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Corporate Governance Group

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NEW YORK COURT REAFFIRMS THAT E-MAIL CORRESPONDENCE CAN CREATE BINDING OBLIGATIONS – SO LONG AS PARTIES REACH A "MEETING OF THE MINDS"

Last fall, a New York State appellate court held in *Naldi v. Grunberg*[1] that an e-mail can constitute a writing satisfying the statute of frauds "so long as its contents and subscription meet all requirements of the governing statute." In so ruling, the Court followed a line of New York precedent that recognized the adaptability of the statute of frauds in the face of technological innovation. Although one might argue that the *Naldi* Court's holding could technically be limited to the confines of NYS General Obligations Law § 5-703 governing "[c]onveyances and contracts concerning real property," it nonetheless remains a decision of broader application inasmuch as it joins the ever-growing body of case law and legislative initiatives that treat e-mails and other electronic correspondence as having legal impact and binding effect.[2]

Background

On February 9, 2007, Robert Naldi offered (through his broker) to purchase real estate owned by Grunberg 55 LLC located at 15-19 West 55th Street in Manhattan for $50 million. Three days later, Grunberg's broker responded with an e-mail setting forth various proposed terms for the purchase and instructing Naldi's broker to "review with your customer and let me know how you would like to proceed." This e-mail included a "counteroffer" of $52 million and, *crucially*, while warning that "ownership will not take the property off the market," advised that Naldi could have a "first right of refusal on any legitimate, better offer during a 30 day period." The e-mail concluded with an automatically generated signature block containing both the broker's name and the name of his firm.

[1] 80 A.D.3d 1 (1st Dept. 2010).

[2] It should be noted that the appellate court's ruling has been appealed to New York State's highest court.

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Apparently without responding to this counteroffer, Naldi began "costly due diligence on the property." Then, on February 16th, Grunberg's attorney forwarded to Naldi's attorney a draft contract for sale of the property containing (despite the $52 million "counteroffer" proposed in the broker's e-mail) a $50 million purchase price. When Naldi subsequently learned that Grunberg was pursuing a $52 million sale to a third party, he sought to exercise his "right of first refusal." Grunberg rejected Naldi's offer and moved forward with the third party sale.

Naldi promptly sued Grunberg in New York State court, setting forth "a single cause of action … for breach of contract" based on Grunberg's "refusal to honor the right of first refusal allegedly granted" in his broker's e-mail. Grunberg moved to dismiss, arguing in the alternative that: (1) there was no "meeting of the minds" regarding the right of first refusal; (2) the right of first refusal was barred by the statute of frauds because it was contained in an e-mail; (3) his broker's e-mail contained only the brokerage firm's automatically generated signature block rather than an actual signature; and (4) his broker did not have the authority to contractually bind Grunberg. When the lower court denied his motion to dismiss, Grunberg appealed.

The Court's Analysis

The Court began its analysis by rejecting Grunberg's claim that "an e-mail can never constitute a writing that satisfies the statute of frauds" applicable to a real estate transaction.[3] Recognizing that e-mails have become "omnipresent in both business and personal affairs," the Court "reaffirm[ed]" the rulings of other New York State courts that "held in other contexts that e-mails may satisfy the statute of frauds."

The Court premised this reaffirmation on two distinct analytical grounds. *First*, as a matter of statutory interpretation, the Court found that the substantive provisions of the federal Electronic Signatures in Global and National Commerce Act ("E-SIGN")[4] are a part of New York State law "whether or not the transaction at issue is a matter 'in or affecting interstate or foreign commerce.'" In the Court's opinion, New York's passage of the Electronic Signatures and Records Act ("ESRA"),[5] its subsequent amendment in 2002 to conform ESRA's and E-SIGN's definitions of "electronic signature" and the amendment's accompanying statement of legislative intent referencing E-SIGN indicate that the legislature chose to "incorporate the substantive terms of E-SIGN into New York state law." This included "E-SIGN's requirement that an electronically memorialized and subscribed contract be given the same legal effect as a contract memorialized and subscribed on paper."

