INADVERTENT CONTRACT FORMATION UNDER NEW YORK LAW:

AN UPDATE

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INTRODUCTION

Over the past *Survey* year, New York courts have continued to address the issue of when email communications and other informal writings create binding contracts.[1] As noted in the 2014–2015 *Survey*, New York courts have held that these communications can result in binding contracts, even where certain terms have yet to be negotiated.[2]

This *Survey* year saw some New York courts declining to find alleged contracts formed by email. However, other New York courts continue to hold that parties can enter into a binding contract—sometimes unwillingly—without memorializing their agreement in the form of a more traditional signed, written document. Notwithstanding recent developments in the relevant case law, a fully executed document naturally continues to be the most effective tool for proving the existence of a contract and its terms.

I. BACKGROUND LAW: CONTRACTS FORMED BY ELECTRONIC COMMUNICATIONS

A contract is binding if there is an offer, acceptance, consideration, mutual assent, an intent to be bound, and both sides agree on all the essential terms.[3] While parties can generally enter into a binding contract without memorializing their agreement in the form of a signed, written document,[4] New York law requires some agreements to be in writing in order for legal rights or obligations to be conferred.

The statute of frauds, codified in General Obligations Law §§ 5–701 through 5–705, requires a signed writing for certain types of agreements, including (1) contracts that by their terms are "not to be performed within one year from the making thereof,"[5] (2) the conveyance of real property,[6] (3) contracts for the payment of finder's fees,[7] and (4) modifications to

1. This Article serves as an update to the 2016 *Survey* on inadvertent contract formation under New York law, Stewart D. Aaron & Jessica Caterina, *2014–15 Survey of New York Law: Contract Formation Under New York Law: By Choice or Through Inadvertence*, 66 SYRACUSE L. REV. 855 (2016).

2. *Id.* at 855–56 (citing Kolchins v. Evolution Mkts., Inc., 128 A.D.3d 47, 49–50, 8 N.Y.S.3d 1, 3 (1st Dep't 2015)).

3. Kowalchuk v. Stroup, 61 A.D.3d 118, 121, 873 N.Y.S.2d 43, 46 (1st Dep't 2009) (citing 22 N.Y. JUR. 2D CONTRACTS § 9 (2008)).

4. *See* Bear Stearns Inv. Prods., Inc. v. Hitachi Auto. Prods. (USA), 401 B.R. 598, 617 (S.D.N.Y. 2009) (citing Winston v. Mediafare Entm't Corp., 777 F.2d 78, 80 (2d Cir. 1985)).

5. N.Y. GEN. OBLIG. LAW § 5–701(a)(1) (McKinney 2012).

6. N.Y. GEN. OBLIG. LAW § 5–703(1) (McKinney 2012).

7. GEN. OBLIG. § 5–701(a)(10).

written agreements which state that they cannot be changed orally.[8] To satisfy the statute of frauds, these types of contracts must be reduced to a writing that identifies the parties, describes the subject matter, states all the essential terms of the agreement, and is signed by the party to be charged.[9]

The statute of frauds was amended in 1994 to recognize as a writing "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."[10] Consistent with this amendment, it is commonly recognized that an email or electronic signature can satisfy the writing and subscription requirements of the statute of frauds.[11] Indeed, New York's Electronic Signatures and Records Act (ESRA) provides that electronic signatures must "have the same force and effect as" handwritten signatures.[12] 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."[13]

The interplay between traditional norms of contract formation and the more recent legislative and judicial recognition of the role of electronic communication can be boiled down to one principle that negotiating parties in New York should be cognizant of: under certain circumstances, the sender of an email, by typing his or her name at the bottom, can inadvertently convert a casual communication into a binding agreement.

II. RECENT CASE LAW FINDING THE EXISTENCE OF BINDING CONTRACTS VIA EMAIL EXCHANGES

New York courts continued to hold this *Survey* year that email exchanges can create binding contracts.

8. *See* N.Y. GEN. OBLIG. LAW § 15–301 (McKinney 2012).

9. Urgo v. Patel, 297 A.D.2d 376, 377, 746 N.Y.S.2d 733, 735 (2d Dep't 2002) (first citing 160 Chambers St. Realty Corp. v. Register of N.Y., 226 A.D.2d 606, 606–07, 641 N.Y.S.2d 351, 352 (2d Dep't 1996); and then citing GEN. OBLIG. § 5–703(2)).

10. GEN. OBLIG. § 5–701(b)(4).

11. *Id.*

12. N.Y. STATE TECH. LAW § 305(3) (McKinney 2016).

13. 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 12 LAWRENCE'S ANDERSON ON THE UNIFORM COMMERCIAL CODE, E-SIGN §§ 101:4, 101:6 (3d ed. 2000 & Supp. 2010); and then citing 3 NIMMER, LAW OF COMPUTER TECHNOLOGY §§ 13:13, 13:15 (4th ed. 2009 & Supp. 2010)).

