INADVERTENT CONTRACT FORMATION UNDER NEW YORK LAW: AN UPDATE

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INTRODUCTION

This Article serves as an update to the 2017 *Survey* on inadvertent contract formation under New York law.[1] As explained in last year's article, New York courts have increasingly been asked to consider whether emails and other informal forms of communication indicate a current intent to be bound, and whether such communications can result in legally binding contracts inadvertently being created.[2] Indeed, in 2015, the Appellate Division, First Department, held that an agreement reached through informal communications, including emails, could establish an enforceable contract to extend an employment agreement, even where certain terms remained to be negotiated.[3] On the other hand, courts may find that informal communications are insufficient to create legally binding agreements, even where the parties intended them to. Several cases decided this *Survey* year considered the binding (and nonbinding) character of informal written and oral communications, including two decisions from the Court of Appeals. For example, in *Stonehill Capital Management LLC v. Bank of the West*, the Court of Appeals held that oral and electronic agreements in the debt and equity market can be sufficient to form final and binding agreements, even if there is language indicating that the agreement is "subject to" the execution of a written agreement.[4] In *In re Hennel*, the Court of Appeals officially adopted the promissory estoppel exception to the statute of frauds, but made clear it only applies in limited circumstances.[5]

As the recent case law shows, this area of the law is developing in real-time, and continues to occupy a somewhat grey area. While New York courts continue to hold that parties can enter into a binding contract or contract modification without memorializing their agreement in the form of a written document, a fully executed document remains the most surefire way to prove the existence of a contract and its terms.

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1. Samuel J.M. Donnelly & Mary Ann Donnelly, *2015–16 Survey of New York Law: Inadvertent Contract Formation Under New York Law*, 66 SYRACUSE L. REV. 835 (2017).

2. *See id.* at 837.

3. Kolchins v. Evolution Mkts., Inc., 128 A.D.3d 47, 49–50, 8 N.Y.S.3d 1, 3 (1st Dep't 2015) (citing N.Y. C.P.L.R. 3211(a)(1) (McKinney 2016)). While the First Department granted leave for the Court of Appeals to address whether the parties' emails and other correspondence created an enforceable contract despite the absence of a formal agreement, the Court of Appeals declined to consider the appeal. Kolchins v. Evolution Mkts., Inc., 28 N.Y.3d 1177, 1177, 71 N.E.3d 958, 958, 49 N.Y.S.3d 369, 369 (2017).

4. 28 N.Y.3d 439, 453, 445, 68 N.E.3d 683, 692, 686, 45 N.Y.S.3d 864, 873, 867 (2016).

5. 29 N.Y.3d 487, 495, 80 N.E.3d 1017, 1022–23, 58 N.Y.S.3d 271, 276–77 (2017) (quoting Philo Smith & Co. v. USLIFE Corp., 554 F.2d 34, 36 (2d Cir. 1977)).

I. BACKGROUND LAW: STATUE OF FRAUDS

New York's statute of frauds, codified in General Obligations Law §§ 5-701 through 5-705, requires a signed writing for certain types of agreements.[6] To satisfy the statute of frauds, these types of contracts must be reduced to a writing that identifies the parties, describes the a subject matter, states all the essential terms of the agreement, and is signed by the party to be charged.[7] It is commonly recognized that an email or electronic signature can satisfy these writing and subscription requirements.[8] Accordingly, if certain conditions are met, the sender of an email, by typing his or her name at the bottom, can inadvertently convert a casual communication into a binding agreement.[9]

Before this past *Survey* period, the Court of Appeals only recognized two exceptions to the statute of frauds: part performance and equitable estoppel.[10] The part performance exception offers relief to plaintiffs who

6. N.Y. GEN. OBLIG. LAW §§ 5-701(a)(1), 5-701(10), 5-703(1) (McKinney 2012).

7. Urgo v. Patel, 297 A.D.2d 376, 377, 746 N.Y.S.2d 733, 735 (2d Dep't 2002) (citing 160 Chambers St. Realty Corp. v. Register of N.Y.C., 226 A.D.2d 606, 606–07, 641 N.Y.S.2d 351, 352 (2d Dep't 1996)).

8. New York's Electronic Signatures and Records Act (ESRA) provides that electronic signatures must "have the same force and effect" as handwritten signatures. *See* N.Y. STATE TECH. LAW § 305(3) (McKinney 2016). Further solidifying this rule, the First Department held in 2010 that "an electronically memorialized and subscribed contract be given the same legal effect as a contract memorialized and subscribed on paper." Naldi v. Grunberg, 80 A.D.3d 1, 12, 908 N.Y.S.2d 639, 646 (1st Dep't 2010) (first citing 15 U.S.C. § 7001(a) (2012); then citing LAWRENCE ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE §§ 101:4, 101:6 (2d ed. 1970); and then citing RAYMOND T. NIMMER, 3 LAW OF COMPUTER TECHNOLOGY §§ 13:13, 13:15 (4th ed. 2010)).

9. Agosta v. Fast Sys. Corp., 136 A.D.3d 694, 695, 26 N.Y.S.3d 534, 537 (2d Dep't 2016) (quoting Newmark & Co. Real Estate Inc. v. 2615 E. 17 St. Realty LLC, 80 A.D.3d 476, 477, 914 N.Y.S.2d 162, 164 (1st Dep't 2011)) (first citing GEN. OBLIG. § 5-701(b)(4); and then citing Trueforge Glob. Mach. Corp. v. Viraj Grp., 84 A.D.3d 938, 939, 923 N.Y.S.2d 146, 148 (2d Dep't 2011)).

10. *In re Hennel*, 29 N.Y.3d at 493, 80 N.E.3d at 1021, 58 N.Y.S.3d at 275 (first citing Am. Bartenders Sch. v. 105 Madison Co., 59 N.Y.2d 716, 718, 450 N.E.2d 230, 230, 463 N.Y.S.2d 424, 424 (1983); then citing Anostario v. Vicinanzo, 59 N.Y.2d 662, 663–64, 450 N.E.2d 215, 216, 463 N.Y.S.2d 409, 410 (1983); then citing Woolley v. Stewart, 222 N.Y. 347, 350–51, 118 N.E. 847, 848 (1918); and then citing Messner Vetere Berger McNamee Schmetterer Euro RSCG v. Aegis Grp., 93 N.Y.2d 229, 235, 711 N.E.2d 953, 956, 689 N.Y.S.2d 674, 677 (1999)). New York's appellate division, by consent, had long recognized promissory estoppel as an equitable exception to the statute of frauds. *See* Castellotti v. Free, 138 A.D.3d 198, 204, 27 N.Y.S.2d 507, 513–14 (1st Dep't 2016) (first citing Fleet Bank v. Pine Knoll Corp., 290 A.D.2d 792, 797, 736 N.Y.S.2d 737, 742 (3d Dep't 2002); then citing Melwani v. Jain, 281 A.D.2d 276, 277, 722 N.Y.S.2d 145, 146 (1st Dep't 2001); then citing Steele v. Delverde S.R.L., 242 A.D.2d 414, 415, 662 N.Y.S.2d 30, 31 (1st Dep't 1997); then citing WE Transp. v. Suffolk Transp. Serv., 192 A.D.2d 601, 602, 596 N.Y.S.2d 166, 167 (2d Dep't), *lv. denied*, 82 N.Y.2d 656, 622 N.E.2d 306, 602 N.Y.S.2d 805 (1993); and then citing Buddman Distribs. v. Labatt Imps., 91 A.D.2d 838, 839, 458 N.Y.S.2d 395, 397 (4th Dep't 1982)); Carvel Corp. v. Nicolini, 144 A.D.2d 611, 612, 535 N.Y.S.2d 379, 381 (2d Dep't 1988) (first citing *Am. Bartenders Sch.*, 59 N.Y.2d at 718, 450 N.E.2d at 230, 463 N.Y.S.2d

