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Cases on Contracts formed by E-Mail

Jonathan P. Shattuck v. David K. Klotzbach et al.

14 Mass. L. Rep. 360; 2001 Mass. Super. LEXIS 642 (2001)

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

The plaintiff brought this action to enforce a contract for the sale of real estate and residential dwelling located at 5 Main Street, Marion, Massachusetts ("the property"), and to recover damages arising out of an alleged breach of that contract. This matter is before the court on the defendants' motion to dismiss. For the reasons set forth below, the defendants' motion to dismiss is *DENIED*.

BACKGROUND

In April 2001, the plaintiff and the defendants began discussions concerning the sale of the property. On April 9, 2001, the plaintiff sent an e-mail to the defendants which contained an offer of \$ 2,000,000 for the property. On April 10, 2001, the defendant, David Klotzbach, responded via e-mail by expressing his appreciation for a reasonable offer, and stated that he would be willing to accept \$ 2,250,000. The defendant further stated that he and his wife Barbara "have been praying for a man such as [the plaintiff] that would love the property as much as [the defendants] do." The defendant concluded by stating that e-mail is the "preferred" manner of communication during their negotiations.

On or about April 20, 2001, the plaintiff and the defendants entered into a purchase and sale agreement concerning the property which was signed by all parties. The agreement provided a \$ 2,200,000 purchase price along with other contingencies. The plaintiff furnished the defendants with the deposit which was held in escrow. Prior to the closing, however, the defendants were unable to procure a "wharf license" as called for in the purchase and sale agreement. Accordingly, the parties terminated the April 20 purchase and sale agreement, and the defendants returned the plaintiff's deposit.

Nevertheless, commencing in July 2001, the parties again began communicating via e-mail concerning the sale of the same property. In an e-mail sent July 24, 2001, the plaintiff wrote to the defendant that he was increasing his offer to \$ 1.825 million. The e-mail also addressed various other details such as the defendants' requests for a closing to take place in less than 30 days and that there be no contingencies.

The defendant, Dave Klotzbach, responded later that day via e-mail stating that he would decrease the price to \$ 2,000,000 as his counter offer. He further stated that if the plaintiff agreed to his counter offer he would ask for "no contingencies that might tie up the property." The defendant specifically stated that any home inspection should take place within 5 days of the signing of the purchase and sale

agreement, and there would be no financing contingency. The defendant conceded that “other standard contingencies are fine.”

On August 31, 2001, the defendant again sent an e-mail to the plaintiff which stated that the defendants “still have NOT sold” the property, and “if you are still interested in a clean deal at \$ 1.825 mil [sic] let me know.”

On September 2, 2001, the plaintiff sent the defendants an e-mail that stated he was still interested in doing a “clean deal” for \$ 1,825,000. He asked if he could make a “request” that he be able to perform a “quick walk-through inspection” and if no big flaws were apparent then he would be allowed to sign a simple purchase and sale agreement “containing only the usual boiler plate language, no financing contingency, [and] no other contingencies at all.”

Finally, on September 10, 2001, the plaintiff sent the defendant an e-mail which stated that the plaintiff’s attorney had told him there were no complications and the attorney would draft a very standard purchase and sale agreement for \$ 1,825,000 “with no usual contingencies.” The defendant responded the same day by e-mail stating “once we sign the P&S we’d like to close ASAP. You may have your attorney send the P&S and deposit check for 10% of purchase price (\$ 182,500) to my attorney.” The e-mail concluded by stating that “I’m looking forward to closing and seeing you as the owner of ‘5 Main Street,’ the prettiest spot in Marion village.”

All e-mails detailed above contained a salutation at the end which consisted of the type written name of the respective sender.

DISCUSSION

When evaluating the sufficiency of a complaint pursuant to *Mass.R.Civ.P 12(b)(6)*, the court must accept as true the allegations of the complaint, as well as any reasonable inferences to be drawn therefrom in plaintiff’s favor. *Fairney v. Savogran Co.*, 422 Mass. 469, 470, 664 N.E.2d 5 (1996); *Eyal v. Helen Broadcasting Corp.*, 411 Mass. 426, 429, 583 N.E.2d 228 (1991) (case citations omitted). “[The] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Nader v. Citron*, 372 Mass. 96, 98, 360 N.E.2d 870 (1977). “[A] complaint is not subject to dismissal if it would support relief on any theory of law.” *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85, 89, 390 N.E.2d 243 (1979). A complaint need only surmount a minimal hurdle to survive a motion to dismiss for failure to state a claim. *Bell v. Mazza*, 394 Mass. 176, 184, 474 N.E.2d 1111 (1985).