Second, the Court held that, "[e]ven in the absence of E-SIGN and the 2002 statement of legislative intent," it "would conclude that the terms 'writing' and 'subscribed' in [the statute of frauds] should now be construed to include, respectively, records of electronic communications and electronic signatures." Citing "the vast growth in the last decade and a half in the number of people and entities regularly using e-mail," the Court observed that "[a]s much as a communication originally written or typed on paper, an e-mail retrievable from computer storage serves the purpose of the statute of frauds by providing 'some objective guaranty, other than word of mouth, that there really has been some deal.'" The Court concluded that just as "[t]he writing

[3] *See* NYS General Obligations Law § 703.
[4] 15 USC § 7001 *et seq*.
[5] N.Y. 1999, ch 4, §2, as amended by N.Y. 2002, ch 314, and by N.Y. 2004, ch 437.

and subscription requirements of the statute of frauds have been held flexible enough to accommodate earlier innovations in communications technology, such as the telegram, the telex, and the fax," the "same logic used to reach those results 'justif[ies] a rule that permits e-mail or other electronic media to constitute an acceptable memorandum … .'"

Despite this determination, the Court concluded that Naldi's breach of contract action should have been dismissed because "there was never a meeting of the minds between the parties on the terms of the proposed right of first refusal." The Court viewed Grunberg's $52 million "counteroffer" as "inextricably linked" with the proffered right of first refusal. Because "there was never any tentative agreement on the $52 million figure set forth in the e-mail," Naldi could not claim a right of first refusal based on the $52 million purchase price. Instead, according to the Court, Naldi could only be alleging that he was entitled to a right of first refusal based on the $50 million price set forth in the February 16th draft contract. And, in light of the fact "the latter alleged right of first refusal cannot be pieced together from [Naldi's broker's] e-mail (offering a right of first refusal linked to a $52 million price term) and the subsequently forwarded draft contract (containing a $50 million price term but silent as to any right of first refusal)," the Court determined that the lower court erred in refusing to dismiss Naldi's action.[6]

Conclusion

Dealmakers and their advisors are well-advised to take note of the *Naldi* Court's ruling and the broader legal trend that considers e-mail and other electronic correspondence to carry the same weight as any manually delivered instrument for purposes of the statute of frauds. Although e-mail has greatly enhanced the efficiency and speed of the dealmaking process, cases like *Naldi* make clear that all deal participants must be careful to avoid an overly casual approach to electronic correspondence. For as dealmakers increasingly rely on e-mail and other electronic communication to negotiate terms and conditions, it is likely that courts will become evermore receptive to allowing such communications to create binding obligations.

Postscript

The *Naldi* decision was recently cited in another New York State appellate court decision, *Newmark & Co. Real Estate Inc. v. 2615 East 17 Street Realty LLC*.[7] In this case, a real estate broker sued a landlord to recover a commission fee set forth in an unsigned, but seemingly fully-negotiated (via e-mail), brokerage agreement. The Court ruled that "[a]n e-mail by a party, under which the sending party's name is typed, can constitute a writing for purposes of the statute of frauds." And in contrast to the outcome in *Naldi*, the *Newmark* Court concluded that an e-mail exchange discussing and incorporating revisions to the brokerage agreement and setting forth all relevant terms constituted a "meeting of the minds" when there was no evidence that the landlord "objected to, protested, or rejected" the final e-mail sent by the broker, which incorporated all of the landlord's proposed revisions. It is worth noting that the Court reached this conclusion even though the landlord apparently did not respond to, or even acknowledge receipt of, the broker's final e-mail.

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[6] With this decision in hand, the Court did not need to consider either of Grunberg's arguments regarding (i) the effect of a subscription via an automatically generated signature block or (ii) the authority of Grunberg's broker to act on his behalf. As discussed in the Postscript to this Client Alert, the former issue was addressed subsequently in another New York State appellate court decision.

[7] 80 A.D.3d 476 (1st Dept. 2011).

Please feel free to discuss any aspect of this Client Alert with your regular Milbank contacts or with any of the members of our Corporate Governance Group, whose names and contact information are provided below.

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