begin performing their obligations under an oral agreement, but only where the "plaintiff's actions can be characterized as 'unequivocally referable' to the agreement alleged."[11] Equitable estoppel may be established by demonstrating "(1) conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intent that such conduct (representation) will be acted upon; and (3) knowledge, actual or constructive, of the true facts."[12] Promissory estoppel is "based on a promise regarding the promisor's future conduct . . . ."[13] Promissory estoppel requires "a clear and unambiguous promise, reasonable and foreseeable reliance by the party whom the promise is made, and an injury sustained in reliance on that promise."[14] For both promissory and equitable estoppel, the party seeking to avoid the statute of frauds must also prove "unconscionable injury."[15]

In *Hennel*, discussed *infra*, the Court of Appeals recognized, for the first time, promissory estoppel as an exception to the statute of frauds defense.[16] But, the Court made clear it only applies in very limited circumstances,[17] thus reinforcing New York's policy of requiring certain contracts to be in writing.

This article below discusses the case law decided during this *Survey* year regarding inadvertent contract formation.

II. Recent Case Law Finding the Existence of Binding Contracts via Email and Other Informal Exchanges

New York courts continued to hold this *Survey* year that email exchanges and other informal communications can create binding contracts, even if one party alleges no agreement was reached.

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at 424; then citing Ackerman v. Landes, 112 A.D.2d 1081, 1083, 493 N.Y.S.2d 59, 61 (2d Dep't 1985); then citing *Buddman Distribs.*, 91 A.D.2d at 839, 458 N.Y.S.2d at 397; and then citing Ginsberg v. Fairfield-Noble Corp., 81 A.D.2d 318, 320–21, 440 N.Y.S.2d 222, 224–25 (1st Dep't 1981)); Bernard v. Langan Porsche Audi, 143 A.D.2d 495, 496, 532 N.Y.S.2d 599, 599 (3d Dep't 1988); *Buddman Distribs.*, 91 A.D.2d at 839, 458 N.Y.S.2d at 397.

11. *Anostario*, 59 N.Y.2d at 664, 450 N.E.2d at 216, 463 N.Y.S.2d at 410.

12. Health-Loom Corp. v. Soho Plaza Corp., 272 A.D.2d 179, 181, 709 N.Y.S.2d 165, 167 (1st Dep't 2000) (quoting Holm v. C.M.P. Sheet Metal, Inc., 89 A.D.2d 229, 234–35, 455 N.Y.S.2d 429, 433 (4th Dep't 1982)).

13. Glasshouse Sys., Inc. v. Int'l Bus. Machs. Corp., 750 F. Supp. 2d 516, 525 (E.D. Pa. 2010) (interpreting New York law).

14. Williams v. Eason, 49 A.D.3d 866, 868, 854 N.Y.S.2d 477, 479 (2d Dep't 2008) (citing Gurreri v. Assocs. Ins. Co., 248 A.D.2d 356, 357, 669 N.Y.S.2d 629, 631 (2d Dep't 1998)).

15. *See In re Hennel*, 29 N.Y.3d at 493, 80 N.E.3d at 1021, 58 N.Y.S.3d at 275.

16. *Id.*

17. *Id.* at 495, 80 N.E.3d at 1022–23, 58 N.Y.S.3d at 276–77 (quoting Philo Smith & Co. v. USLIFE Corp., 554 F.2d 34, 36 (2d Cir. 1977)).

A. Stonehill Capital Management LLC v. Bank of the West, 28 N.Y.3d 439, 68 N.E.3d 683, 45 N.Y.S.3d 864 (2016)

In *Stonehill*, the Court of Appeals held, in a unanimous decision, that the acceptance of an auction bid for the sale of a syndicated loan may constitute a final and binding trade, even if there is language indicating that the agreement is "subject to" the execution of a mutually acceptable, written agreement.[18]

In that case, the plaintiff alleged that Bank of the West (BOTW) solicited Mission Capital Advisors, LLC ("Mission") to manage an online auction of nonperforming mortgage loans.[19] Mission issued a memorandum announcing its solicitation of bids for the purchase of the loans and *Stonehill* submitted a bid to purchase a loan known as the "Goett Loan."[20] Mission later notified Stonehill by telephone that it had submitted the winning bid for the Goett Loan, and confirmed in a follow up email that "[s]ubject to mutual execution of an acceptable [Loan Sale Agreement]," BOTW had accepted Stonehill's bid.[21] The parties subsequently exchanged drafts of a proposed sales agreement through a series of email exchanges.[22] An email from BOTW accepting Stonehill's bid stated that the bid was "[s]ubject to mutual execution of an acceptable" loan sale agreement and the submission of a ten percent deposit.[23]

Before the loan sale agreement was signed, Mission notified Stonehill that BOTW had decided not to proceed with the sale of the Goett Loan and terminated the trade.[24] Stonehill sued BOTW and Mission, alleging breach of contract and breach of the implied covenant of good faith and fair dealing.[25] BOTW argued that no contract was formed because the transaction was "subject to" the execution of a final, written agreement and the payment of a ten percent deposit by Stonehill, neither of which was satisfied prior to BOTW's withdrawal from the transaction.[26]

The trial court disagreed and granted Stonehill's motion for summary judgment on the breach of contract action, finding that there

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18. Stonehill Capital Mgmt. LLC v. Bank of the W., 28 N.Y.3d 439, 453, 445, 68 N.E.3d 683, 692, 686, 45 N.Y.S.3d 864, 873, 867 (2016).

19. *Id.* at 443–44, 68 N.E.3d at 685, 45 N.Y.S.3d at 866.

20. *Id.* at 444, 68 N.E.3d at 685–86, 45 N.Y.S.3d at 866–67.

21. *Id.* at 445, 68 N.E.3d at 686, 45 N.Y.S.3d at 867.

22. *Id.* at 446, 68 N.E.3d at 687, 45 N.Y.S.3d at 868.

23. *Stonehill Capital Mgmt. LLC*, 28 N.Y.3d at 445, 68 N.E.3d at 686, 45 N.Y.S.3d at 867.

