

METES AND BOUNDS

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Of Keystrokes and Ballpoints: Real Estate and the Statute of Frauds in the Electronic Age

When cramming for the bar exam lo those many years ago, each of us memorized the legal transactions that require a writing in order to be enforceable. While §§ 5-701 and 5-703 of the N.Y. General Obligations Law (GOL) contain a lengthy list of such transactions, most of us remember only two or three. The one we all remember is that an agreement for the sale of real property is enforceable if it is in writing with a contract, or some memorandum of it, signed by the party who refuses to acknowledge the contract.¹

With e-mail becoming such a popular means of communication, a clash between electrons and ink was inevitable. So far, New York has produced two lower court cases involving real estate transactions where, like the Pilgrims, the Statute of Frauds found itself in a strange, new world. Will the Internet be as friendly to the statute as Squanto was to Myles Standish or will it produce odd results, like the Pilgrims' descendants winning two World Series in the space of four years?²

The two cases reached opposite conclusions. *Rosenfeld v. Zerneck*³ endorsed the notion that e-mails can create a binding real estate contract. *Vista Developers Corp. v. VFP Realty LLC*⁴ did not.

In *Rosenfeld*, a seller responded to an e-mail and telephone call from prospective purchasers with an e-mail of his own. In the "Subject" line of his e-mail, the seller typed the street address of the property offered for sale. Below appeared the date and the names of the parties to whom and by

whom the message was sent. The text read:

"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?)

...
"With kind regards,
"Michael."⁵

When Michael refused to consummate the transaction because no formal contract was signed, Tom and Debbie commenced suit for specific performance, arguing that Michael's e-mail, when coupled with an earlier one of theirs, constituted a legally binding contract. The first question was whether Michael's typed signature on the e-mail satisfied the Statute of Frauds.

Because no other New York cases had dealt with this issue, the *Rosenfeld* court drew from *Parma Tile Mosaic & Marble Co. v. Estate of Fred Short*.⁶ Real estate was not at issue in *Parma*. It involved another type of transaction that requires the signature of the

party to be held accountable, *i.e.*, a promise to pay another's debts. The Court of Appeals was confronted with the question of whether the imprint of a sender's name on a telefacsimile ("fax") transmission of a guaranty was a subscription by the sender sufficient to satisfy the Statute of Frauds. Although recognizing that a signature can be printed, the court held that a printed signature must be inserted "with an intent, actual or apparent, to authenticate a writing."⁷ Here the fax machine was programmed to print the sender's name automatically when the recipient's fax machine printed the transmission. That was not enough to "constitute a signing authenticating the contents of the document for Statute of Frauds purposes."⁸

The *Rosenfeld* court distinguished the *Parma* fax from Michael's e-mail, noting that Michael purposely typed his name at the end of the message, "manifest[ing] his intention to authenticate this transmission for statute of frauds purposes."⁹ Hence, Michael could not escape liability based upon the Statute of Frauds. (The case was dismissed, however, because the e-mails did not set forth the amount of the down payment – an essential term.)

Vista Developers Corp. v. VFP Realty LLC involved a series of e-mails between a prospective buyer and seller. Each e-mail contained a typewritten signature. Again the seller was the defendant, urging dismissal of the purchaser's complaint for specific performance based upon the Statute

of Frauds. The *Vista Developers* court never dealt with the content of the exchanged e-mails for it found as a matter of law that e-mails cannot satisfy the Statute of Frauds in real estate transactions. The court's logic focused on the difference between GOL § 5-703, which governs real estate transactions, and GOL § 5-701, which pertains to other transactions that require a writing.

The plaintiff's argument hinged on GOL § 5-701(b)(4), which provides:

For purposes of this subdivision, 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.

Thus, argued the plaintiff, the e-mails complied with the "[subscription] by the party to be charged" requirement of the Statute of Frauds.¹⁰ The defendants countered by noting that paragraph (b) of GOL § 5-701 applies only to what the statute defines as "qualified financial contracts"¹¹ and that contracts for the sale of real property are not included in that definition.¹²

Because the modernization of the Statute of Frauds contained in GOL § 5-701(b)(4) does not appear in GOL § 5-703, the court reasoned "that the intent of the Legislature was to amend the method for establishing agreements required to be in writing other than those involving contracts and conveyances concerning real property, which are purposely dealt with in a separate section of Article 5."¹³ Accordingly, e-mails could not satisfy the statute's subscription requirement for real estate contracts.

Two Smoking Guns Ignored

Not presented to the *Vista Developers* court were two arguments that may have swayed its decision – one from

the ancient world and one from modern times.

Telegrams

Often when confronted by newfangled innovations, courts will look to the rules established when dealing with earlier technology.¹⁴ The *Vista Developers* plaintiff might have argued that the case law involving the "original e-mail," *i.e.*, the telegram, was pertinent.

Now forgotten, the telegram once was a major means of communication. A sender would give a message either in writing or orally to a telegraph company that would transmit that message over wire to its office nearest the recipient. There, the impulses from the wire would be converted to written words with the sender's name subscribed at the bottom. The telegram then would be delivered to the recipient. The use of telegrams satisfied the Statute of Frauds

long before GOL § 5-701 was amended by adding paragraph (b)(4).¹⁵

This similarity between telegrams and e-mails cogently argues for the importation of "telegram jurisprudence" into the world of e-mails.

