

Watch Out for Emails Forming Contracts

By James S. Singer, Esq.

In a recent decision by the Middlesex Superior Court entitled *Feldberg, et al. v. Coxall*, the Judge concluded that a series of emails between a buyer and a seller which contained material terms may be sufficient to form a binding contract regarding the sale of real estate.

The issue arose in the context of a *lis pendens*, which is a mechanism to provide notice to third parties, after an appropriate endorsement by a judge, that the subject matter of litigation constitutes a claim of a right to title to real estate. The case involved a claim by a prospective purchase of some vacant undeveloped land in Sudbury for \$475,000. The plaintiff/buyer asserted that a series of emails provides a sufficient basis for an enforceable contract. The defendant/seller disputed that the emails "reflect an offer and acceptance to show a present intent to be bound by the purchase and sale," and also denied the emails constitute a sufficient writing to satisfy the statute of frauds.

Initially, the case is yet another extension of the landmark case decided by the Supreme Judicial Court in 1999 entitled *McCarthy v. Tobin*, where the Court enforced an offer to purchase, notwithstanding the parties' failure to enter into a formal purchase and sale agreement, even though it was specifically required in the offer to purchase. *McCarthy* held that there is an enforceable agreement if the terms are "sufficiently complete and definite" and there is "a present intent of the parties at the time of formation to be bound by those terms." If "the parties have agreed upon all material terms, it may be inferred that the purpose of a final document" is merely to serve as a "polished memorandum" of an already binding contract.

In *Feldberg*, the Court evaluated the exchange of emails over several days and without making a final adjudication, denied the seller's special motion to dismiss.

The lack of a signature was a significant issue in the case, given the Massachusetts statute of frauds, which requires for the sale of land, a writing "signed by the party to be charged therewith." (emphasis added)

Neither party cited any conclusive authority, but the Court found that the plaintiffs/buyers

"have a plausible position," that no signed writing is required. As the Court noted, citing from a Pennsylvania case, "in truth, the Courts have not yet set forth rules of the road for 'the intersection between the seventeenth-century statute of frauds and the twenty-first century electronic mail.'

The Court also addressed the Uniform Electronic Transmission Act, which became effective in Massachusetts in 2004. As the Court noted, it applies to transactions between "parties each of which *has agreed* to conduct transactions by electronic means" (emphasis added). Whether the parties have in fact so agreed "is determined from the context and surrounding circumstances, including the parties' conduct," per the applicable statute quoted by the Court. The Court found "[t]he parties' conduct here in using email to conduct the negotiations in this case arguably constitute an agreement to conduct transactions by electronic means."

The parties in *Feldberg* eventually settled their dispute so we will never know what the final outcome would have been as to whether the Court would have found after trial an enforceable contract in fact existed under the facts of the case.

Significant to the decision is that a Court could construe a binding contract for the purchase of real estate by the exchange of emails ("writings") where all material terms are provided and the parties expressed an intention to be bound even if there is no signed offer to purchase.

Clients must be more careful in their email exchanges to make it clear they do not intend to be bound by *any* agreement that is not on hard paper and actually signed, if that is their desire. It may be wise to insert a general disclaimer to your email signature that there is no intent to be bound by any communication by electronic means and a fully signed written document is required. If you would like Rudolph Friedmann to assist you in developing such language, give us a call.

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