24. *Id.* at 447, 68 N.E.3d at 687, 45 N.Y.S.3d at 868.

25. *Id.* at 447, 68 N.E.3d at 688, 45 N.Y.S.3d at 869.

26. *Id.* at 450–51, 68 N.E.3d at 690, 45 N.Y.S.3d at 871.

was a binding agreement.[27] The First Department reversed, holding that Stonehill had failed to establish acceptance of the contract.[28] The Court of Appeals reversed the appellate division, holding that BOTW's and Mission's telephonic and electronic communications with Stonehill clearly established that the parties intended to enter into a binding agreement.[29] Thus, the parties' failure to fulfill the written execution and deposit conditions in the contract did "not render their agreement unenforceable."[30]

Noting "the general rule . . . that a seller's acceptance of an auction bid forms a binding contract, unless the bid is contingent on future conduct," the Court held that where "closure of the transaction required execution of a signed document" and "tender of the [ten percent] deposit," there was no "clear expression that the parties were not bound to consummate the sale and that [the defendant] could withdraw at any time, for any reason."[31] Therefore, the Court found that "the signed writing and deposit were post-agreement requirements necessary for the consummation of the transfer," rather than conditions "delay[ing] [the] formation of a binding contract absent the passage of those events."[32]

This ruling is significant because it overturned the appellate division decision that would have allowed parties to change their minds after agreeing to certain trades via online auctions. The decision makes clear that when two parties agree to the material terms of a sale of a syndicated loan, the parties have entered into a binding agreement, even where the sale remains subject to the execution of a written sales agreement. Moreover, the decision reinforces that courts should analyze the "totality of the parties' actions and communications" in determining whether an enforceable agreement concerning the sale of a syndicated loan exists.[33]

B. Chan v. Kwok, No. 653093/2013, 2016 N.Y. Slip Op. 31538(U) (Sup. Ct. N.Y. Cty. July 27, 2016)

In *Chan v. Kwok*, the New York County Commercial Division considered whether the plaintiff was entitled to a management and

27. Stonehill Capital Mgmt., LLC v. Bank of the W., No. 652287/2012, 2014 N.Y. Slip Op. 30751(U), at 9 (Sup. Ct. N.Y. Cty. Mar. 24, 2014).

28. Stonehill Capital Mgmt., LLC v. Bank of the W., 127 A.D.3d 429, 430, 7 N.Y.S.3d 91, 92 (1st Dep't 2015) (quoting King v. King, 208 A.D.3d 1143, 1144, 617 N.Y.S.2d 593, 593 (3d Dep't 1994)).

29. *Stonehill Capital Mgmt. LLC*, 28 N.Y.3d at 449, 68 N.E.3d at 689, 45 N.Y.S.3d at 870.

30. *Id.* at 443, 68 N.E.3d at 685, 45 N.Y.S.3d at 866.

31. *Id.* at 449, 451, 68 N.E.3d at 689, 691, 45 N.Y.S.3d at 870, 872 (citing N.Y.C v. Union News Co., 222 N.Y. 263, 270, 118 N.E. 635, 636 (1918)).

32. *Id.* at 452–53, 68 N.E.3d at 691–92, 45 N.Y.S.3d at 872–73.

33. *Id.* at 449, 68 N.E.3d at 689, 45 N.Y.S.3d at 870.

development fee for the work he performed on a residential investment property, even though the parties did not sign a writing assenting to any such fee.[34]

Plaintiff Raymond Chan, an architect with experience developing residential and commercial real estate, alleged that he located an investment property on West 49th Street in New York.[35] He presented to his family, with whom he had previously invested in other properties, a document estimating the costs to develop the 49th Street property as well as an estimate of rental profits.[36] The end of the document stated: "A [ten percent] development & management fee is to be deducted from net profit or increase in property value above base value."[37] The plaintiff included this provision in his proposal so he could be compensated for any work done on the property in the event that it was sold immediately after it was developed.[38] Per his proposal, if the property was retained for a longer period of time, Chan would "reduce the fee from [ten] to [eight] to [six] [percent]."[39] There were no writings signed by the family members agreeing to or otherwise memorializing the management and development fee.[40] Instead, the only written agreement between the family members was a shareholder letter, with shares in the property allocated based on the amount each family member contributed.[41]

Title to the property was held by a corporation (Clinton 49), which had purchased the property in 1995.[42] In 1998, after completion of construction, the building was rented to tenants.[43] "Additionally, the existing mortgage was refinanced with [the plaintiff] personally guarantying the loan."[44] "Mone[y] received from the refinancing [was] distributed to the shareholders."[45]

"In February 2003, the property was refinanced again."[46] The plaintiff issued a letter "on Clinton 49 letterhead stating the amount of the pro rata distribution to each shareholder," noting that "[a] [six percent] management [and] development fee will be charged" based on the money

34. *See* No. 653093/2013, 2016 N.Y. Slip Op. 31538(U), at 10 (Sup. Ct. N.Y. Cty. Jul. 27, 2016).
35. *Id.* at 1–2.
36. *Id.* at 2.
37. *Id.*
38. *Id.* at 2–3.
39. *Chan*, 2016 N.Y. Slip Op. 31538(U), at 3 (fourth alteration in original).
40. *Id.* at 5–6.
41. *Id.* at 3.
42. *Id.*
43. *Id.* at 4.
44. *Chan*, 2016 N.Y. Slip Op. 31538(U), at 4.
45. *Id.*
46. *Id.*

distributed to each shareholder, including rental income.[47] According to the plaintiff, none of the shareholders objected to his fee.[48]

The plaintiff eventually wished to sell the property, and found a buyer for the majority share in the Clinton 49 company.[49] "The minority members felt compelled to sell their interest as well," but a dispute arose as to whether the plaintiff was entitled to a management and development fee based on the shareholder defendants' sale of their shares, where no written agreement existed memorializing the terms of the fee.[50] After the plaintiff's sisters refused to pay him a development and management fee of six percent from profits realized by the sale of their shares, the plaintiff sued them for breach of contract, or, alternatively, unjust enrichment.[51]

Citing settled principles of contract formation, the court noted that intent to enter into a contract is

> determined objectively, gathered by [the parties'] expressed words and deeds. Accordingly, an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound by it. The parties' course of conduct may be looked at to determine whether there was a meeting of the minds sufficient to give rise to an enforceable contract.[52]

The court determined that, "although [the] defendants did not sign a writing expressly assenting to the management and development fee, the surrounding circumstances establish[ed] that the parties intended to be bound by the payment term."[53] The court also noted that the plaintiff's letter proposal to his family members "explicitly" mentioned the fee, and that the defendants "agreed to be bound by the fee term by making monetary investments in the project."[54] In short, the court concluded, even in the absence of a formal, executed agreement, the letter proposal combined with "the surrounding circumstances and course of conduct establish[ed] that the parties intended to be bound by the term granting a management and development fee to [the] plaintiff."[55]

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47. *Id.*
48. *Id.* at 5.
49. *Chan*, 2016 N.Y. Slip Op. 31538(U), at 8.
50. *Id.* at 8–9.
51. *Id.* at 1, 8–9.
52. *Id.* at 10 (internal quotations omitted) (first quoting Brown Bros. Elec. Contractors v. Beam Constr. Corp., 41 N.Y.2d 397, 399, 361 N.E.2d 999, 1001, 393 N.Y.S.2d 350, 352 (1977); and then quoting Flores v. Lower E. Side Serv. Ctr., 4 N.Y.3d 363, 369–70, 828 N.E.2d 593, 597–98, 795 N.Y.S.2d 491, 495 (2005)) (citing God's Battalion of Prayer Pentecostal Church v. Miele Assocs., LLP, 6 N.Y.3d 371, 374, 845 N.E.2d 1265, 1267, 812 N.Y.S.2d 435, 437 (2006)).
53. *Id.* at 11.
54. *Chan*, 2016 N.Y. Slip Op. 31538(U), at 11.
55. *Id.* at 12.