G.L.C. 259, § 1 provides that “no action shall be brought . . . upon a contract for the sale of lands . . . unless the promise, contract or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therein or by some person thereunto still lawfully authorized.” The defendants contend that there is no signed written memorandum sufficient to satisfy the Statute of Frauds. Specifically, the defendants argue that the e-mails in question were not signed and thus cannot satisfy the Statute of Frauds.

Where the defendant pleads the statute of frauds, the burden is on the plaintiff to prove the existence of a memorandum complying with the statute’s requirements. *Espy v. Eells*, 349 Mass. 314,

316-17, 207 N.E.2d 918 (1965); *Michelson v. Sherman*, 310 Mass. 774, 776, 39 N.E.2d 633 (1942). “A memorandum is signed in accordance with the statute of frauds if it is signed by the person to be charged in his own name, or by his initials, or by his Christian name alone, or by a printed, stamped or typewritten signature, if signing in any of these methods he intended to authenticate the paper as his act.” *Irving v. Goodimate Co.*, 320 Mass. 454, 458-59, 70 N.E.2d 414 (1946). Here, all e-mail correspondences between the parties contained a typewritten signature at the end. Taken as a whole, a reasonable trier of fact could conclude that the e-mails sent by the defendant were “signed” with the intent to authenticate the information contained therein as his act.

Moreover, courts have held that a telegram may be a signed writing sufficient to satisfy the statute of frauds. See *Providence Granite Co, Inc. v. Joseph Rugo, Inc.*, 362 Mass. 888, 889, 291 N.E.2d 159 (1972) (“a telegram which was a ‘writing sufficient to indicate that a contract for sale [under G.L.c. 106, § 2-201(1)] (had) been made . . . and signed by the party whom enforcement . . . (was) sought’ ”); *Hansen v. Hill*, 215 Neb. 573, 340 N.W.2d 8, 13 (Neb. 1983) (intent to authenticate by signature demonstrated by name typed on telegram). This court believes that the typed name at the end of an e-mail is more indicative of a party’s intent to authenticate than that of a telegram as the sender of an e-mail types and sends the message on his own accord and types his own name as he so chooses. In the case at bar, the defendant sent e-mails regarding the sale of the property and intentionally and deliberately typed his name at the end of all such e-mails. A reasonable trier of fact could conclude that the e-mails sent by the defendant regarding the terms of the sale of the property were intended to be authenticated by the defendant’s deliberate choice to type his name at the conclusion of all e-mails.

The defendants further contend that, even if e-mails are capable of satisfying the statute of frauds, the defendants hold title to the property jointly, and thus the signature of both the defendants would be needed. The plaintiff has not alleged that the defendant, Barbara W. Klotzbach, has ever signed any written memoranda sufficient to satisfy the statute of frauds. Nevertheless, the signature of the defendant-husband may also bind the defendant-wife who impliedly gave her consent and acquiescence in the sale of jointly held property. See *Tzitzon Realty Co., Inc. v. Mustonen*, 352 Mass. 648, 654, 227 N.E.2d 493 (1967). Here, the correspondences suggest that the defendant-wife was aware of the ongoing negotiations concerning the sale of the property. Thus, a reasonable trier of fact could conclude that the defendant-husband’s signature on the memorandum acted as a signature of both defendants for the purpose of satisfying the statute of frauds.

The defendants finally contend that the e-mails, even if sufficiently authenticated, do not contain the essential terms. A memorandum sufficient to satisfy the statute of frauds need not be a formal document intended to serve as a memorandum of the oral contract, but must contain the essential terms of the contract agreed upon: in the case of an interest in real estate, the parties, the locus, the nature of the transaction, and the purchase price. *A.B.C. Auto Parts, Inc. v. Moran*, 359 Mass. 327, 329, 268 N.E.2d 844 (1971); *Cousbelis v. Alexander*, 315 Mass. 729, 730, 54 N.E.2d 47 (1944). Multiple writings relating to the subject matter may be read together in order to satisfy the memorandum requirement so long as the writings, when considered as a single instrument, contain all the material terms of the contract and are authenticated by the signature of the party to be charged. *Flynn v. Wallace*, 359 Mass. 711, 717, 270 N.E.2d 919 (1971); *Waltham Truck Equip. Corp. v. Massachusetts*

Equip. Co., 7 Mass.App.Ct. 580, 583, 389 N.E.2d 753 (1979). The writings may, but need not, incorporate each other by reference. *Tzitzon Realty Co., Inc. v. Mustonen*, 352 Mass. 648, 653, 227 N.E.2d 493 (1967).

