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Careful What You Email — It Could Be a Binding Contract

By Deborah B. Koplovitz

This article aims to give managing agents and boards of directors some guidance about the relevant laws related to emails so that unintended consequences – such as the one hinted at in the title – can be avoided.

Can an Email Be a Binding Contract?

Yes, an email will satisfy the requirement in New York state that certain contracts have to be in writing to be enforceable (known as the "statute of frauds") provided the contents of the email and the signature at the end of the email meet all requirements of the state's General Obligations Law. *Naldi v Grunberg*, 80 A.D.3d 1, 3 (1st Dep't 2010).

This rule developed because in New York, many contract types have traditionally been required to be in writing in order to be enforceable. Examples are real estate sales, leases and other contracts that are longer than one year in length; sales of goods over $500 in value; and other contracts such as those in which one party promises to pay for the debt of another.

It has also come about because of both federal and state laws that provide that an electronic signature can be used in the same way as an original signature on a document. *See e.g.* 15 USC § 7001; New York State's Electronic Signatures and Records Act ("ERSA").

Just what the content of the email must say, and how the email must be signed, however, are factual questions, and the New York State Court of Appeals has not yet ruled on whether, in the context of a real estate transaction, an automatically generated email signature is sufficient, or if the sender must actually retype his or her name above the automatically generated signature.

The Appellate Division, First Department, ruled, "An email sent by a party, under which the sending party's name is typed, can constitute a writing for purposes of … General Obligations Law § 5-701 [b] [4]" *Newmark & Co. Real Estate Inc. v 2615 E. 17 Realty LLC*, 80 A.D.3d 476, 477 (1st Dep't 2011)

When Does the Content of an Email Create a Binding Contract?

Putting aside the issue of whether an email has to contain a retyped name, or if the signature block is sufficient in order for the email to be "signed," we will examine what the con-

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tents of an email require in order to bind the sender (or the sender's principal).

Pursuant to long-standing legal analysis, to form a binding contract there must be a "meeting of the minds." *Farago v Burke*, 262 NY 229, (1933). A meeting of the minds exists when the terms are "sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." *Id.*, citing to *Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584 (1999).

Courts look to the totality of all of the words, phrases and expressions in an email, as well as the objectives they are looking to attain, to determine whether there has been a meeting of the minds. *Stonehill Capital Mgt. LLC v. Bank of the W.*, 28 N.Y.3d 439, 448-449 (2016)

Therefore, provided all the material terms are in an email, it can most definitely constitute a written contract.

The Solution?

Managing agents and board members should use standard caveats in all email correspondence to avoid being faced with a claim that a co-op or condo is now bound by the terms of an email. It is, of course, best to consult with counsel about the specific requirements that should serve as a shield against any claims that an email has created a binding contract.

In general, disclaimers should make it clear to any third party that the material terms have not been agreed to, the discussion remains subject to proper board approval, and the terms discussed can be revoked, rescinded or revised by the board. There are a number of other disclaimers to consider that can help create enough of a barrier to avoid facing a claim of breach of contract.

Remember, while email can be expedient, sometimes the best practice is to pick up the phone and have a discussion the old-fashioned way!