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REAL ESTATE UPDATE

New York Appellate Court Concludes E-Mail Satisfies Writing Requirement

The New York Appellate Division's (First Department) recent decision in *Naldi v. Grunberg* held that "an electronically memorialized and subscribed contract be given the same legal effect as a contract memorialized and subscribed on paper."¹

The Appellate Division's ruling sends a flashing red signal to real estate counsel and their clients to qualify any casual e-mail transmittal with a requirement that a definitive paper counterpart or authorized PDF will be required to be mutually executed before parties can be bound to the terms of an agreement.

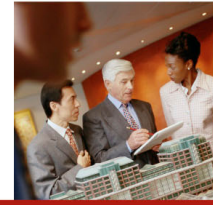
The Statute of Frauds, one of the most venerable legal doctrines dating back to the English "Act for Prevention of Frauds and Perjuries," was enacted in 1677. The New York Statute of Frauds, embodied in Section 5-703 of the New York General Obligations Law, essentially provides that contracts for the sale of real property are required to be in writing in order for them to be effective.²

Of course, in today's hyperkinetic business environment, **no one** exchanges paper drafts of agreements by courier or mail. Preliminary communications, offers, acceptances and deal documentation are routinely transmitted via e-mail, with paper documents sometimes circulated at a physical closing.

In response to these developments, the New York Statute of Frauds was amended in 1994 to recognize as a writing "the tangible written text produced by telex, telefacsimile, computer retrieval or other process by which electronic signals are transmitted by telephone or otherwise" and as a signature "any symbol executed or adopted by a party with the present intention to authenticate a writing."

In the years following that amendment, there has been considerable litigation over the binding or non-binding character of e-mail communications.³ However, these decisions have been incomplete and inconsistent in many respects. In fact, until *Naldi*, the New York courts had not fully articulated the extent to which e-mail communications would be sufficient to bind parties to a contract for the sale of real property under the New York Statute of Frauds.

In *Naldi*, the Appellate Division unanimously concluded that electronically transmitted e-mails satisfy the requirement in New York's Statute of Frauds that real estate contracts be reduced to writing in a case involving the sale of a trio of Manhattan buildings. The case also affirmed that "given the vast growth" during the last 15 years in "the number of people and entities regularly using e-mail, we would conclude that the terms 'writing' and 'subscribed' as used in New York's



Statute of Frauds governing real estate deals...encompass both electronic communications and electronic signatures.”

The facts of *Naldi* will appear all too common to most real estate deal lawyers. Grunberg, the seller, sought to sell a trio of adjoining buildings in Midtown Manhattan to Naldi, an Italian purchaser. After some initial discussion over the price—\$52 million, as Grunberg wanted, or \$50 million, as Naldi proposed—the seller’s broker, Massey Knakal, transmitted an e-mail to the purchaser that read as follows:

Below is a response to your customer’s offer for 15-19 West 55th Street. Please review with your customer and let me know how you would like to proceed.

Counteroffer: \$52 million.

DD: No due diligence period although complete unfettered access and first right of refusal on any legitimate, better offer during a 30 day period.

Deposit: 10% deposit hard in escrow in the US upon signing of contract that the ownership will furnish to them forthwith. Negotiations will take place during their due diligence.

The ownership will not take the property off the market for anyone without a signed contract and hard money.

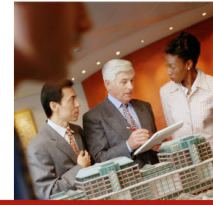
Mark J. Spinelli
Director of Sales
Massey Knakal Realty Services

Naldi had previously made a \$50 million counter-offer (as we will see, Grunberg’s saving grace).

Relying on the e-mail, Naldi’s attorneys commenced their due diligence reviews. Thereafter, Naldi’s counsel delivered a proposed contract draft to the seller reflecting a \$50 million purchase price. Grunberg rejected Naldi’s offer and began to shop the property to other prospective purchasers for a \$52 million purchase price. Naldi then delivered a letter to Grunberg purporting to exercise the “first right of refusal” referenced in the broker’s February 12 e-mail for Grunberg’s sought-after \$52 million price, stating:

Pursuant to the first right you granted me as per above, I hereby offer to purchase the properties for a cash consideration of \$52,000,000...I am ready to sign the sale contract and to deposit 10% in escrow on [*sic*] your attorney’s account within [*sic*] 9:00 p.m. of Monday 12th March, 2007.