In the case at bar, the e-mails contain terms for the sale of 5 Main Street, Marion Village, Marion, Massachusetts. The e-mails further refer to a purchase price of \$ 1,825,000 and the defendant explicitly asked the plaintiff to send a “deposit check for 10% of [the] purchase price (\$ 182,500) . . .” Finally, the multiple e-mails demonstrate the parties to the sale, to wit the plaintiff and the defendants. Thus, a reasonable trier of fact could conclude that the parties had formed an agreement as to the essential terms of a land sale contract; the parties, the locus, the nature of the transaction, and the purchase price.

ORDER

For the foregoing reasons, it is hereby *ORDERED* that the defendants’ motion to dismiss be *DENIED*.

Ernest B. Murphy, J., Justice of the Superior Court

December 11, 2001

Example of a Case Brief

Title & Citation: Shattuck v. Klotzbach, 14 Mass. L. Rep. 360 (2001)

Procedural history: Motion to dismiss denied

Facts: After an earlier contract in April 2001 for the purchase and sale of a house fell through, the parties renewed their negotiations by email a few months later. On July 24, buyer offered \$1.825 million but seller and did not accept. On August 31, the seller offered to sell for \$1.825 million. On September 2, buyer asked to inspect the property with a quick “walk through” and agreed to use a simple purchase and sale contract without any contingencies. On September 10, buyer informed the seller that everything seemed fine, and his attorney would draw up the contract. Defendant responded the same day asking the buyer to send the 10% down payment and contract to the seller’s lawyer, and asked to hold the closing ASAP after the contract was signed.

Issue: Did the parties form by exchange of emails a contract for the purchase and sale of real estate?

Holding: Maybe yes (the plaintiff only survived a motion to dismiss, so the underlying issue was not yet decided)

Rule: A contract for the purchase of real estate may be formed by emails if the emails evidence the parties’ intent to form a contract and, taken together, contain all the essential terms of the transaction.

Rationale: Real estate contracts can only be enforced if they are embodied in a signed writing that covers all essential terms, but that doesn’t mean the contract must be found in a single document. If the parties’ intent to form a contract is clear, then a series of emails between the

buyer and seller can be read together as the expression of the parties' intent even though the emails don't explicitly refer to each other.

Disposition: Motion to dismiss denied

Tommy Rosenfeld v. Michael Zerneck

4 Misc. 3d 193; 776 N.Y.S.2d 458; 2004 N.Y. Misc. LEXIS 497 (2004)

Herbert Kramer, J.

A great deal can be accomplished over the Internet: A few well-placed keystrokes 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

"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.

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.

“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. v Estate of Short*, 87 N.Y.2d 524, 526, 663 N.E.2d 633, 640 N.Y.S.2d 477 [1996].) In *Parma Tile*, the Court of Appeals decided that [HN1] “the automatic imprinting, by a fax machine, of the sender’s name at the top of each page transmitted” (*id. at* 526) 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. at* 528.) Nor does the intentional programming of the fax machine suffice to demonstrate the sender’s “intention to authenticate every document subsequently faxed.” (*id. at* 528.)

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* 528 n 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 [HN3] 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 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 memorandum 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, as repealed by L 1997, ch 556, § 5; *Page v Muze, Inc.*, 270 A.D.2d 401, 705 N.Y.S.2d 383 [2d Dept. 2000]). The rationale

³ “[T]he Legislature amended *section 5-701 of the General Obligations Law* to provide that: [HN2] ‘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* § 5-701 [b] [4]).” (*Id. at* 528 n 1.)

for that decision may lie in the fact that the UCC provision, unlike the general statute of frauds (*General Obligations Law § 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 *UCC 8-113*, 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. 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 v U.S. Bank*, 5 A.D.3d 728, 774 N.Y.S.2d 176 [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 these premises. The defendant's motion is granted. The complaint is dismissed and the notice of pendency is cancelled.

Long Brief Format

Title & Citation:

Procedural history:

Facts:

Issue:

Holding:

Rule:

Rationale:

Disposition: