

New York Miscellaneous Reports
ROSENFELD v. ZERNECK, 24143 (2004)
TOMMY ROSENFELD AND DEBORAH GOODSTEIN ROSENFELD, Plaintiffs,
v. MICHAEL
ZERNECK A/K/A MICHAEL VON ZERNECK, Defendants.
24143.
Supreme Court of the State of New York, Kings County.
Decided May 4, 2004.

Plaintiffs were represented by Esanu, Katsky, Korins & Siger, LLP, New York, New York.

Defendant was represented by Harold M. Hoffman, Esq., New York, New York.
HERBERT KRAMER, J.

A great deal can be accomplished over the internet: A few well placed key strokes can send us to exotic places, requisition goods and services, find employment and educate us. Is it possible to make a contract for the sale of real property via e-mail?

Defendant moves for summary judgment dismissing a complaint that seeks specific performance of the contract for the sale of the defendant's home. Defendant argues that the e-mail he sent was merely preliminary and was never intended as the consummate agreement which, he argues, required further discussion. Accordingly, defendant claims that this e-mail did not satisfy the statute of frauds. Although as will be discussed below, the "signature" on the e-mail is valid under our general statute of frauds, the e-mail messages that were exchanged in the instant matter did not create a binding agreement as they lacked a vital term.

After viewing the property, plaintiffs informed the defendant that they "loved the house" and offered a \$3,500,000 cash deal. They followed up with an e-mail to the defendant.¹

Shortly thereafter, defendant and plaintiff had a telephone conversation.

Defendant followed up with the following e-mail that is at the heart of this controversy:²

¹ Dear Michael and Liz, I am glad I had an opportunity to speak with Michael last night. Debbie, Zachary, Noah and I loved your home and its warmth and wish to confirm our firm \$3,500,000 all cash offer, subject To normal property inspections. Moreover, we see no problem with your desire to close about July 1, 2004. This is our best offer and, as you know, it is net of any broker fees. We look forward to hearing from you at your earliest convenience. Best Regards, Tom & Debbie Rosenfeld (Defendant's name address and telephone number were typed in.)

² The subject line recites: "18 Prospect Park West." It is followed by a "date" line and "from" and "to" lines which recite the parties' e-mail addresses and a "cc" line.

Dear Tom & Debbie,

This note is to confirm yesterday's telephone conversation in which I accepted your all cash offer of \$3,525,000 for 18 PPW, with no contingencies for financing or sale of your present residence, to close no later than July 1, 2004.

As we discussed, please contact Liz early next week to schedule your inspection. My attorney will prepare a contract of sale, to be signed after your engineer's report. (What is the contact information for your attorney? Will you be making the purchase jointly? What is your present address?)

We look forward to continuing cordial relations regarding the sale of this very special home to you and your family.

With kind regards, Michael

Thereafter, plaintiffs e-mailed the defendant providing him with the information he requested.

A threshold issue of apparent first impression in this State, which was not raised by either party, is whether the typed signature at the bottom of defendant's e-mail satisfies the requirement that a "writing be subscribed under New York State's general Statute of Frauds (General Obligations Law § 5-701)." *Parma Tile Mosaic & Marble Co., Inc., v. Estate of Short*, 87 N.Y.2d 524, 526 (1996). In *Parma Tile*, the Court of Appeals decided that "the automatic imprinting, by a fax machine, of the sender's name at the top of each page transmitted," *id* at 528, did not "constitute a signing authenticating the contents of the document for Statute of Frauds purposes" because the fax machine "after being programmed to do so, automatically imprinted [the sender's name] on every page transmitted, without regard to the applicability of the Statute of Frauds to a particular document." *Id.* Nor does the intentional programming of the fax machine suffice to demonstrate the senders "intention to authenticate every document subsequently faxed." *Id.*

The fax transmission in *Parma* did not satisfy the Statute of Frauds because there was never any demonstration of the sender's specific intent to authenticate it and not because it was electronically transmitted. Electronic transmissions, are not, in and of themselves incapable of subscription and indeed as the *Parma* Court itself observed, the Statute of Frauds was specifically amended as of September 1994 to say just this. *Id* at fn. 1.³

Here, in contradistinction to the fax machine imprint in *Parma*, we have the defendant's typewritten name upon an e-mail which the defendant acknowledges that he sent. This Court holds that the sender's act of typing his name at the bottom of the e-mail manifested his intention to authenticate this transmission for Statute of Frauds purposes

³ "The legislature amended section 5-701 of the General Obligations Law to provide that 'the tangible written text produced by telex, telefacsimile, computer retrieval or other process by which electronic signals are transmitted by telephone or otherwise shall constitute a writing and any symbol executed or adopted by a party with the present intention to authenticate a writing shall constitute a signing'(General Obligations Law section 5-701[b][4])."

and the copy of the e-mail in question submitted as evidence by the defendant constitutes a sufficient demonstration of same.

In so holding, this Court is aware of a decision in the Second Department which holds that an e-mail memo with a typewritten signature does not satisfy the subscription requirement of the former Statute of Frauds provision contained in the Uniform Commercial Code (UCC 8-319, repealed L. 1997). *Page v. Muze*, 270 A.D.2d 401 (2d Dept. 2000). The rationale for that decision may lie in the fact that the UCC provision, unlike the general statute of Frauds, GOL 5-701[b](4) discussed infra, did not make any accommodation for the realities of doing business in our electronic age. Indeed it is for that very reason that the UCC provision was repealed. See Uniform Commercial Code § 8-113, Official Comment. Indeed, if the general Statute of Frauds, which controls in our case, had not been amended to provide for the subscription of electronically transmitted memoranda, we would be constrained by this decision to hold that this e-mail did not satisfy the subscription requirements.⁴ However, under the General Obligations Law as amended it does and we so hold.

As to the content of the e-mail: Although this e-mail identified the parties and the property and stated the price, it failed to lay out all of the essential terms of the agreement since it did not set forth any understanding as to the amount of the contract deposit *Gibraltar Estates, Inc. v. U.S. Bank N.Y.*, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2000 WL 34251065 (2d Dept. 2004). Nor did it indicate how the parties intended to treat the commercial lease then encumbering the premises.

Accordingly, this Court finds that the parties did not have a meeting of the minds as to the terms of the sale of this premises. The defendant's motion is granted. The complaint is dismissed and the notice of pendency is cancelled.

This constitutes the decision and order of the Court.

Dear Editor,

In this case I was asked to decide, inter alia, whether e-mail messages can be sufficiently subscribed so as to satisfy the general statute of frauds. Since this appears to be a question of first impression in this State, I believe it will be of interest to bench and bar.

Thank you for your consideration of this matter.

⁴ This Court has reviewed the briefs on appeal and the record in *Page*. The e-mail in *Page* was very similar in form to the e-mail at bar, containing a typewritten signature below the body of the letter. Appellant argued that the general Statute of Frauds governed. Disagreeing, the *Page* Court held that the former UCC Statute of Frauds controlled and under that provision the subscription requirement was not deemed to have been satisfied.