A. Agosta v. Fast Systems Corp.*, 136 A.D.3d 694, 26 N.Y.S.3d 534 (2d Dep't 2016)*

In *Agosta v. Fast Systems Corp.*, the Second Department upheld the Supreme Court, Suffolk County Commercial Division's holding that a binding agreement could be created where the parties did not execute a formal contract, but communicated via email regarding the contract's terms.[14] The Supreme Court denied the plaintiffs' motion for summary judgment, wherein the plaintiffs argued that because the parties had not signed a fully integrated contract, the statute of frauds barred the purported agreement.[15] The Supreme Court found that the parties' course of conduct, including their email exchanges, inferred a current intent to be bound.[16] The court held that the parties' signed and unsigned writings, when read together, were sufficient to establish a binding agreement.[17]

On appeal, in affirming the denial of the defendant's summary judgment motion, the Second Department agreed that the agreement was not rendered moot by the statute of frauds.[18] The court set forth the established rule that

> an agreement "need not be contained in one single document, but rather may be furnished by piecing together other, related writings." . . . [T]he terms of the contract "must be set out in the various writings presented to the court, and at least one writing, the one establishing a contractual relationship between the parties, must bear the signature of the party to be charged."[19]

Further, "[a]n e-mail sent by a party, under which the sending party's name is typed, can constitute a [signed] writing for [the] purposes of the statute of frauds."[20]

The Second Department concluded that because "the terms of the

14. 136 A.D.3d 694, 695, 26 N.Y.S.3d 534, 537 (2d Dep't 2016).

15. Agosta v. Fast Sys. Corp., No. 19067-13, 2015 N.Y. Slip. Op. 50107(U), at 1, 7–8 (Sup. Ct. Suffolk Cty. Feb. 3, 2015) (citing GEN. OBLIG. § 5–701(a)(1)).

16. *Id.* at 8.

17. *Id.* at 7–8 ("[I]t is well established that the statutorily required writing need not be contained in a single document, but may be furnished by piecing together other, related writings.") (citing William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d 470, 477, 5 N.E.3d 976, 981, 982 N.Y.S.2d 813, 818 (2013)).

18. *Agosta*, 136 A.D.3d at 695, 26 N.Y.S.3d at 536.

19. *Id.* at 695, 26 N.Y.S.3d at 536–37 (first quoting *Rabizadeh*, 22 N.Y.3d at 477, 5 N.E.3d at 981, 982 N.Y.S.2d at 818; and then quoting Crabtree v. Elizabeth Arden Sales Corp., 305 N.Y. 48, 55–56, 110 N.E.2d 551, 554 (1953)).

20. *Id.* at 695, 26 N.Y.S.3d at 537 (quoting Newmark & Co. Real Estate Inc. v. 2615 E. 17 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)).

alleged agreement were set forth in various writings, including an email and an assignment signed by [one of] the plaintiff[s]," the plaintiffs failed to establish their prima facie entitlement to judgment as a matter of law on their statute of frauds defense.[21]

B. Law Offices of Ira H. Leibowitz v. Landmark Ventures, Inc.*, 131 A.D.3d 583, 15 N.Y.S.3d 814 (2d Dep't 2015)*

In *Law Offices of Ira H. Leibowitz v. Landmark Ventures, Inc*., the plaintiffs filed suit to recover legal fees for services rendered on behalf of the defendant, Landmark Ventures, Inc.[22] The Second Department affirmed the grant of summary judgment in favor of the plaintiffs.[23] The Second Department held that the plaintiffs set forth a prima facie case for judgment as a matter of law on their breach of contract claim, where they submitted email exchanges in support of their allegation that a contract had been formed.[24]

The court reviewed the correspondence, taking note of the material elements included in the emails.[25] For example, for "one matter, the parties agreed that the plaintiffs would represent Landmark at a rate of $350 per hour."[26] For another matter, the parties agreed to "an initial retainer fee of $5,000, plus a 25% contingency fee with respect to any sums that Landmark ultimately recovered."[27] The court concluded that, by the "plain language employed" by the parties in their emails, the plaintiffs made an offer to represent Landmark in specific matters for certain fees, and Landmark accepted that offer.[28] Accordingly, the court held that the email correspondence formed a legally binding agreement, and that the plaintiffs were entitled to their legal fees for services rendered.[29] The defendant in *Leibowitz* did not contest whether a binding agreement was created by the email exchanges, but unsuccessfully sought to interpose a counterclaim against the plaintiffs for interference with contract.[30]

21. *Id.*

22. 131 A.D.3d 583, 584, 15 N.Y.S.3d 814, 816 (2d Dep't 2015).

23. *Id.* at 583–84, 15 N.Y.S.3d at 816.

24. *Id.* at 584, 15 N.Y.S.3d at 817 (citing Kasowitz, Benson, Torres & Friedman, LLP. v. Duane Reade, 98 A.D.3d 403, 405, 950 N.Y.S.2d 8, 10 (1st Dep't 2012)).

25. *Id.* at 584–85, 15 N.Y.S.3d at 817.

26. *Id.* at 584, 15 N.Y.S.3d at 817.