The Electronic Signatures and Records Act

Article III of the N.Y. State Technology Law¹⁶ has ushered in a new legal world that most of us have yet to explore. The Legislature's stated intention is "to support and encourage electronic commerce and electronic government by allowing people to use electronic signatures and electronic records in lieu of handwritten signatures and paper documents."¹⁷ With that in mind, the law states that "unless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand.



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The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand.”¹⁸

While GOL § 5-703 does not specifically authorize electronic signatures on real estate contracts, it does not specifically disavow them. Moreover, the areas where the State Technology Law, by its own terms, does not apply, include such matters as wills, powers of attorney, health care proxies, negotiable instruments and “any conveyance or other instrument recordable under article nine of the real property law”¹⁹ but not real estate contracts.

Vista Developers may have been decided differently if the State Technology Law had been brought to the court’s attention.

Conclusion

While there is now a particular conflict between courts of co-ordinate jurisdiction, in time either the appellate courts or further legislation will quiet that controversy. However, there is a more important point.

Though obviously focused upon the commercial arena, the State Technology Law is predicated upon a legislative finding “that it is in the best interest of the state of New York, its citizens, businesses and government entities for State and federal law to work in tandem to promote the use of electronic technology in the everyday

*lives and transactions of such individuals and entities.”*²⁰ As a result, we and our clients unwittingly may be entering into binding agreements every day through the casual use of e-mail. Think about that before e-mailing an invitation to lunch. If you’re not careful, you may be obligating yourself to pick up the check. ■

1. GOL § 5-703(2): “A contract for . . . the sale, of any real property, or interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing.”

2. Massachusetts’s answer can be found in *Shattuck v. Klotzbach*, 14 Mass. L. Rptr. 360 (Super. Ct. 2001), where it was decided that e-mail can satisfy the Statute of Frauds.

3. 4 Misc. 3d 193, 776 N.Y.S.2d 458 (Sup. Ct., Kings Co. 2004).

4. 17 Misc. 3d 914, 847 N.Y.S.2d 416 (Sup. Ct., Queens Co. 2007).

5. *Rosenfeld*, 4 Misc. 3d at 194–95.

6. 87 N.Y.2d 524, 640 N.Y.S.2d 477 (1996).

7. *Id.* at 527 (quoting Judge Cardozo in *Mesibov, Glinert & Levy, Inc. v. Cohen Bros. Mfg. Co.*, 245 N.Y. 305, 310 (1927)).

8. *Id.* at 528. It is imperative to remember that the events in *Parma* predated an amendment to GOL § 5-701 and the enactment of Article III of the State Tech. Law (discussed below). Either may have led the Court to a different conclusion.

9. *Rosenfeld*, 4 Misc. 3d at 196. See also *Stevens v. Publicis, S.A.*, 854 N.Y.S.2d 690 (1st Dep’t 2008). (“The e-mails . . . constitute ‘signed writings’ within the meaning of the Statute of Frauds, since plaintiff’s name at the end of his e-mails signified his intent to authenticate the contents.”).

10. GOL § 5-703(2).

11. GOL § 5-701(b)(2)(a)–(j). It also does not apply to contracts involving a natural person.

12. *Vista Developers Corp. v. VFP Realty LLC*, 17 Misc. 3d 914, 919–20, 847 N.Y.S.2d 416 (Sup. Ct., Queens Co. 2007).

13. *Id.* at 921. GOL § 5-703 actually appears in Title 7 of Article 5 of the N.Y. General Obligations Law.

14. For example, the Court of Appeals declined to hold an Internet service provider liable for defamatory e-mails sent by one of its subscribers. The Court analogized libel by e-mail to slander by telephone. Since years ago it had exonerated the telephone companies from such liability, the Court freed Internet service providers as well, holding that such providers play the same passive role with respect to message content as telephone companies do. *Lumney v. Prodigy Servs. Co.*, 94 N.Y.2d 242, 701 N.Y.S.2d 684 (1999), cert. denied, 529 U.S. 1098 (2000).

15. *La Mar Hosiery Mills, Inc. v. Credit & Commodity Corp.*, 28 Misc. 2d 764, 768, 216 N.Y.S.2d 186 (City Ct., N.Y. Co. 1961) (“The signature on the telegram in suit, although typed in the office of the telegraph company, is therefore defendant’s authorized signature within the requirements of the Statute of Frauds.”).

16. State Tech. Law §§ 301–309. The federal government has a similar statute – the Electronic Signatures in Global and National Commerce Act (15 U.S.C. §§ 7001–7006), known colloquially as the E-Sign Law. Though applicable only to transactions “affecting interstate or foreign commerce” (15 U.S.C. § 7001(a)), the term “transaction” includes “the sale, lease, exchange, or other disposition of any interest in real property, or any combination thereof.” 15 U.S.C. § 7006(13)(B). Furthermore, while the law specifically exempts areas that historically have been the sole province of the states, such as wills and family law (see 15 U.S.C. § 7003(a)(1), (2)), no specific exception appears for intrastate real estate sales.

17. 2002 N.Y. Laws ch. 314, § 1.

18. State Tech. Law § 304(2). Section 302(3) defines an “electronic signature” as “an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record.” The definition of an electronic signature in the E-Sign Law, 15 U.S.C. § 7006(5), is nearly identical.

19. State Tech. Law § 307(1), (2), (3).

20. 2002 N.Y. Laws ch. 314, § 1 (emphasis supplied).

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