DOI: https://doi.org/10.17816/RJLS642089

Falsification of evidence as a form of manifestation of lies in civil and arbitration proceedings

O.A. Sukhorukova

Voronezh State University, Voronezh, Russia

ABSTRACT

The article considers the problem of falsification of evidence in civil and arbitration proceedings. Along with false information about the facts of the dispute, presented to the court by the parties and third parties in their explanations, intentional distortion of the circumstances of the case may also manifest itself in the form of falsification of evidence. The work substantiates the need to include both material and intellectual forgery in the concept of falsification of evidence. The emphasis on both methods of forgery is due to the standpoint of the Supreme Court of the Russian Federation, which declares that only material forgery constitutes falsification, which seems to be an erroneous approach. Procedural response measures are also proposed in relation to persons who submit false evidence. Particular emphasis is placed on the need for an appropriate procedural response to the facts of "complicity" in falsification by representatives of persons participating in the case, up to and including the application of procedural sanctions to them and disciplinary measures against barristers.

Keywords: reliability of evidence; falsification of evidence; material forgery; intellectual forgery; truth; procedural sanctions; exclusion of evidence.

To cite this article

Sukhorukova OA. Falsification of evidence as a form of manifestation of lies in civil and arbitration proceedings. *Russian journal of legal studies*. 2024;11(4):101–106. DOI: https://doi.org/10.17816/RJLS642089

Received: 20.11.2024 **Accepted:** 05.12.2024 **Published online:** 29.12.2024

УДК 347.94

DOI: https://doi.org/10.17816/RJLS642089

Фальсификация доказательств как форма проявления лжи в гражданском и арбитражном процессе

О.А. Сухорукова

Воронежский государственный университет, Воронеж, Россия

АННОТАЦИЯ

В статье рассматривается проблема фальсификации доказательств в гражданском и арбитражном процессе. Наряду с ложными сведениями о фактах спора, которые стороны и третьи лица представляют суду в своих объяснениях, намеренное искажение обстоятельств дела может проявляться и виде фальсификации доказательств. Обосновывается необходимость включения в понятие фальсификации доказательства как материального, так и интеллектуального подлога. Акцентирование внимания на обоих способах подлога обусловлено позицией Верховного Суда РФ, согласно которой фальсификацию образует только подлог материальный, что представляется ошибочным подходом. Предлагаются также меры процессуального реагирования в отношении лиц, приобщающих подложные доказательства. Особо подчеркивается необходимость надлежащей процессуальной реакции на факты «соучастия» в фальсификации представителей лиц, участвующих в деле, вплоть до применения к ним процессуальных санкций и дисциплинарных мер в отношении адвокатов.

Ключевые слова: достоверность доказательств; фальсификация доказательств; материальный подлог; интеллектуальный подлог; истина; процессуальные санкции; исключение доказательства.

Как цитировать

Сухорукова О.А. Фальсификация доказательств как форма проявления лжи в гражданском и арбитражном процессе // Российский журнал правовых исследований. 2024. Т. 11. № 4. С. 101–106. DOI: https://doi.org/10.17816/RJLS642089

Рукопись получена: 20.11.2024 **Рукопись одобрена:** 05.12.2024 **Опубликована online:** 29.12.2024

Lie has become a companion of today's court proceedings, and this is a reality that has to be acknowledged, but cannot be tolerated if we want to maintain justice as the basis of the rule of law. Here, we agree with Immanuel Kant, who wrote:

Truthfulness in testimony, which can in no way be avoided, is a formal duty of a man in relation to everyone, no matter how great the resulting harm for him or for someone else; and, although, I do not do injustice to the one who forces me to testify, without having the right to do so, if I distort the truth, nevertheless, with such a distortion, which must therefore be called a lie (even if not in the legal sense), I violate the duty in general in its most essential parts: that is, insofar as it depends in me, I contribute to the fact that no statements (testimonies) are accepted in good faith at all and that, consequently, all contractual rights are destroyed and void; and this is an injustice in relation to all mankind in general.

Thus, the definition of a lie as intentionally false testimony against another man does not require an additional thought that the lie must necessarily harm another man, as lawyers require for its complete definition (*mendacium est falsiloquium in praejudicium alterius*). A lie always harms someone, if not an individual, then humanity in general, for it makes the very source of law unusable [1, p. 73].

In this sense, no legitimation of lies is acceptable from the point of view of the idea of justice and, therefore, law must absolutely not tolerate lies in court. Instead, we see an inappropriately liberal approach to the parties and third parties in civil and arbitration proceedings, where their false explanations of the facts of the dispute do not entail any serious legal consequences, at least such consequences, if threatened, that would have some preventive effect up to and including criminal liability for false testimony. We obviously need to revise this approach.

However, false explanations are not the only type of lie in court. Another significant manifestation of it is the falsified evidence. In terms of criminal law, we can say that this type represents a much more socially dangerous act as by distorting the facts in explanations, we only create a false perception of reality with a judge; and, for example, by fabricating documents, we also "retroactively remake" this reality by distorting it in historical memory. And this is not an exaggeration. What happens today will be judged by the documents and evidence that will be discovered tomorrow, and then it will be almost impossible to discern truth from lies. But let's go back to the issues of the proceedings.

The Civil Procedure Code of the Russian Federation (the "Russian Civil Procedure Code") includes Article 186. It provides that if a petition is filed that evidence in the case has been forged, the court may commission an expert examination to verify this claim or propose that the parties submit other evidence.[1]

Article 161 of the Arbitration Procedure Code of the Russian Federation (the "Russian Arbitration Procedure Code") provides a more detailed regulation, namely:

1. If a party to a case files a written petition to an arbitration court in relation to falsification of evidence submitted by another party to the case, the Court shall:

1) Explain the criminal law consequences of such petition;

2) Exclude the challenged evidence from the body of evidence in the case with the consent of the person who submitted it;

3) Validate the petition in falsification of evidence, if the person submitting it objects to its exclusion from the body of evidence in the case.

In this case, the arbitration court acting under the federal law validates the petition in falsification of evidence, including an expert examination, requests other evidence or takes other measures.

2. The arbitration court shall record the results of consideration of the petition in falsification of evidence in the court transcript.[2]

It seems that both Codes do not provide a concept of false or falsified evidence respectively.

In legal literature, there is a conventional idea of falsified evidence as a document that does not correspond to reality as it is forged to look like a real one or the content of a real document is forged.

In the first case, we refer to intellectual forgery, which, according to Bonner, is manifested in drawing and issuing a document that is formally accurate (all details are accurately shown), but contains deliberate misrepresentations (e.g. a false invoice (in and in a proper form) for transportation of goods not actually accepted or illegally manufactured goods made by authorized persons) [2, p. 437].

In the second case, we refer to material forgery, i.e. distortion of a real document by means of corrections, additions, etc. In fact, these are the documents that called falsified.

Despite the obvious importance of both forgery types for the correct resolution of the case, in its Resolution No. 46 of the Plenum *in Application of the Arbitration Procedure Code of the Russian Federation in Trial Court Cases* dated December 23, 2021, the Supreme Court of the Russian

[1] Civil Procedure Code of the Russian Federation No. 138-FZ dated November 14, 2002 (as amended in October 26, 2024). URL: https://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=LAW&n=489141&dst=100001#rcyZeUUGij1EVxaH1 (accessed in November 20, 2024).

[2] Arbitration Procedure Code of the Russian Federation No. 95-FZ dated July 24, 2002 (as amended in August 08, 2024). URL: https://www.consultant.ru/cons/cgi/online.cgi?req=doc&rnd=xTRZw&base=LAW&n=482731&cacheid=4C3B9EBE1C401EA59190C792A8AE443C&mode=rubr#8BjbeUUkrD8FmyYr (accessed in November 20, 2024).

Federation states that petitions reasoned by signs of false evidence, i.e. acts resulting in falsification of the form of evidence, including creating a document with the purpose of submitting it to the court (e.g. the time of the document mismatches the dates indicated in it) or making corrections to or amending an existing document (e.g. the forgery of signatures in a document, adding new text into it) shall be considered under Article 161 of the Russian Arbitration Procedure Code. According to Part 3, Article 71 of the Russian Arbitration Procedure Code, petitions in unreliable evidence (e.g. in relation to false facts in the document) shall not be considered under the above-mentioned Article.[3]

Thus, the assertion of unreliability of evidence does not entail any significant consequences for the person filing it, except that such evidence will not be used by the court to establish the relevant facts. When assessing this conclusion of the Supreme Court of the Russian Federation, we should first analyze the use of the concept of unreliable evidence in this context.

