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Litigation & Arbitration Group Client Alert: Recent New York Court Decision Confirms That Email Exchanges Can Create Enforceable Agreements

Courts in New York, as elsewhere, encourage litigants and their counsel to reach agreements on the conduct and resolution of litigations. In fact, the practice commentary to New York's Civil Practice Law and Rules ("CPLR") states that such "stipulations are favored by judicial policy." To avoid the uncertainty that might accompany informal, oral agreements, New York's CPLR 2104 requires that stipulations not made in open court or reduced to an order by the court, be "in a writing subscribed by [a party or his or her] attorney."

In today's practice, attorneys routinely reach agreements through email. In a recent decision, the Appellate Division, Second Department, confirmed that emails can satisfy the requirements of CPLR 2104 if (1) they contain all material terms of an agreement, (2) they reflect a "manifestation of mutual accord," and (3) a party or his or her agent (including attorneys) types his or her name in the email with an intent that it be treated the same as a signature. Of particular note about this decision is that the email in question was not simply a routine extension of a discovery deadline, or another ministerial matter. Rather, it memorialized the terms of a settlement agreement that resolved a significant portion of a litigation.

BACKGROUND

Forcelli v. Gelco Corporation involved a three-car traffic accident on the Saw Mill River Parkway. Defendant Mitchell Maller drove one of the cars, which was owned by defendant Gelco Corporation. In January 2011, Gelco and Maller (the "Gelco Defendants") moved for summary judgment, seeking dismissal of all of the claims. In March 2011, the Gelco Defendants agreed to mediate with the plaintiffs. Brenda Greene, a claims adjuster for the Gelco Defendants' insurer also attended. Ms. Greene told plaintiffs' counsel that she had authority to settle the case on behalf of the Gelco Defendants.

The mediation did not result in an immediate settlement, but the parties continued their discussions. On May 3, 2011, Ms. Greene orally offered to settle the case for $230,000. Plaintiffs' counsel orally accepted. Ms. Greene then sent the following email to plaintiffs' counsel:

> Per our phone conversation today, May 3, 2011, you accepted my offer of $230,000 to settle this case. Please have your client executed [sic] the attached Medicare form as no settlement check can be issued without this form.
>
> You also agreed to prepare the release, please included [sic] the following names: Xerox Corporation, Gelco Corporation, Mitchell G. Maller and Sedgwick CMS. Please forward the release and dismissal for my review. ***Thanks Brenda Greene***. (Emphasis added)

Plaintiff Forcelli signed a release the next day. On May 10, however, the Supreme Court issued an order granting the Gelco Defendants' motion for summary judgment, dismissing the claims against them. After the court's decision, the Gelco Defendants "rejected" the settlement, and took the position that "there was no settlement consummated under New York CPLR 2104 between the parties." Plaintiffs sought to enforce the settlement.

EMAILS CAN BE BINDING AGREEMENTS UNDER CPLR 2104

The Second Department began its analysis with a review of CPLR 2104 and general principles of contract law. It concluded that, to be binding, the email in question had to be signed by the party to be bound, contain all material terms of the agreement, and manifest mutual assent of the parties to the terms. The court spent little time on the last two criteria, and instead focused its attention on whether the email had been "subscribed," or signed, within the meaning of CPLR 2104.

In the Second Department's view, Ms. Greene's act of ending her email message with "the simple expression, 'Thanks Brenda Greene,'" was, in effect, a signature. The court contrasted this with a situation in which the "sender's email software has been programmed to automatically generate the name of the email sender, along with other identifying information, every time an email message is sent." The Second Department held that Ms. Greene's email was a subscribed writing within the meaning of CPLR 2104 and was enforceable.

The court left open the possibility that an email containing only a person's signature block, rather than his or her separately typed name, has not been "subscribed" within the meaning of CPLR 2104. If the Second Department does take that position, it would be inconsistent with the First Department's decision in *Williams v. Delsener*, 59

A.D.3d 291 (1st Dep't 2009). In *Williams*, the First Department held that a party was bound by an agreement contained in an email from his counsel that was "signed" with the counsel's signature block, but not a separately typed signature.

The Second Department's decision comports with the norms of litigation practice. Nevertheless, litigants and counsel should make certain that if you are extending or accepting an offer over email that is subject to a condition, such as the execution of a more formal agreement later, your email should explicitly state that condition. If it does not, you run the risk of being bound by the terms set forth in your email.

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