27. *Landmark Ventures*, 131 A.D.3d at 584–85, 15 N.Y.S.3d at 817.

28. *Id.* at 584, 15 N.Y.S.3d at 817 (quoting *Kasowitz*, 98 A.D.3d at 405, 950 N.Y.S.2d at 10).

29. *Id.* at 584–85, 15 N.Y.S.3d at 816–17.

30. *Id.* at 585–86, 15 N.Y.S.3d at 817–18.

C. Josephberg v. Crede Capital Group, LLC*, 140 A.D.3d 629, 34 N.Y.S.3d 447 (1st Dep't 2016)*

Josephberg v. Crede Capital Group, LLC involved a breach of contract action arising from the plaintiff's alleged wrongful termination.[31] The plaintiff alleged that the defendant Crede Capital Group LLC ("Crede"), a private equity firm, failed to pay him a fifteen percent commission for securing deals while employed as a salesman at Crede's predecessor, Socius Capital Group, LLC ("Socius").[32] The plaintiff alleged that he was never given, nor did he sign, a written employment agreement.[33] Instead, the plaintiff alleged that he had an oral agreement with Socius under which he would be paid fifteen percent of any profits generated by financing transactions originated by him.[34] The defendants moved to dismiss the complaint on several grounds, arguing, inter alia, that Josephberg's breach of contract claims were barred by the statue of frauds.[35] The motion court agreed and dismissed the plaintiff's action.[36]

The First Department reversed, finding that the material elements of Josephberg's oral agreement were set forth in subsequent emails that were authored by two partners at Socius: "Plaintiff alleges that defendant Socius orally agreed to provide him with 15% of the profits generated by financing transactions originated by him. The emails to which he points, authored by defendants Wachs and Peizer, equal partners in Socius, confirm the material elements of this alleged agreement."[37] Therefore, the court concluded, the emails satisfied the requirements of the statute of frauds.[38]

D. Rothstein v. Mahne*, No. 15-CV-3236, 2015 U.S. Dist. LEXIS 151056 (S.D.N.Y. Nov. 5, 2015)*

In *Rothstein v. Mahne*, the plaintiff filed suit in the U.S. District Court for the Southern District of New York against "MAZ

31. 140 A.D.3d 629, 629, 34 N.Y.S.3d 447, 448 (1st Dep't 2016) (citing N.Y. C.P.L.R. 3211(a)(5) (McKinney 2016)).

32. *Id.*

33. Josephberg v. Crede Capital Grp., LLC, No. 650915/2013, 2014 N.Y. Slip. Op. 31018(U), at 1 (Sup. Ct. N.Y. Cty. Apr. 15, 2014).

34. *Josephberg*, 140 A.D.3d at 629, 34 N.Y.S.3d at 448.

35. *Id.* (citing C.P.L.R. 3211(a)(5)).

36. *Id.*

37. *Id.* (first citing Morris Cohon & Co. v. Russell, 23 N.Y.2d 569, 574–75, 245 N.E.2d 712, 715, 297 N.Y.S.2d 947, 952 (1969); and then citing N.Y. GEN. OBLIG. LAW § 5–701(a)(10) (McKinney 2012)).

38. *Id.* (first citing *Russell*, 23 N.Y.2d at 574–75, 245 N.E.2d at 715, 297 N.Y.S.2d at 952; and then citing GEN. OBLIG. § 5–701(a)(10)).

Technologies, Inc. ('MAZ') and Christopher Mahne, the President and Chairman of MAZ ('Mahne') (collectively, '[the defendants]'), alleging that [the] [d]efendants breached a contract for [the] [p]laintiff's services relating to the sale of [the] [d]efendants' patent portfolio to Empire IP LLC ('Empire')."[39] The plaintiff brought claims for breach of contract, unjust enrichment, quantum meruit, and promissory estoppel.[40] The district court, applying New York law, denied the defendants' motion to dismiss, finding that the plaintiff adequately alleged the existence of an enforceable contract consisting of emails and other communications.[41]

The plaintiff asserted that Mahne offered to pay him an undisclosed sum in return for his help in locating buyers for the patent portfolio.[42] The plaintiff, allegedly relying on the defendants' promises, commenced work on identifying potential business opportunities.[43] This work included connecting Mahne to Empire, which resulted in a contract under which Empire would sell the patent portfolio (the "Empire Contract").[44] The terms of the Empire Contract contemplated that Empire would bring legal actions for any patent infringement, "and would pay a percentage of any proceeds obtained from those lawsuits to MAZ as consideration for the sale of the patents."[45]

The plaintiff contended that, prior to finalization of the Empire Contract, he engaged in several email exchanges with the defendants in which they agreed to pay him ten percent of any amounts payable to them under the soon-to-be-finalized Empire Contract.[46] The plaintiff also alleged that, in the course of "numerous discussions, emails and other communications, Mahne agreed" to pay the plaintiff for his work.[47] Relying on these exchanges, the plaintiff continued to do work for the defendants prior to finalization of the Empire Contract, which was eventually memorialized in an October 25, 2012 written letter agreement (the "Letter Agreement").[48]

By its terms, the Letter Agreement "memorialize[d]" the parties' agreement concerning the enforcement, licensing and monetization of

39. No. 15-CV-3236, 2015 U.S. Dist. LEXIS 151056, at *1 (S.D.N.Y. Nov. 5, 2015).

40. *Id.*

41. *Id.* at *1, *11.