The concept of unreliable evidence is provided by Part 3, Article 71 of the Russian Arbitration Procedure Code. From the standpoint the legislature, evidence shall be deemed reliable by the arbitration court if, following its verification and examination, the information in it is found to be true. Schwartz is right when he asserts that "it is impossible to verify evidence as the court has no knowledge of the actual facts. Moreover, the well-known problem of the nature of truth (objective or formal) found by the court is that the facts established by the court will be considered to have actually taken place" [3].

If we proceed with this thought, we note that the reliability test, of course, must verify the facts included in the evidence. However, the court deals with the most probable version of reality from the court's point of view rather than reality itself; therefore, the conclusion about reliability shall be made by the concepts of conclusiveness, consistency, and adequacy. If the evidence allows the court to make an established opinion in the real facts of the case and accept it as the most probable version of events, it finds such evidence reliable, i.e. the evidence, which it is prepared to use as the basis for its findings. A certain degree of assumption will always be there as all judgments about the facts of the case by persons who are not directly involved in it are probabilistic.

To summarize, we can conclude that the reliability of evidence is not an objective characteristic as it only reflects the degree of trust in it by the court. In fact, this meaning is embedded in the term; reliable means worthy to be relied upon.

Thus, false evidence cannot be reliable and, therefore, be used to resolve the case. However, the court may lose trust in evidence due to various reasons, and the most important is the receipt of information in the falsification of evidence. However, a conclusion of the Supreme Court of the Russian Federation that the provisions in falsification are not applicable to petitions in unreliable evidence, e.g. the false facts in written evidence, seems to be unreasonable because such falsification may result from direct falsification by intellectual forgery.

Schwartz conveys a confusing position in this issue in the above-mentioned article. He proposes, for the purposes of separating the concepts of unreliability and falsification, to strictly distinguish the content and form of evidence because he believes that falsification of the form does not at all mean the false content. To support his conclusion, he gives an example of a receipt made under a loan agreement and falsified by the claimant for the proceedings; despite that it had never been actually made, it accurately shows actual relations of the parties.

In this case, it appears that the facts and their effect recorded in the receipt have been incorrectly assessed. The fact is not only that the money was transferred, but also that this transfer was not confirmed by the issuance of that very receipt. It means that the receipt, if there were one, would have confirmed both the signing of the loan agreement, the money transfer and the very fact of the receipt being made. Therefore, any falsification of evidence is not limited to damage to form, but means a distortion of facts, since half-truth is also a lie. Indeed, it actually represents both material and intellectual forgery.

Thus, any inclusion of the falsified evidence shall have negative consequences for the person submitting it. A possible exception is a case where such person acts unconsciously, i.e. he or she does not know that the evidence is false. The legal treatment of the situation should depend in the nature of involvement of the party to the case in such falsification. Thus, if a person who files evidence knows that it is false, regardless of whether he or she is the producer of such evidence, first, criminal proceedings shall be initiated in relation to such person under Article 303 of the Russian Criminal Code; second, procedural measures shall be taken against such person as part of the relevant civil proceedings, namely, the establishment of his or her bad faith and imposition of legal costs and a court fine for contempt of court; third, clearly, such evidence shall be excluded from the body of evidence in the case.

If the person submitting the false evidence does not know that it is false, the only consequence for him or her, if the fact is identified, is the exclusion of the evidence from the body

[3] *On Application of the Arbitration Procedure Code of the Russian Federation in Trial Court Cases*, Resolution No. 46 of the Plenum of the Supreme Court of the Russian Federation dated December 23, 2021. URL: https://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=LAW&n=404664&dst=1000000001&cacheid=077D9D3B08A336606A5F7C0108E405AF&mode=splus&rnd=xTRZw#kHHfeUU4GVp2MWlk2 (accessed in November 20, 2024).

of evidence in the case, i.e. there can be no sanctions against him or her.