C. Ahmed v. Carrington, No. 12-15575, 2017 N.Y.L.J. Lexis 656 (Sup. Ct., Suffolk Cty. Mar. 15, 2017)

In this case, plaintiff Ahmed filed suit in New York Supreme Court, Suffolk County, to recover damages with respect to a loan modification agreement he had entered into with Carrington Mortgage.[56] Both parties moved for summary judgment, with Ahmed alleging that Carrington breached the parties' loan modification agreement when it failed to pay property taxes.[57]

As alleged in the complaint, on May 26, 2006, Ahmed obtained a mortgage-backed $433,500.00 loan from Mortgage Line Financial Corporation.[58] The following year, Carrington "assumed service of the loan."[59] On March 9, 2009, Ahmed wrote Carrington and explained that, due to medical issues, he was unable to work and requested modification of the loan.[60] On May 4, 2009, Carrington notified Ahmed via letter that it would waive Ahmed's "obligation to pay escrow funds for property tax purposes."[61] However, Ahmed testified that he had not previously seen the waiver until his deposition in this case.[62]

On September 29, 2009, Carrington officially modified the loan, and "the parties agreed to a new principal balance of $403,700.00, at a fixed interest rate of 5.125[%]."[63]

> The loan modification agreement, drafted by Carrington, also provided for a monthly payment of $2,162.33, and specifically stated: "[That the loan would] be escrowed for payment of taxes and/or insurance. The escrow portion of your payment will be $129.08. The escrow portion of your payment may fluctuate periodically based upon the required escrow analysis."[64]

"On July 15, 2010, [Ahmed] received notice from the Suffolk County Treasurer that his property taxes were not being paid."[65] By that point, Ahmed had made "84 payments of $2,162.33 to Carrington," and noted on each check that the money was for "principle, insurance, and real estate taxes after modification of September 29, 2009."[66] "Carrington

56. Ahmed v. Carrington Mortg. Servs., No. 13-15575, 2017 N.Y.L.J. LEXIS 656, at *2 (Sup. Ct. Suffolk Cty. Feb. 17, 2017).
57. *Id.* at *2–*3, *5.
58. *Id.* at *3.
59. *Id.*
60. *Id.*
61. *Ahmed*, 2017 N.Y.L.J. LEXIS 656, at *3–*4.
62. *Id.* at *4.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Ahmed*, 2017 N.Y.L.J. LEXIS, at *4–*5 (internal quotations omitted).

maintained, despite the . . . language of the loan modification agreement, that the May 4, 2009 waiver controlled and that [Ahmed] was responsible for payment of the real estate taxes on the subject property, and that the escrow of $129.08 was for *insurance* only."[67]

Ahmed filed suit, alleging that Carrington breached the loan modification agreement by "failing to pay property taxes [on] the secured property."[68] Both parties moved for summary judgment.[69] The Supreme Court, Suffolk County, determined that "[t]he September 2009 loan modification agreement constituted a [binding] contract between the parties," notwithstanding the May 4, 2009 communication from Carrington.[70] Accordingly, the court concluded that Ahmed was entitled to summary judgment "based upon Carrington's failure to timely pay real estate taxes on the secured property . . . ."[71]

III. Recent Cases Where Contracts Were Not Found to Have Been Formed or Modified by Informal Correspondence

A. Saul v. Vidokle, 151 A.D.3d 780, 56 N.Y.S.3d 230 (2d Dep't 2017)

In this past *Survey* period, the Second Department considered whether an agreement for the sale of real estate, negotiated through email exchanges, was enforceable.[72] The court concluded that email correspondence concerning the sale of real estate is not enough to satisfy the statute of frauds.[73]

In *Saul*, the plaintiff sought specific performance of a purported oral agreement to purchase a condominium owned by his neighbor (Vidokle).[74] The agreement was alleged to have been memorialized in email discussions between the parties.[75] "The defendant emailed his attorney with information regarding the sale, including the parties' names, the purchase price . . . and an agreement that no [real estate]

67. *Id.* at *4 (emphasis added).

68. *Id.* at *5.

69. *Id.* at *2–*3.

70. *Id.* at *4, *6.

71. *Ahmed*, 2017 N.Y.L.J. LEXIS, at *7.

72. *See* Saul v. Vidokle, 151 A.D.3d 780, 780–81, 56 N.Y.S.3d 230, 231 (2d Dep't 2017).

73. *Id.* at 781, 56 N.Y.S.3d at 231 (first citing *In re* Piterniak, 51 A.D.3d 931, 931, 856 N.Y.S.2d 878, 878 (2d Dep't 2008); then citing Nesbitt v. Penalver, 40 A.D.3d 596, 598, 835 N.Y.S.2d 426, 429 (2d Dep't 2007); then citing Gibraltar Estates, Inc. v. U.S. Bank N.A., 5 A.D.3d 728, 729, 774 N.Y.S.2d 176, 177 (2d Dep't 2004); and then citing O'Brien v. West, 199 A.D.2d 369, 370, 605 N.Y.S.2d 366, 367 (2d Dep't 1993)).

74. 151 A.D.3d at 780, 56 N.Y.S.3d at 231; Memorandum of Law in Support of Defendant Anton Vidokle's Motion to Dismiss at 1, Saul v. Vidokle, No. 505186/2014 (Sup. Ct. Kings Cty. July 31, 2014).