42. *Id.* at *2.

43. *Id.*

44. *Rothstein*, 2015 U.S. Dist. LEXIS 151056, at *2.

45. *Id.* at *3.

46. *Id.* ("Plaintiff alleges that 'agreement [was] documented in numerous emails and was clearly stated on many occasions in other communications.'" (alteration in original)).

47. *Id.*

48. *Id.* at *3–4.

MAZ's patent portfolio.[49] Further, the Letter Agreement stated in relevant part that, in return for the consulting services the plaintiff already had rendered, the defendants would pay the plaintiff ten percent of any proceeds received.[50] Subsequently, Empire assigned its rights in the portfolio to a subsidiary.[51] Thereafter, the plaintiff alleged, even though Empire and its affiliates "settled significant patent litigation and paid a percentage of those proceeds to" the defendants, the defendants never paid the plaintiff.[52]

The district court held that the plaintiff adequately alleged the existence of an enforceable contract.[53] The court noted that, in order to defeat the defendants' motion to dismiss, the plaintiff had to allege "(1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages."[54] Focusing on the first element, the defendants argued, inter alia, that the alleged contract entered into with the plaintiff was unenforceable because it ran afoul of the statute of frauds, N.Y. General Obligations Law § 5–1107.[55]

The court disagreed, finding that "[a]n oral contract may be binding even if the parties plan to create a documentary record of the agreement."[56] The defendants argued that the exception to the statute of frauds, allowing oral agreements whose terms are later memorialized in a writing signed by the party to be charged,[57] could not apply because the Amended Complaint did not allege a specific oral contract that was later memorialized by the Letter Agreement.[58]

The court found,

> While not a model of drafting, the Amended Complaint alleges

49. *Rothstein*, 2015 U.S. Dist. LEXIS 151056, at *4.

50. *Id.*

51. *Id.* at *4–5.

52. *Id.* at *5.

53. *Id.* at *6.

54. *Rothstein*, 2015 U.S. Dist. LEXIS 151056, at *6 (quoting Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc., 837 F. Supp. 2d 162, 188–89 (S.D.N.Y. 2011)).

55. *Id.* (citing N.Y. GEN. OBLIG. LAW § 5–1107 (McKinney 2010)).

56. *Id.* at *7 (quoting Pretzel Time, Inc. v. Pretzel Int'l, Inc., No. 98 CIV. 1544, 2000 U.S. Dist. LEXIS 14907, at *7 (S.D.N.Y. Oct. 10, 2000)) (citing Winston v. Mediafare Entm't Corp., 777 F.2d 78, 80 (2d Cir. 1985)).

57. *Id.* at *8–9. *See, e.g.*, N.Y. GEN. OBLIG. LAW § 5–701(b)(3)(d) (McKinney 2012) ("Notwithstanding paragraph one of subdivision a of this section: . . . There is sufficient evidence that a contract has been made if: . . . There is a note, memorandum or other writing sufficient to indicate that a contract has been made, signed by the party against whom enforcement is sought or by its authorized agent or broker.").

58. *Rothstein*, 2015 U.S. Dist. LEXIS 151056, at *8–9.

> that [the] [d]efendants agreed to pay [the] [p]laintiff ten percent of all proceeds from Empire's litigation regarding the patents at issue. [Further,] [t]he Amended Complaint [] alleges that the agreement was reduced to writing in emails . . . , and was further memorialized in the . . . [Letter Agreement] signed by the [d]efendants.[59]

The court gave particular attention to the following terms of the Letter Agreement: "'This letter memorializes our agreement concerning the enforcement, licensing and monetization of MAZ Technologies' patent portfolio;' 'I have asked you to perform;' 'I have agreed to pay.'"[60] The court concluded that, "[d]rawing all inferences in [the] [p]laintiff's favor, the Amended Complaint adequately allege[d] that the essential terms of the contract were reduced to a writing signed by the [d]efendants."[61] Thus, the court concluded that the Amended Complaint pled sufficient facts as to the existence of a contract that complied with the statute of frauds.[62]

III. RECENT CASES WHERE CONTRACTS WERE NOT FOUND TO HAVE BEEN FORMED BY EMAIL OR OTHER CORRESPONDENCE

There also were decisions in this *Survey* year where New York courts held that email exchanges or other correspondence did not create binding contracts.

A. Lake Overlook Partners, LLC v. Sosa, *49 Misc. 3d 1215(A), 29 N.Y.S.3d 847 (N.Y. Sup. Ct. Kings County, Oct. 26, 2015)*

In *Lake Overlook Partners, LLC v. Sosa*, the Supreme Court, Kings County, held that emails reflected negotiations that did not form a binding agreement because they failed to memorialize all of the material terms of the agreement.[63] The court therefore granted the defendant's motion to dismiss.[64]

In *Lake Overlook Partners, LLC*, a lawsuit concerning an interest in real property, the plaintiff conceded that there was no written agreement between the parties, but relied upon a series of emails in order to prove that a binding contract was formed.[65] The court noted, "General Obligations Law § 5–701(b)(4) provides that 'the tangible written text

59. *Id.* at *9.
60. *Id.*
61. *Id.*
62. *Id.* at *10.
63. No. 501112/2015, 2015 N.Y. Slip. Op. 51686(U), at 5, 9 (Sup. Ct. Kings Cty. Oct. 26, 2015).
64. *Id.* at 10.
65. *Id.* at 4–5.

produced by [an e-mail] . . . 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.'"[66] The court also noted that a "statutorily required writing need not be contained in one single document, but rather may be furnished by piecing together other, related writings."[67] However, to satisfy the statute of frauds,

> [A] memorandum, subscribed by the party to be charged, must designate the parties, identify and describe the subject matter, and state all of the essential terms of a complete agreement. A writing is not a sufficient memorandum unless the full intention of the parties can be ascertained from it alone[,] without recourse to parol evidence.[68]

In determining whether the emails the plaintiff attached to his papers in opposition to the defendant's motion to dismiss were sufficient to create a binding agreement, the court concluded that they were, at best,

> merely negotiations for an agreement. Indeed, the e-mails submitted by the plaintiff conclusively establish[ed] that [the] defendant and [the plaintiff] intended to finalize their agreement in a signed writing, which never materialized. . . . As such, there was no mutual assent or meeting of the minds as to any proposed agreement or joint venture.[69]

B. Pohlman v. Madia*, 132 A.D.3d 1370, 17 N.Y.S.3d 541 (4th Dep't 2015)*

In *Pohlman v. Madia*, the plaintiff filed suit seeking specific performance of a real estate contract involving commercial property owned by the defendants.[70] The lower court granted summary judgment to the plaintiff, holding that a meeting of the minds had occurred between

66. *Id.* at 5 (citing N.Y. GEN. OBLIG. LAW § 5–701(b)(4) (McKinney 2012)).

67. *Id.* (quoting William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d 470, 477, 5 N.E.3d 976, 981, 982 N.Y.S.2d 813, 818 (2013)).

68. *Lake Overlook Partners*, 2015 N.Y. Slip. Op. 51686(U), at 5 (second alteration in original) (quoting Dahan v. Weiss, 120 A.D.3d 540, 542, 991 N.Y.S.2d 119, 120 (2d Dep't 2014)) (first citing TR-One, Inc. v. Lazz Dev. Co., 95 A.D.3d 1303, 1303–04, 945 N.Y.S.2d 416, 417 (2d Dep't 2012); then citing Nesbitt v. Penalver, 40 A.D.3d 596, 597, 835 N.Y.S.2d 426, 428 (2d Dep't 2007); then citing Cohen v. Swenson, 140 A.D.2d 407, 407, 528 N.Y.S.2d 110, 111 (2d Dep't 1988); then citing Schuman v. Strauss, 139 A.D.2d 502, 503, 527 N.Y.S.2d 247, 248 (2d Dep't 1988); and then citing Conway v. Maher, 185 A.D.2d 570, 572, 586 N.Y.S.2d 660, 661 (3d Dep't 1992)).

69. *Id.* at 8 (first citing *Dahan*, 120 A.D.3d at 542, 991 N.Y.S.2d at 121; then citing Schutty v. Speiser Krause P.C., 86 A.D.3d 484, 484, 928 N.Y.S.2d 4, 5 (1st Dep't 2011); then citing Langer v. Dadabhoy, 44 A.D.3d 425, 426, 843 N.Y.S.2d 262, 262 (1st Dep't 2007); and then citing May v. Wilcox, 182 A.D.2d 939, 940, 582 N.Y.S.2d 294, 294 (3d Dep't 1991)).

70. 132 A.D.3d 1370, 1371, 17 N.Y.S.3d 541, 542 (4th Dep't 2015).

the parties and that the transaction should have proceeded to closing.[71] The Fourth Department reversed and granted summary judgement in favor of the defendants.[72]

The real estate contract at issue was contingent upon approval by the parties' respective attorneys.[73] The purchaser's attorney approved the contract on the condition that the seller sign an addendum requiring them to provide the purchaser with a Phase I environmental report and warranty ("Phase I report").[74] The seller's attorney rejected the purchaser's attorney's request for a Phase I report, and submitted proposed modifications to the contract.[75] Thereafter, the purchaser's attorney emailed the seller's attorney, informing him the purchaser had "ordered" a Phase I report and stated, "Assuming these reports come back reasonably OK, which we anticipate, we're good to go."[76]

