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Civil LITIGATION

# House of frauds

The rule requiring many contracts to be in writing and signed by the party sought to be bound in order to be enforceable is called the "Statute of Frauds." As everyone who has searched Wikipedia knows, that term comes from an Act of Parliament passed in 1677, entitled "An Act for Prevention of Frauds and Perjuries." This rule has been followed ever since as part of the common or statutory law in nearly every modern jurisdiction. As with most rules of law, there are, in certain circumstances, exceptions to the strict rule requiring the writing to be subscribed by a party to be enforceable.

For example, Article 2 of the Uniform Commercial Code governing contracts between merchants provides that, if "within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents", that party is bound unless it gives written notice of objection to its contents within 10 days after receipt. In today's business world, when many people conduct transactions by mobile device — via email or even text — enforceable contracts are made and ultimately performed, and this informality rarely causes any problems.

However, the courts still strictly enforce the statute of frauds with respect to certain types of contracts, and most particularly, contracts for the sale of real property. We recently handled a matter that serves as a cautionary tale for those who use electronic communications when negotiating real

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property contracts. With the names and location changed to protect the innocent and the devious, here is that tale.

Mr. Cairo was named the executor of Mr. Falcon's estate, which included a beautiful waterfront home in Malta, New York. Although Cairo retained counsel to handle the estate administration, against counsel's advice he decided to try to sell the house without a real estate agent in order to save the commission. One of the three prospective buyers, Mr. Gutman, badly wanted the house and in face-to-face meetings, phone calls and emails, pressured Cairo to agree to his offer. Finally, one night Gutman sent Cairo an email (copying the estate's counsel) that restated the offered price but omitted other material terms, and asked Cairo: "Please respond by email that you accepted my offer." Without consulting with counsel, Cairo immediately emailed back to Gutman: "I accept your offer. Please send all documents to my lawyer", but he did not type his name at the end of the email.

To make a long story short, the estate's lawyer deemed the email exchange insufficient to form a contract, and after notifying Gutman and the other potential buyers that formal written contract offers should be submitted by a date certain, Cairo accepted the offer of prospective buyer Mr. Spade. Gutman promptly sued the Falcon estate for specific performance of the alleged contract and put a notice of pendency on the house.

We were retained to represent the estate, and sent a letter to Gutman's attorney informing him that the alleged contract was unenforceable under the statute of frauds and demanding that he discontinue the action and remove the notice of pendency. After Gutman's lawyer demanded that the estate pay Gutman $100,000 to get out of the "contract", we filed a summary judgment motion.

Cairo's first line of defense was based on the well-settled law that an enforceable real estate contract must state the necessary and essential terms of agreement, and that where, as was the case in this matter, an offer was subject to the approval of the estate's attorney and the execution of a formal written contract, the alleged email contract was insufficient. The estate's more fundamental argument, however, was that the emails relied upon by Gutman did not constitute a writing that satisfied the statute of frauds.

In researching the issues, we found that while an exchange of emails could in certain circumstances qualify as a contract that satisfies the statute of frauds, those emails must not only show agreement to the essential terms, but must also be subscribed by the parties. We cited case law that held that an email sent by a party cannot constitute

a writing for purposes of the statute of frauds unless the sending party "subscribed" that writing by his/her inclusion of his/her typed named or electronic signature after the body of the email. As explained in those cases, the addition of the sender's typed name to the email provides the proof that the contract was subscribed by the party to be charged, as required by the New York General Obligations Law. In our case, because Cairo did not type his name or place his electronic signature below his email, it was not subscribed by Cairo and was not a writing for purposes of the statute of frauds.

Gutman backed down and agreed to accept a nuisance settlement, but Cairo also had to pay Spade the costs he incurred as a result of the delay caused by the lawsuit. Although Cairo was able to dodge most of the bullets directed his way, his hair-trigger email response to Gutman put him in a position where he had to pay over $20,000 to Gutman and Spade and incur substantial legal fees. Had Cairo typed his name at the end of his email, he would have been in an even worse position, as he would have been deemed to have agreed to sell the house to both Gutman and Spade.

This costly and painful experience taught Cairo that he should have listened to estate counsel and relied upon the expertise of a real estate agent in order to sell the house without complications. The lessons for the rest of us are that we need to be extremely careful when we conduct contract negotiations on our electronic devices, and that the parties should include their names at the end of their communications (and not rely upon the name/address/phone number blocks automatically generated by their email software) in order to create an enforceable contract.

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