75. *Saul*, 151 A.D.3d at 780, 56 N.Y.S.3d at 231.

brokers would be involved in the sale and that the defendant would lease the property back from the plaintiff" on a monthly basis until his new home was complete.[76]

Days later, "the defendant was informed by a . . . broker that the property could be sold for a significantly higher amount; accordingly, the defendant asked the plaintiff to 'wait' on moving forward with the execution of a formal contract."[77] The plaintiff refused, insisting that "the parties were already bound by their emails," and filed suit for "specific performance of the alleged agreement."[78] The supreme court denied the defendants' motion to dismiss.[79]

The Second Department concluded that the emails the plaintiff relied on "to establish the alleged agreement . . . were insufficient to satisfy the statue of frauds."[80] Specifically, the emails "left for future negotiations essential terms of the . . . contract, such as a down payment, the closing date, the quality of title to be conveyed, the risk of loss during the sale period, and adjustments for taxes and utilities . . . ."[81] Accordingly, the Second Department concluded, "the [s]upreme [c]ourt should have granted the defendant's motion to dismiss the complaint."[82] The Second Department remitted "the matter to the Supreme Court, Kings County, for a determination of the award of costs and expenses occasioned by the filing and cancellation of the notice of pendency. . . ."[83]

The key takeaway from this case is that email correspondence can suffice to form an enforceable contract; however, when emails omit the essential terms of the proposed agreement, and indicate that the agreement is subject to continued negotiation and a formal written contract, there is no binding agreement and dismissal of the complaint is warranted.

B. Kassin Sabbagh Realty LLC v. Beekman, No. 653828/2015,

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76. *Id.* at 780–81, 56 N.Y.S.3d at 231.

77. *Id.* at 781, 56 N.Y.S.3d at 231.

78. *Id.*

79. *Id.*; Order Denying Motion to Dismiss, Saul v. Vidokle, No. 505186/2014, NYSCEF No. 57 (Mar. 26, 2015).

80. *Saul*, 151 A.D.3d at 781, 56 N.Y.S.3d at 231.

81. *Id.* at 781, 56 N.Y.S.3d at 231–32 (first citing *In re* Piterniak, 51 A.D.3d 931, 931, 856 N.Y.S.2d 878, 878 (2d Dep't 2008); then citing Nesbitt v. Penalver, 40 A.D.3d 596, 598, 835 N.Y.S.2d 426, 429 (2d Dep't 2007); then citing Gibraltar Estates, Inc. v. U.S. Bank N.A., 5 A.D.3d 728, 729, 774 N.Y.S.2d 176, 177 (2d Dep't 2004); and then citing O'Brien v. West, 199 A.D.2d 369, 370, 605 N.Y.S.2d 366, 367 (2d Dep't 1993)).

82. *Id.* at 781, 56 N.Y.S.3d at 232 (citing N.Y. C.P.L.R. 3211(a)(1), (5), (7) (McKinney 2016)).

83. *Id.* at 782, 56 N.Y.S.3d at 232 (citing N.Y. C.P.L.R. 6514(c) (McKinney 2010)).

2016 N.Y. Slip Op. 32371(U) (Sup. Ct. N.Y. Cty. Nov. 29, 2016)

In this case, the New York County Commercial Division held that email correspondence did not constitute a binding modification of an otherwise valid agreement.[84]

"In December 2014, Beekman Residential Suites LLC (the "seller") contracted to sell a property" (Beekman Tower) to a third party "for $137,500,000."[85] A closing date was set, but was later delayed at the third party's request.[86] The third party did not appear at closing, nor did it pay the $7,000,000 fee as required by the sales contract for extending the closing date.[87] The seller filed a declaratory judgment action against the third party, alleging breach of contact.[88]

"While that suit was pending," the plaintiff broker, Kassin Sabbagh Realty, LLC, negotiated the sale of Beekman Tower to the defendant, Beekman Tower Associates, LLC, for $127,000,000.[89] "On April 22, 2015, the broker and the defendant entered into a commission agreement whereby the broker would be paid a 0.5% commission on the purchase price in the amount of $635,000."[90] The commission agreement provided in pertinent part:

> Other than the commission set forth herein, broker shall not be entitled to any other fee, payment or compensation in connection with the project. The commission shall be due and payable upon final closing of title. In the event the contract is terminated, or the matter does not close for any other reason, no commission shall be due to broker.[91]

"The following day . . . the defendant and the seller entered into a sale contract," with closing scheduled for June 8, 2015.[92] "The contract barred the seller from selling the property or settling the pending litigation with the defaulted third party."[93] "[The] defendant had the right to terminate the contract for unpermitted exceptions defined as 'defects, objections or exceptions in the title to the property which are not

84. Kassin Sabbagh Realty LLC v. Beekman Tower Assocs., No. 653828/2015, 2016 N.Y. Slip Op. 32371(U), at 21–22 (Sup. Ct. N.Y. Cty. Nov. 29, 2016).

85. *Id.* at 1 (citing Complaint at 1, Beekman Residential Suites LLC v. 3 Mitchell Place Loft LLC, No. 651042/2015 (Sup. Ct. N.Y. Cty. Mar. 31, 2015)).

86. *Id.*

87. *Id.* (citing Complaint at 1, 3, 7, Beekman Residential Suites LLC v. 3 Mitchell Place Loft LLC, No. 651042/2015 (Sup. Ct. N.Y. Cty. Mar. 31, 2015)).

88. *Id.* at 2.

89. *Kassin Sabbagh Realty LLC*, 2016 N.Y. Slip Op. 32371(U), at 2.

90. *Id.* at 2.

91. *Id.*

92. *Id.*

93. *Id.* at 3.

Permitted Exceptions and to which [the] purchaser objects.'"[94] "In the event an Unpermitted Exception was filed as a result of the pending litigation, the defendant was permitted to cancel the contract."[95]

"On May 7, 2015, while the seller and the defendant were still negotiating, the defaulted third party filed a notice of pendency and counterclaimed for specific performance . . ." on the contract "or, in the alternative, a refund of the $8,000,000 deposit made to the seller in 2015 in the pending litigation."[96] "The notice of pendency was an unpermitted exception to good and marketable title."[97] After the parties reached an agreement, the pending litigation was dismissed and the third party paid the defendant a breakup fee and the seller's asking price.[98] Accordingly, the seller realized almost $12,000,000 "more than what was contracted for between the seller and the defendant."[99] "[The] [p]laintiff did not receive a commission as the defendant did not close on the contract to purchase Beekman Tower."[100]

The plaintiff filed suit on November 19, 2015, asserting, in relevant part, "breach of contract based on an alleged amended agreement."[101] The plaintiff sought "to recover a broker's commission pursuant to the commission agreement," or, alternatively, "damages sounding in quasi-contract arising from . . . [the] breakup fee the defendant received after the deal between the defendant and the seller did not close."[102]

The court noted that "New York courts have refused to allow a broker to collect a commission where the closing failed and the commission agreement specified that a commission is due at closing."[103] The court noted that here, the commission agreement clearly stated that "[a]t closing, broker shall be paid a commission equal to one-half percent (0.5%) of the purchase price."[104] In other words, a condition precedent for the payment of the commission was the closing, which had not occurred.