The purchaser's attorney then sent a letter stating that he had "no problem" with the seller's proposed modifications to the contract.[77] The purchaser's attorney "further stated that, should a Phase II . . . report become necessary based on the results of the Phase I report," the purchaser expected the seller to pay for it.[78] The seller's attorney responded via letter that the seller would not agree to this request.[79] Following this exchange, another attorney representing the purchaser issued a letter (the "October letter"), stating that the environmental reports were complete, and that the purchaser wished to proceed with the purchase of the property.[80] The seller's attorney argued that no contract had been formed because it "had not been unconditionally approved."[81] The purchaser then filed suit for breach of contract.[82]

Contrary to the purchaser's contentions, the Fourth Department concluded that the purchaser's attorney "did not waive any conditions or unconditionally approve the contract in his [October] letter."[83] The court determined that approval of the contract was clearly conditioned on the

71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Pohlman*, 132 A.D.3d at 1371, 17 N.Y.S.3d at 542.
76. *Id.* (alteration in original).
77. *Id.*
78. *Id.*
79. *Id.*
80. *Pohlman*, 132 A.D.3d at 1371, 17 N.Y.S.3d at 542–43.
81. *Id.* at 1371–72, 17 N.Y.S.3d at 543.
82. *Id.* at 1372, 17 N.Y.S.3d at 543.
83. *Id.*

seller's provision of a Phase I report, as well as an agreement to pay for a Phase II report, if necessary.[84] The court noted that, while it could be inferred from the October letter that no Phase II report was needed, the attorney failed to state that he had "unconditionally approved the contract as proposed."[85] Accordingly, "there was not a valid contract between the parties."[86]

C. Mercator Corp. v. Windhorst*, 159 F. Supp. 3d 463 (S.D.N.Y. 2016)*

In this lawsuit, Mercator Corporation sued the defendants in the Southern District of New York for breach of contract, arguing that an email exchange established a binding contract with the defendants (one corporate, one individual) to provide consulting and advisory services.[87] The defendants moved to dismiss the plaintiff's Amended Complaint, arguing that no such agreement had been reached.[88]

On January 31 or February 1, 2014, Mercator CEO James Giffen met with Larry Windhorst, co-founder and Chairman of the Board of Sapinda Holding, a Dutch company, aboard Windhorst's yacht "after being introduced by a mutual acquaintance."[89] Giffen alleged,

> [D]uring this meeting . . . , "the essential terms of a collaboration" were "negotiated and agreed upon" and . . . Windhorst, on behalf of Sapinda, agreed to hire Mercator to "provide consulting and advisory services . . . in connection with investment opportunities."
>
> After this meeting, Giffen sent an email to Windhorst suggesting they "open a Sapinda office in New York . . . . [Griffen added] that he "look[ed] forward to your [Windhorst's] summary of the agreements we reached today."[90]

"On February 2, 2014, Windhorst sent an email response 'on behalf of Sapinda'" UK, a subsidiary company of Sapinda Holding, "upon which [Giffen] base[d] its claims for breach of contract."[91] The email set forth a compensation fee for the plaintiff's services, a time period for the agreement (five years), and contained language such as "I am very

84. *Id.* (citing Reg'l Gravel Prods. v. Stanton, 135 A.D.2d 1079, 1079, 524 N.Y.S.2d 114, 115 (4th Dep't 1987)).

85. *Pohlman*, 132 A.D.3d at 1372, 17 N.Y.S.3d at 543 (citing *Reg'l Gravel Prods.*, 135 A.D.2d at 1979, 524 N.Y.S.2d at 1115).

86. *Id.*

87. Mercator Corp. v. Windhorst, 159 F. Supp. 3d 463, 466–68 (S.D.N.Y. 2016).

88. *Id.* at 469.

89. *Id.* at 467.

90. *Id.* (last two alterations in original).

91. *Id.*

excited working with you."[92] Giffen argued "that this email established a binding contract between Mercator and both Sapinda Holding and Windhorst individually."[93]

Months later, Giffen submitted to Sapinda UK invoices for reimbursement of business expenses.[94] "The invoices referred to 'the agreement reached'" by the parties on February 1, 2014.[95] Sapinda UK did not respond, and in June 2014 Giffen "sent a third invoice to Sapinda UK Limited for $250,000 for a 'consultant fee' for . . . March 1, 2014 to May 31, 2014."[96] This invoice, which "referred only to Sapinda UK, not Sapinda Holding," also went unanswered.[97] Thereafter, on July 1, 2015, Giffen filed an Amended Complaint for breach of contract against Windhorst and Sapinda Holding (not Sapinda UK).[98]

The defendants argued that, even if a valid contract existed, the plaintiff "failed to sue the proper party."[99] Giffen countered that "there [was] a valid and enforceable contract," sufficient to satisfy the statute of frauds, "and that Sapinda Holding [was] the real party in interest" given that Sapinda UK was its subsidiary.[100] The plaintiff also alleged that Windhorst "manifested his intent to be individually bound by the Contract."[101]