When Grunberg refused Naldi’s new offer, Naldi sued Grunberg for breach of contract based on a breach of the right of first refusal allegedly granted to Naldi in the broker’s e-mail reproduced above. In response, Grunberg moved to dismiss the lawsuit arguing, among other things, that the



so-called right of first refusal was barred by the statute of frauds because it was memorialized only in an e-mail.

Although the Appellate Division ultimately sided with Grunberg and rejected Naldi's argument because it concluded that the parties had failed to reach an essential agreement on the purchase price, the Appellate Division held that an e-mail would have been sufficient to bind a seller had an agreement been reached on the purchase price.

In its reasoning, the Appellate Division first noted that the New York legislature had enacted the Electronic Signatures and Records Act (ESRA)⁴, which provided that:⁵

[U]nless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand. ESRA § 304[2]

After ESRA was enacted, Congress enacted the Electronic Signatures in Global and National Commerce Act (E-Sign)⁶ in 2000, which provided that:

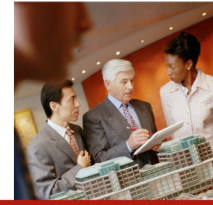
(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and that (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

In response, ESRA was amended in 2002 to conform the definition of the term "electronic signature" to E-Sign's definition of the same term.⁷

Based on the foregoing, the Appellate Division held that "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 is part of New York law..." and went on to state that "[e]ven in the absence of E-Sign and the 2002 statement of legislative intent, given the vast growth in the last decade and a half of the number of people and entities regularly using e-mail, we would conclude that the terms "writing" and "subscribed" in GOL § 5-703 should now be construed to include, respectively, records of electronic communications and electronic signatures..."⁸

The import of the *Naldi* decision on real estate practitioners is clear:

- Any e-mail communication transmitting an offer, counteroffer, term sheet, contract, lease or other similar real estate-related communication should be accompanied by an appropriate disclaimer to the effect that the e-mail in question may not form the basis of a binding agreement without the express written confirmation of the parties in a separate written agreement; and



- Any communication by a broker on behalf of its principal should require that the broker indicate on all e-mail communications that the broker is not authorized to bind the principal without the principal entering into a separate agreement with the counterparty to the e-mail.

Clients may find that, without appropriate safeguards, unscrupulous counsel and other parties may seek to use the *Naldi* decision to gain leverage over a counterparty embroiled in a contested real estate transaction by alleging that a binding agreement arose through an e-mail exchange.

FOR MORE INFORMATION

Please contact **Mario J. Suarez** or any member of our **Real Estate** practice group for more information.

If you do not wish to receive future communications by email, please send an email with the word “unsubscribe” as the subject line to Georgene.Davison@ThompsonHine.com.

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¹ *Naldi v. Grunberg*, 2010 NY Slip Op. 07079, at p. 2 (decided on October 5, 2010).

² General Obligations Law § 5-703.

³ The Appellate Division cited *Williamson v. Delsener*, 59 AD3d 291 (2009); *Stevens v. Publicis, S.A.*, 50 AD3d 253, 254-255 (2008), lv dismissed 10 NY3d 930 (2008); *Rosenfeld v. Zerneck*, 4 Misc. 3d 193 (Sup. Ct., Kings County 2004) (stating, in dicta, that an e-mail reflecting an agreement to sell real property may satisfy the statute of frauds, although the e-mail at issue failed to state all essential terms); see also *Bazak Intl. Corp. v. Tarrant Apparel Group*, 378 F Supp. 2d 377, 383-386 (S.D.N.Y. NY 2005) (holding that e-mail satisfied the requirement of a “writing in confirmation of the contract” under New York UCC § 2-201(2)).

⁴ Article III of the New York State Technology Law (L 1999, ch. 4, § 2, as amended by L 2002, ch. 314 and by L 2004, ch. 437).

⁵ The court noted that it could be argued that E-Sign also applied based on Naldi’s Italian nationality as a transaction “in or affecting interstate or foreign commerce” for purposes of E-Sign.

⁶ 15 USC § 7001 *et seq.*, as added by Pub. L 106-229, 114 U.S. Stat. 464.

⁷ NY L 2002, ch. 314, § 2.

⁸ Grunberg’s two other arguments, namely that the “signature block” at the bottom of the Spinelli e-mail (identifying the writer and his title, firm, address and telephone and fax numbers) was automatically generated by the e-mail system rather than deliberately typed and therefore does not qualify as an intentional subscription for purposes of the statute of frauds, and that even if the broker “subscribed” the e-mail within the meaning of GOL § 5-703, neither he nor his brokerage firm, Massey Knakal, had authority to enter into binding contracts on defendant’s behalf, were not reached since the complaint was dismissed for lack of agreement on a fundamental business point.