The plaintiff also alleged breach of contract based on an amended

94. *Kassin Sabbagh Realty LLC*, 2016 N.Y. Slip Op. 32371(U), at 3.
95. *Id.*
96. *Id.* at 3–4.
97. *Id.* at 4.
98. *Id.*
99. *Kassin Sabbagh Realty LLC*, 2016 N.Y. Slip Op. 32371(U), at 4–5.
100. *Id.* at 5.
101. *Id.*
102. *Id.*
103. *Id.* at 6–7.
104. *Kassin Sabbagh Realty LLC*, 2016 N.Y. Slip Op. 32371(U), at 8 (alteration in original).

commission agreement.[105] In support of this argument, the plaintiff produced an email correspondence that allegedly showed that the defendant, David Lichtenstein (sole and controlling member of Beekman Tower Associates, LLC) agreed to modify the commission agreement.[106] The plaintiff alleged that "upon discovering [the] defendant's receipt of . . . [the] breakup fee," he emailed Lichtenstein requesting a commission on the $3,000,000 breakup fee.[107] However, the plaintiff had actually emailed another person regarding this, and had copied Lichtenstein, who in turn replied, "[p]lease take me off this e-mail chain."[108] The email chain did not show that Lichtenstein ever "agreed to modify the commission agreement."[109]

The court stated that, while a "modification may be proved circumstantially by the conduct of the parties, there was no evidence of such conduct by [Lichtenstein]."[110] The court further noted that "[a]n oral modification of a written agreement requires [the] plaintiff to show all the elements of contract formation, including mutual assent."[111] "Further, 'mere silence, when not misleading, cannot be construed as acceptance.'"[112] The court concluded that "Lichtenstein's refusal to comment [on] the commission on the breakup fee was not assent to a modification. The plaintiff has failed to allege Lichtenstein's assent either by conduct or by writing. . . . [T]he plaintiff has failed to show an oral modification of the written contract."[113] Accordingly, the Court granted the "defendants' motion to dismiss [the] plaintiff's second cause of action for breach of amended commission agreement."[114]

The key takeaway from this case is that brokers in New York should be cognizant of the language in their commission agreements in order to determine what grounds, if any, a broker may recover a commission in the event that the sale falls through.

C. D & S Restoration, Inc. v. Wenger Const. Co., 54 Misc. 3d 763, 39

105. *Id.* at 5.
106. *Id.* at 14, 19.
107. *Id.* at 14.
108. *Id.*
109. *Kassin Sabbagh Realty LLC*, 2016 N.Y. Slip Op. 32371(U), at 14.
110. *Id.* at 15 (internal quotations omitted) (quoting Beacon Terminal Corp. v. Chemprene, Inc., 75 A.D.2d 350, 354, 429 N.Y.S.2d 715, 718 (2d Dep't 1980)).
111. *Id.* (quoting Naccarato v. Commercial Capital Corp., 2008 N.Y. Slip Op. 50613(U), at 5 (Sup. Ct. N.Y. Cty. Mar. 13, 2008)).
112. *Id.* (quoting Karpen v. Ali, 2015 N.Y. Slip Op. 50327(U), at 2–3 (Sup. Ct. Kings Cty. Mar. 13, 2015)).
113. *Id.*
114. *Kassin Sabbagh Realty LLC*, 2016 N.Y. Slip Op. 32371(U), at 16.

N.Y.S.3d 911 (Sup. Ct. Nassau Cty. Oct. 27, 2016)

In this case, the Supreme Court, Nassau County considered a subcontractor's breach of contract action against a contractor with respect to a contract to perform construction on a public school.[115] As alleged in the complaint, the "defendant entered into a contract with the New York City School Construction Authority" (SCA) in January 2011 to perform a construction project at a public school in Staten Island.[116] A couple of months later, the parties entered into a subcontract, under which the "plaintiff was to perform asbestos abatement work in connection with the project . . . ."[117]

Work on the project was completed in December 2012, but "final negotiations were not complete until June 24, 2016," at which time "payment became due to [the] plaintiff."[118] In the interim, the defendant sent the plaintiff an email on March 24, 2014, stating that SCA had agreed to credits of $115,818.48.[119] The plaintiff responded by email, agreeing to the credit and the subsequent payment.[120] The plaintiff then inquired as to when it would receive payment, and the defendant responded that he would "'look into the payment status' at the SCA."[121] Thereafter, plaintiff D&S trusted defendant Wenger and waited for the payment it agreed upon.[122]

The plaintiff filed a motion for summary judgment "in lieu of complaint."[123] The plaintiff argued in relevant part that the agreement as to credits in the March 25, 2014 email was intended by the parties to constitute a separate agreement for payment of the new amount.[124] The defendant argued that this action was time-barred based on a limitations period in the subcontract, which required the plaintiff to commence any action or proceeding against the defendant within one year after substantial completion of the plaintiff's work.[125] "SCA certified the project work as substantially complete" in October 2012.[126] The court

115. D & S Restoration, Inc. v. Wenger Constr. Co., 54 Misc. 3d 763, 765–66, 39 N.Y.S.3d 911, 913 (Sup. Ct. Nassau Cty. Oct. 27, 2016).

116. *Id.* at 765, 39 N.Y.S.3d at 913.

117. *Id.*

118. *Id.*

119. Affirmation in Opposition at 9, D & S Restoration, Inc. v. Wenger Constr. Co., 54 Misc. 3d 763, 39 N.Y.S.3d 911 (Sup. Ct. Nassau Cty. Oct. 27, 2016) (No. 601894-16).

120. *Id.*

121. *Id.*

122. *Id.* at 10.

123. *D & S Restoration, Inc.*, 54 Misc. 3d at 765, 39 N.Y.S.3d at 913.

124. *Id.* at 768, 39 N.Y.S.3d at 915.

125. *Id.* at 765, 39 N.Y.S.3d at 913.

126. *Id.*

agreed.[127]

The court noted that "the SCA certified the project work as substantially complete" in October 2012, the emails between the parties were sent in March 2014, and the plaintiff commenced the action in the March 2016.[128] "[C]redit negotiations between the parties and between [the] defendant and the SCA were part of, contemplated within . . . , and subject to the terms of the subcontract."[129] Furthermore, the subcontract stated that "[n]o oral modification of this Subcontract shall have any force or effect,"[130] the enforceability of which was further codified in General Obligations Law § 15-301(1), which provides that a written agreement containing "a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent."[131]

The court concluded that the "plaintiff's argument that the emails between the parties on or about March 25, 2014 constitute a separate agreement which is not subject to the terms of the subcontract is fatally defective."[132] "It is this court's opinion that credit negotiations between the parties and between [the] defendant and the SCA were part of, contemplated within (i.e. para 5 [sic]), and subject to the terms of the subcontract."[133] Accordingly, the court dismissed the plaintiff's complaint in its entirety.[134]

D. Barnes v. Mruvka, No. 651163/2016, 2017 N.Y. Slip Op. 50390(U) (Sup. Ct. N.Y. Cty. Feb. 24, 2017)

In this case, "[p]laintiff Frank E. Barnes III[] filed suit against defendants Alan Mruvka, StorageBlue Equities, LLC[,] and the Murray Mruvka Family Trust, alleging several causes of action," including breach of contract "relating to work allegedly performed by [the] plaintiff on behalf [the] defendants [sic]."[135]

According to the complaint, "between March 2014 and May 2015 [the plaintiff] spent several thousands of hours rendering [various]

127. *Id.*

128. *D & S Restoration, Inc.*, 54 Misc. 3d at 765, 768, 39 N.Y.S.3d at 913, 915.