In its decision on the defendants' motion to dismiss, the court found none of the plaintiff's arguments availing. The court, applying New York law, concluded that the plaintiff "failed to allege sufficient facts to" establish a binding contract with either defendant, noting that "the Amended Complaint and the documents upon which [Giffen] relie[d] to establish the contract—including the [] email . . .—show[ed] that the contract, if it existed, was between Mercator and Sapinda UK, not Sapinda Holding."[102] Moreover, the court held, the February 2, 2014 emails submitted by Giffen "fail[ed] to designate the parties to the contract. . . . There is in fact no reference to Sapinda Holding in the email."[103] Therefore, the email correspondence could not constitute a

92. *Mercator Corp.*, 159 F. Supp. 3d at 467–68.
93. *Id.* at 468.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Mercator Corp.*, 159 F. Supp. 3d at 468.
98. *Id.* at 469.
99. *Id.* at 470.
100. *Id.*
101. *Id.*
102. *Mercator Corp.*, 159 F. Supp. 3d at 469–70.
103. *Id.* at 471.

writing sufficient to satisfy the statute of frauds.[104]

D. 42nd Ave. Commons, LLC v. Barracuda, LLC*, 140 A.D.3d 1012, 35 N.Y.S.3d 366 (2d Dep't 2016)*

In this lawsuit, the Second Department concluded in a brief Decision and Order that emails exchanged between the parties' attorneys did not constitute a written contract for the sale of real property, as required by the statute of frauds.[105]

The plaintiff argued that the emails submitted to the court "purportedly reflected the parties' agreement [as] to the material terms of the proposed contract."[106] The trial court granted the defendant's motion to dismiss on the ground of the statute of frauds.[107] Upon review, the Second Department affirmed, concluding that, even if the vendor defendant's attorney signed the emails, there was no evidence that the "attorney had been authorized . . . to bind the [vendor] to the contract of sale."[108] The court further concluded that the emails actually "established that the parties did *not* intend to be bound until the signing of a formal [written] contract [for] sale."[109]

IV. PRELIMINARY AGREEMENT NOT FORMED BY EMAIL

There also was one decision during the *Survey* period concerning the enforceability of an alleged preliminary agreement created in part by email. In *ICBC (London) PLC v. Blacksands Pacific Group, Inc.*, the Southern District of New York (applying New York law) held that emails were insufficient to create an enforceable agreement where they were not signed, and where the plain language of the emails expressly anticipated

104. *Id.* The court, however, made its dismissal without prejudice to the plaintiff filing a Second Amended Complaint that properly alleges a contract. *Id.* at 472 (citing Zuker v. Katz, 708 F. Supp. 525, 531 (S.D.N.Y. 1989)).

105. 42nd Ave. Commons, LLC v. Barracuda, LLC, 140 A.D.3d 1012, 1013, 35 N.Y.S.3d 366, 367–68 (2d Dep't 2016) (quoting Leist v. Tugendhaft, 64 A.D.3d 687, 688, 882 N.Y.S.2d 521, 523 (2d Dep't 2009)) (first citing N.Y. GEN. OBLIG. LAW § 5–703(2) (McKinney 2012); then citing Nesbitt v. Penalver, 40 A.D.3d 596, 599, 835 N.Y.S.2d 426, 429 (2d Dep't 2007); then citing DeMartin v. Farina, 205 A.D.2d 659, 660, 613 N.Y.S.2d 655, 656 (2d Dep't 1994); then citing *Leist*, 64 A.D.3d at 688, 882 N.Y.S.2d at 523; and then citing Piller v. Marsam Realty 13th Ave., LLC, 136 A.D.3d 773, 774, 25 N.Y.S.3d 273, 274 (2d Dep't 2016)).

106. *Id.* at 1013, 35 N.Y.S.3d at 367 (citing GEN. OBLIG. § 5–703(2)).

107. *Id.* (first citing N.Y. C.P.L.R. 3211(a)(1), (5) (McKinney 2016); and then citing GEN. OBLIG. § 5–703(2)).

108. *Id.* at 1013, 35 N.Y.S.3d at 367–68 (first citing *Leist*, 64 A.D.3d at 688, 882 N.Y.S.2d at 523; then citing *Nesbitt*, 40 A.D.3d at 599, 835 N.Y.S.2d at 429; and then citing *DeMartin*, 205 A.D.2d at 660, 613 N.Y.S.2d at 656).

109. *Id.* at 1013, 35 N.Y.S.3d at 368 (emphasis added) (citing *Piller*, 136 A.D.3d at 774, 25 N.Y.S.3d at 274).

future preparation.[110]

The plaintiff, ICBC (a London-based bank), entered into a bridge loan agreement (the BLA) on November 23, 2013 with Blacksands and its subsidiary, Alpha Blue.[111] Under the BLA, ICBC was to provide a twenty million dollar, ninety-day loan to Alpha Blue, which Blacksands guaranteed.[112] Alpha Blue later withdrew five million dollars from the loan, but neither Alpha Blue nor Blacksands repaid the amount when the loan matured.[113] ICBC filed suit to recover principal and interest under the BLA.[114]

