saad was completely

¹⁹*Delorean Cadillac v. Weaver* (Oct. 2, 1997), Cuyahoga App. No. 71827, citing *Hillside Dairy Co. v. Cleveland Trust Co.* (1944), 142 Ohio St. 507.

blameless. However, Lakeshore Citgo's assertions is not borne out by the foregoing discussion.

{¶ 63} Assuming that Headley turned a blind eye to Saad Saad's representations that he was Asad Saad, that his birthday was October 15, 1946, and that he was the duly authorized president of the corporation, Sofien Saad could have disaffirmed the contract, but chose otherwise.

{¶ 64} Further, as borne out by the above discussion, Sofien Saad proceeded to ratify the fraudulently acquired contract by utilizing and benefitting from the money order machines. Further, Sofien Saad inappropriately utilized the machine for Lakeshore Citgo's benefit, as well as for personal benefit, all at the expense of Western Union. Consequently, the "two innocent party defense" has no bearing on the instant matter. Accordingly, we overrule Lakeshore Citgo's first four assigned errors.

Attorney Fees

{¶ 65} In the fifth assigned error, Lakeshore Citgo argues the trial court erred in awarding attorney fees to Western Union. We disagree.

{¶ 66} The awarding of attorney fees is within the sound discretion of the trial court.²⁰ Therefore, an award of attorney fees will only be disturbed upon a finding of an abuse of discretion.²¹

²⁰*R.C.H. Co. v. 3-J Machining Serv.*, Cuyahoga App. No. 82671, 2004-Ohio-57, citing *Tovar v. Tovar* (Nov. 10, 1993), Cuyahoga App. No. 63933.

{¶ 67} An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.²² When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court.²³

{¶ 68} At the outset, the presumption of validity and regularity attends the court's determination that the fees were reasonable.²⁴ With this standard in mind, we review the matter before us.

{¶ 69} In the instant case, the Money Order Trust Agreements central to this appeal provides for an award of attorney fees to the prevailing party. The agreement reads in pertinent part as follows:

“Indemnification; Limitation of Damages. Seller shall reimburse, indemnify and hold IPS, its parents, subsidiaries, affiliates, directors, officers, employees and assigns harmless from all losses, claims, demands, actions, suits, proceedings or judgments, including costs, expenses and reasonable attorney's fees incurred by IPS resulting, in whole or in part, from any violation of this agreement****”²⁵

{¶ 70} In addition to the plain reading of the contract, the trial court conducted a hearing and Western Union presented the testimony of an expert witness, who

²¹Id.

²²*State v. Clark*, 71 Ohio St.3d 466, 1994-Ohio-43.

²³*In re Jane Doe I* (1991), 57 Ohio St.3d 135.

²⁴*Reminger & Reminger Co., L.P.A. v. Fred Siegel Co., L.P.A.* (Mar. 1, 2001), Cuyahoga App. No. 77712.

²⁵Trial Ex. 50, 51.

opined that the fees were reasonable. As such, we find no abuse of discretion in the trial court's award of attorney fees. Accordingly, we overrule Lakeshore Citgo's fifth assigned error.

Trial Continuance

{¶ 71} In the sixth assigned error, Lakeshore Citgo argues the trial court abused its discretion when it denied its motion to continue the trial. We disagree.

{¶ 72} The standard of review for the denial of a motion for continuance is whether the trial court abused its discretion.²⁶ An abuse of discretion is more than an error of law; it implies an attitude by the trial court that is arbitrary, capricious, or unconscionable.²⁷

{¶ 73} The appellate court must weigh the potential prejudice to a defendant against the trial court's right to control its own docket and the public's interest in the prompt and efficient dispatch of justice.²⁸ In evaluating a motion for a continuance, a court should note inter alia: the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstances that give rise to the request for a

²⁶*McCormack v. Banarjee* (April 6, 2000), Cuyahoga App. Nos. 76112 and 76153.

²⁷*Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

²⁸*State v. Unger* (1981), 67 Ohio St.2d 65.

continuance; and other relevant factors, depending on the unique facts of each case.²⁹

{¶ 74} In the instant case, the record reveals that Sofien Saad's motion for continuance was filed thirteen days prior to trial. The record also reveals that the trial was previously set and rescheduled six times. In addition, the matter had been pending for over five years at the time Sofien Saad requested the continuance.

{¶ 75} We conclude the trial court properly denied the motion to continue the trial. We also conclude that Sofien Saad was not prejudiced because he was represented by counsel throughout the trial and his deposition testimony was read into evidence. Accordingly, we overrule Lakeshore Citgo's sixth assigned error.

{¶ 76} Judgment affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

It is ordered that appellants and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

²⁹Id. at 67-68.

PATRICIA ANN BLACKMON, JUDGE

KENNETH A. ROCCO, P.J., and
ANN DYKE, J., CONCUR