129. *Id.* at 768, 39 N.Y.S.3d at 915.

130. *Id.* at 768–69, 39 N.Y.S.3d at 915 (alteration in original) (internal quotations omitted) (quoting N.Y. GEN. OBLIG. LAW § 15-301(1) (McKinney 2010)).

131. GEN. OBLIG. § 15-301(1) (internal quotations omitted).

132. *Id.*

133. *Id.*

134. *D & S Restoration, Inc.*, 54 Misc. 3d at 769, 39 N.Y.S.3d at 915.

135. Barnes v. Mruvka, No. 651163/2016, 2017 N.Y. Slip Op. 50390(U), at 1 (Sup. Ct. N.Y. Cty. Feb. 24, 2017).

services" to the defendants, including "play[ing] a key role in securing financing on a $31,275,000 mortgage."[136] Throughout this period, "the parties never agreed to a specific compensation schedule."[137] The plaintiff alleged "that at an initial meeting in March 2014, the parties agreed that he would be paid 'on a traditional advisory fees basis'" but that he later "asked for a monthly salary of $10,000 plus a success fee/bonus."[138] In response to the plaintiff's compensation requests, the "defendant Mrkuva [sic] acknowledged that he would be a [sic] due a bonus" and suggested the parties "continue discussing the terms of said bonus."[139]

"Upon closing of the mortgage, [o]n June 1, 2015, [the] plaintiff submitted an invoice to [the] defendants seeking $274,324 as a success fee."[140] The defendants rejected the amount but lent the plaintiff $52,500.[141] "On June 22, 2015, [the] plaintiff received a letter from [the] defendant along with a check in the amount of $20,400."[142] The letter stated in pertinent part that "[b]y cashing the enclosed check of $20,400, you are accepting this as a total and final payment and agreeing that there are no other monies owed or due to you."[143] "The memo portion of the check stated 'Once Cashed, Check Constitutes Total Final Payme' [sic]."[144] "On June 23, 2015, [the] plaintiff crossed off the words 'final payme' [sic] and deposited the check."[145] A few days later, the plaintiff sent the defendants a letter "stating that cashing the check was not a waiver of his rights."[146] This action followed, and the defendants moved to dismiss the complaint.[147]

The court found that the documentary evidence, as well as the complaint, showed that the parties never agreed to an annual salary or bonus structure.[148] The court considered two memos written by the plaintiff, containing his proposed compensation, and concluded that "[n]owhere in any of these memos did the parties agree to a compensation schedule or even a bonus."[149] Additionally, "[f]ollow up communications

136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 1–2.
140. *Barnes*, 2017 N.Y. Slip Op. 50390(U), at 2.
141. *Id.* at 2.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Barnes*, 2017 N.Y. Slip Op. 50390(U), at 1.
146. *Id.* at 2.
147. *Id.*
148. *Id.*
149. *Id.*

by email also show that the parties never agreed to any salary or set compensation or even a bonus structure. However, it is clear that StorageBlue did indicate an openness to pay a bonus."[150] The court further found that the plaintiff's cashing of the check in June 2015 "constituted an accord and satisfaction of the clearly disputed question as to the amount of the bonus."[151]

The court determined that the plaintiff's own memo contradicted his assertion that the parties had agreed to a traditional advisory fee arrangement, and that it was "similarly clear from the submitted emails that no bonus structure was ever formalized."[152] Upon finding that no agreement was ever made between the parties with respect to a salary or bonus structure, the court dismissed the action.[153]

IV. PROMISSORY ESTOPPEL IS INSUFFICIENT TO OVERCOME THE STATUTE OF FRAUDS

This past *Survey* period, New York's highest court reaffirmed the principle that people and businesses take a huge risk if they do not insist on written contracts.

In re Hennel involved a decedent who owned an apartment building and allegedly entered into an agreement with his grandsons, whereby they would assume maintenance and eventual ownership of the property.[154] The grandsons did not want to be responsible for the $100,000 mortgage on the property so the decedent allegedly promised his grandsons that he would provide for payment of the mortgage in his will.[155]

The decedent's 2006 will appeared to memorialize this oral agreement.[156] However, his 2008 will revoked all previous wills and did not include the same terms, although the grandsons claimed Hennel told them their agreement was still valid.[157] The grandsons assumed ownership of the property but the 2008 will failed to pay off the property's mortgage.[158]

After Hennel's death, his grandsons sued to have the mortgage satisfied by their grandfather's estate, but they admitted that they could not satisfy the statute of frauds, since their agreement with their

150. *Barnes*, 2017 N.Y. Slip Op. 50390(U), at 2.
151. *Id.*
152. *Id.* at 3.
153. *Id.*
154. 29 N.Y.3d 487, 489–90, 80 N.E.3d 1017, 1018–19, 58 N.Y.S.3d 271, 272–73 (2017).
155. *Id.* at 490, 80 N.E.3d at 1019, 58 N.Y.S.3d at 273.
156. *Id.* at 490–91, 80 N.E.3d at 1019, 58 N.Y.S.3d at 273.
157. *Id.*
158. *Id.*

grandfather had been oral.[159] In the absence of a written contract, the grandsons argued that promissory estoppel trumped the statue of frauds.[160]

The Court of Appeals found that the decedent's promise *could* constitute an exception to the statute of frauds, but refused to make an exception because nonenforcement of the promise, while unfair, was not unconscionable in this case.[161]

The Court looked to the fact that during the decedent's life, his grandsons used the property's rental income to pay the mortgage down, without contributing any of their own personal funds.[162] In addition, the value of the property at the time of the decedent's death was $235,000, and the mortgage balance was approximately $80,000.[163] The Court found that receiving property with a net equity of $150,000, rather than an expected $235,000 of equity, was insufficient to satisfy the unconscionability standards for disregarding the statute of frauds.[164] In the absence of an unconscionable injury, the Court concluded, promissory estoppel could not overcome the statute of frauds.[165]

While the Court of Appeals has now officially adopted the promissory estoppel exception to the statute of frauds, the exception requires a fact-based inquiry and only applies in limited circumstances. As a result, *In re Hennel* reinforces the longstanding rule in New York that certain contracts must be in writing in order to be enforced.

V. A BINDING AGREEMENT IS NOT CANCELLED BY EMAIL

Lastly, during the *Survey* period the Second Department considered whether an email communication could cancel an otherwise valid contract.

In *Long Island Horse Properties, Inc. v. Fleischman*, a small claims action, the plaintiffs sought to recover a $5,000 brokerage commission.[166]

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159. *In re Hennel*, 29 N.Y.3d at 492, 80 N.E.3d at 1021, 58 N.Y.S.3d at 275; *In re Hennel*, 133 A.D.3d 1120, 1120, 20 N.Y.S.3d 460, 462 (3d Dep't 2015).