Blacksands counterclaimed, alleging that that the BLA was part of a broader agreement to roll the bridge loan into a seventy million dollar Revolving Credit Facility (RCF) to fund Blacksands' purchase of a California oil field.[115] Blacksands argued that "it was not obligated to repay the bridge loan because it was understood by all parties that the principal would roll over into the RCF by the BLA's maturity date."[116] Accordingly, Blacksands alleged ICBC breached this larger agreement when it declined to issue the promised RCF and instead filed suit to recover monies owed under the BLA.[117]

Blacksands relied on several pieces of evidence that it alleged created a binding preliminary agreement

> obligating ICBC to issue the RCF: (1) an unsigned November 2013 term sheet; (2) a November 15, 2013 email exchange between ICBC and its counsel seeking an estimate to draft the BLA and a potential RCF; (3) and a November 26, 2013 conference call during which, Blacksands alleges, ICBC "confirmed that it was going to issue the RCF."[118]

The plaintiff moved for summary judgment on its affirmative claim and to dismiss the defendant's counterclaims.[119] In assessing whether a preliminary agreement to issue the RCF had been created, the court

110. No. 15 Civ. 0070, 2015 U.S. Dist. LEXIS 131211, at *20–22 (S.D.N.Y. Sept. 29, 2015) (quoting Brown v. Cara, 420 F.3d 148, 154 (2d Cir. 2005)) (first citing N.Y. GEN. OBLIG. LAW § 5–701 (McKinney 2012); and then citing Bronner v. Park Place Entm't Corp., 137 F. Supp. 2d 306, 311 (S.D.N.Y. 2001)).

111. *Id.* at *1.

112. *Id.*

113. *Id.* at *2.

114. *Id.* at *4.

115. *ICBC (London) PLC*, 2015 U.S. Dist. LEXIS 131211, at *3–5.

116. *Id.* at *3.

117. *Id.* at *1, *3–4.

118. *Id.* at *3–4 (quoting Counterclaims of Defendant at 7, *ICBC (London) PLC*, 2015 U.S. Dist. LEXIS 131211 (No. 15 Civ. 0070)).

119. *Id.* at *1.

looked at whether the parties had "agreed to all necessary elements of the contract and [were], therefore, bound to the ultimate objective despite the fact that a more formal or elaborate writing [had] yet to be produced."[120] In order to avoid binding parties when "no agreement has been finalized, "[t]here is a strong presumption against finding binding obligation in agreements which . . . expressly anticipate future preparation."[121]

As the court noted, the BLA expressly "stated that the parties would 'enter into and continue good faith negotiations of additional financing arrangements.'"[122] Further, the BLA "incorporated by reference a November 14, 2013 letter, which stated that '[f]inal approval' of any additional financing arrangements was at ICBC's 'sole discretion subject to final review to be completed in good faith within the 90 day Bridge Loan maturity date."'[123] The court concluded that this demonstrated the parties' express agreement that there was no obligation to issue the RCF, only an obligation to negotiate in good faith toward additional financing.[124]

The court rejected the defendant's argument that the term sheet "and the November 15, 2013 email chain in which ICBC sought its counsel's estimate for drafting both the BLA and the RCF" could be read together to create a binding preliminary agreement because the emails were not "signed by ICBC" and were therefore insufficient to create an enforceable agreement.[125] Moreover, even if the letter and emails imposed an obligation on ICBC to issue an RCF, the BLA supplanted it.[126] The BLA, signed after the email exchange, stated that it "supersede[d] any prior agreements."[127] Further, the BLA expressly contemplated that negotiations on further financing were ongoing, and would presumably result in a separate contract.[128]

Based on the foregoing, the court concluded that ICBC had established a prima facie case for default on a promissory note under the BLA and was entitled to five million dollars plus accrued interest and

120. *ICBC (London) PLC*, 2015 U.S. Dist. LEXIS 131211, at *19–20 (quoting Brown v. Cara, 420 F.3d 148, 154 (2d Cir. 2005)).

121. *Id.* at *20 (alteration in original) (quoting *Brown*, 420 F.3d at 154).

122. *Id.* at *8.

123. *Id.* (alteration in original).

124. *Id.* at *8–9. The court also determined that because BLA's integration clause stated that the BLA was the "'entire understanding among the parties' and 'supersede[s] any prior agreements,'" the BLA stood on its own as an independent contract. *ICBC (London) PLC*, 2015 U.S. Dist. LEXIS 131211, at *9 (alteration in original).

125. *Id.* at *21–22.

126. *Id.* at *9.

127. *Id.*

128. *Id.* at *8.

attorney's fees.[129]

CONCLUSION

The decisions 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 a fact-intensive one. The decisions provide a useful reminder of the need for parties in business negotiations 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.

129. *ICBC (London) PLC*, 2015 U.S. Dist. LEXIS 131211, at *36. The court also dismissed Blacksands' counterclaims against ICBC, except to the extent that Blacksands alleged a breach of a Type II preliminary agreement to negotiate in good faith toward issuance of the RCF. *Id.* at *37.