Another important question is whether there will be any consequences for the representative of the relevant party, if the fact of false evidence is established. In the proceedings, the representative uses the evidence and the facts of the case that the client has provided to him or her, and it may seem that the identification of false evidence by a party may not affect him or her. But it is actually not the case. If the representative is involved in the falsification (and often it is he or she who initiates it) or even aware of it, there shall be negative consequences for him or her, too. No doubt, the facts of such knowledge or complicity shall be established in a criminal investigation, but it is also possible to address this issue in civil proceedings. For example, if the representative files the evidence that includes conflicting facts of the dispute and, accordingly, provides inconsistent explanations during the proceedings (e.g., at first, such representative claims that the contract was signed by the director of the legal entity and, later, such representative claims that the director did not sign the contract), this may and should be interpreted by the court as an intentional lie and direct contempt; the court shall impose a court fine in the representative and, if he or she has the status of a lawyer, issue of a corresponding special order in disciplinary action against him or her. By the way, the grounds for this are provided by the Code of Legal Ethics. Thus, Clause 1, Article 4 provides that "a lawyer shall, under all circumstances, maintain the honor and dignity inherent in his or her profession"; Clause 1, Article 8 provides that "in his or her professional activities, a lawyer shall act honestly, reasonably, diligently, fundamentally, with due care and promptly perform his or her duties," and, finally, Clause 1, Article 10 provides that "the law and morality in the profession of a lawyer prevails over the will of the client. No wishes or requests of the client aimed at violating the law or rules provided by this Code may be implemented by a lawyer."[4]

In general, it is worth noting that lying in court both by giving false explanations and falsifying evidence, is also an absolute manifestation of contempt; therefore, participants in the proceedings who are caught lying shall be subjected to appropriate sanctions; it is unacceptable to ignore such facts. Moreover, for professional participants in the proceedings, the sanctions should be more severe as compared to those imposed in the parties because they are more aware, or at least should be aware, of the harm to the value-based system of justice that they are encroaching in with such dishonest behavior.

We support the position of Afanasyev, who believes that the deliberate lies of the parties to the case expressed both in actions and deliberate omission is bad faith, a manifestation of abuse of their procedural evidence-related rights and obligations [4, p. 27]. It is high time for the state to seriously consider a tougher position in this issue and a significant improvement of the standard of good faith behavior of the parties to civil litigation.

REFERENCES

1. Kant II. *On the well-known proverb: this may be true in theory, but is not good in practice; II. On the imaginary right to lie out of philanthropy.* Saint Petersburg: A. Benke printing house; 1913. 78 p. (In Russ.)

2. Bonner AT. *Problems of establishing the truth in civil proceedings.* St. Petersburg: Legal book; 2009. 831 p. (In Russ.) EDN: QRIFQR

3. Schwartz MZ. On the issue of falsification of evidence in arbitration proceedings. *Arbitration disputes.* 2010;(3):79–92. (In Russ.) EDN: ULLZKH

4. Afanasyev SF. On the right to lie in a civil procedure and means to level it (including taking into account electronic technologies). *Lawyer.* 2020;(1):22–28. EDN: HSSZTC doi: 10.18572/1812-3929-2020-1-22-28

СПИСОК ЛИТЕРАТУРЫ

1. Кант И. I. Об известной поговорке: это может быть верно в теории, но не годится в практике; II. О мнимом праве лгать из человеколюбия. Санкт-Петербург: типография А. Бенке, 1913. 78 с.

2. Боннер А.Т. Проблемы установления истины в гражданском процессе. Санкт-Петербург: Юридическая книга, 2009. 831 с. EDN: QRIFQR

3. Шварц М.З. К вопросу о фальсификации доказательств в арбитражном процессе // Арбитражные споры. 2010. № 3. С. 79–92. EDN: ULLZKH

4. Афанасьев С.Ф. О праве на ложь в цивилистическом процессе и способах его нивелирования (в том числе с учетом электронных технологий // Юрист. 2020. № 1. С. 22–28. EDN: HSSZTC doi: 10.18572/1812-3929-2020-1-22-28

[4] Code of Legal Ethics. https://fparf.ru/documents/fpa-rf/documents-of-the-congress/the-code-of-professional-ethics-of-lawyer/ (accessed in November 20, 2024).

AUTHOR INFO

Olga A. Sukhorukova, Cand. Sci. (Jurisprudence), associate professor; eLibrary SPIN: 6212-5690;
e-mail: osuhorukova@gmail.com

ОБ АВТОРЕ

Ольга Александровна Сухорукова, канд. юрид. наук, доцент;
eLibrary SPIN: 6212-5690;
e-mail: osuhorukova@gmail.com

DOI: https://doi.org/10.17816/RJLS642089