160. *See In re Hennel*, 29 N.Y.3d at 493, 80 N.E.3d at 1021, 58 N.Y.S.3d at 275.

161. *See id.* at 495, 497, 80 N.E.3d at 1022, 1024, 58 N.Y.S.3d at 276, 278.

162. *Id.* at 496, 80 N.E.3d at 1023, 58 N.Y.S.3d at 277 (first citing Castellotti v. Free, 138 A.D.3d 198, 204–05, 27 N.Y.S.3d 507, 514 (1st Dep't 2016); and then citing Fleet Bank v. Pine Knoll Corp., 290 A.D.2d 792, 796–97, 736 N.Y.S.2d 737, 741–42 (3d Dep't 2002)).

163. *See id.* (explaining that the property was worth $235,000, minus the remaining mortgage, leaving the plaintiffs with approximately $150,000 of equity, and meaning the remaining mortgage was around $85,000).

164. *See id.* at 497, 80 N.E.3d at 1023–24, 58 N.Y.S.3d at 277–78.

165. *In re Hennel*, 29 N.Y.3d at 497, 80 N.E.3d at 1024, 58 N.Y.S.3d at 278 (citing Christian v. Christian, 42 N.Y.2d 63, 71, 365 N.E.2d 849, 855, 396 N.Y.S.2d 817, 823 (1977)).

166. No. 2015-736SC, 2017 N.Y. Slip Op. 50421(U), at 1 (2d Dep't Apr. 7, 2017).

At a bench trial, "the evidence showed that the parties entered into a contract" from July 11, 2013 to January 31, 2014, under which the "plaintiffs agreed to represent [the] defendant as a buyer's broker, and [the] defendant agreed to work exclusively with [the] plaintiffs . . . in connection with the purchase of residential property."[167] Moreover, if the defendant entered into a contract to purchase residential property in either Nassau County or Suffolk County during the term of the contract, it had to pay the plaintiffs a 2% commission of the purchase price if the property was listed with a broker, and 2.5% of the purchase price if the property was not so listed.[168]

> The contract further provided, in pertinent part, that, . . . [if the] defendant entered into a contract to purchase residential real property in either Nassau or Suffolk counties within 120 days after the expiration of the term of the contract, [the] plaintiffs would be entitled to the same commission if they had 'first introduced' [the] defendant to such property.[169]

Notably, the contract also provided that, "[n]either party may waive any of its rights or any obligation of the other party or any provision of this Agreement except by an instrument in writing signed by that party."[170]

According to plaintiff Wendy Butler, who worked as a licensed real estate broker for plaintiff Long Island Horse Properties, Inc., on July 26, 2013, after showing the defendant several properties, he sent her an email in which he stated his intention "to put the project on hold,"[171] and that Butler should "consider our contract cancelled at this point while we work out our next steps."[172] Several months later, the defendant entered into direct negotiations with the owner of one of the properties Butler had shown him.[173] On February 26, 2014, the defendant signed a contract with the owner of the property to purchase the premises.[174] After closing, the defendant refused to pay the plaintiffs a commission.[175] This lawsuit followed.

At the close of trial, the district court awarded $5,000 to the plaintiffs, finding that defendant's July 26, 2013 email to Butler did not effectively cancel the parties' contract and that the defendant was

167. *Id.*
168. *Id.*
169. *Id.* at 1–2.
170. *Id.* at 2 (internal quotations omitted).
171. *Long Island Horse Props., Inc.*, 2017 N.Y Slip Op. 50421(U), at 2.
172. *Id.* (internal quotations omitted).
173. *Id.*
174. *Id.*
175. *Id.*

therefore liable to the plaintiffs for a commission.[176] The Second Department affirmed, also finding that the defendant's email constituted an unsuccessful attempt to cancel the parties' contract and avoid paying a commission.[177] However, the court concluded, the email did constitute "a positive and unequivocal repudiation of the parties' contract, as a result of which [the] plaintiffs were entitled to damages" for the defendant's act of bad faith.[178]

CONCLUSION

The cases surveyed in this article show that the issue of whether and to what extent a contract can be formed by email or other informal written communications is not always clear and is an area of the law that is developing in real time. As shown in *Stonehill*, email communications that confirm the existence of a contract by setting forth the material terms of the agreement can constitute binding contracts.[179] The cases surveyed above provide additional reminders of the need to exercise caution and care when engaging in electronic communications. Parties contracting in New York should continue to consider including language in their emails that expressly disclaims an enforceable contract until a formal, written agreement is signed by both parties.

Conversely, for parties who wish to ensure that an email exchange or other correspondence be formally recognized as a binding agreement, these cases shed light on the conditions that must be met in order for this to occur. In the real estate context, this means that the emails should include, among other things, a deposit or down payment, closing date, quality of title, escrow, risk of loss, right to inspect, terms for default, and adjustments for taxes and utilities. As shown in *Saul*, the absence of these terms can be fatal and render any agreement unenforceable under the statute of frauds.[180]

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176. *Long Island Horse Props., Inc.*, 2017 N.Y Slip Op. 50421(U), at 2.

177. *Id.* (first citing Long Island R.R. Co. v. Northville Indus. Corp., 41 N.Y.2d 455, 464, 362 N.E.2d 558, 564, 393 N.Y.S.2d 925, 931 (1977); and then citing Palmetto Partners, LP v. AJW Qualified Partners, LLC, 83 A.D.3d 804, 806–07, 921 N.Y.S.2d 260, 264 (2d Dep't 2011)).

178. *Id.* (first citing *Long Island R.R. Co.*, 41 N.Y.2d at 464, 362 N.E.2d at 564, 393 N.Y.S.2d at 931; then citing *Palmetto Partners, LP*, 83 A.D.3d at 806–07, 921 N.Y.S.2d at 264; and then citing Lansco Corp. v. Strike Holdings, LLC, 135 A.D.3d 445, 446, 21 N.Y.S.3d 888, 888 (1st Dep't 2016)).

179. *See* Stonehill Capital Mgt. LLC v. Bank of the W., 28 N.Y.3d 439, 450, 68 N.E.3d 683, 690, 45 N.Y.S.3d 864, 871 (2016).

180. *See* Saul v. Vidokle, 151 A.D.3d 780, 781, 56 N.Y.S.3d 230, 231–32 (2d Dep't 2017) (first citing *In re* Piterniak, 51 A.D.3d 931, 931, 856 N.Y.S.2d 878, 878 (2d Dep't 2008); then citing Nesbitt v. Penalver, 40 A.D.3d 596, 598, 835 N.Y.S.2d 426, 429 (2d Dep't 2007); then citing Gibraltar Estates, Inc. v. U.S. Bank N.A., 5 A.D.3d 728, 729, 774 N.Y.S.2d 176, 177 (2d Dep't 2004); and then citing O'Brien v. West, 199 A.D.2d 369, 370, 605 N.Y.S.2d 366,

367 (2d Dep’t 1993)).