

INADVERTENT CONTRACT FORMATION VIA EMAIL UNDER NEW YORK LAW: AN UPDATE

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INTRODUCTION

This Article serves as an update to the 2016–17 *Survey* on inadvertent contract formation under New York law.¹ While previous *Survey* articles have addressed contract formation through various informal means, the authors here focus on cases concerning contract formation over email correspondence because of an abundance of decisions on this issue in New York during the *Survey* period.

As explained in last year’s *Survey*, New York courts have increasingly been asked to consider whether emails indicate a current intent to be bound, and whether such communications can result in legally binding contracts inadvertently being created.² Over the past *Survey* period, New York’s highest court weighed in on a significant contract formation dispute in *Kolchins v. Evolution Markets, Inc.*³ As previously reported, in 2015, the First Department held that an agreement reached through emails and other correspondence could establish an enforceable contract to extend an employment agreement, even where certain key terms remained to be negotiated.⁴ On appeal, the Court of Appeals agreed with the First Department’s conclusion that a reasonable fact-finder could determine that the evidence presented would support a finding that a binding contract was formed by the parties.⁵ While it remains to be seen how the appellate divisions will apply *Kolchins* to subsequent contract formation disputes, the case represents a clear indication that New York State courts are inclined to look closely at email correspondence to enforce agreements that have not yet been executed.⁶

Federal courts in New York were similarly active this past *Survey* period in adjudicating disputes concerning inadvertent contract formation

1. Hon. Stewart D. Aaron and Jessica Caterina, *2016–17 Survey of New York Law: Inadvertent Contract Formation Under New York Law: An Update*, 67 SYRACUSE L. REV. 835 (2017).

2. *See id.* at 837.

3. (*Kolchins III*), 31 N.Y.3d 100, 96 N.E.3d 784, 73 N.Y.S.3d 519 (2018).

4. *Kolchins v. Evolution Mkts., Inc. (Kolchins II)*, 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)), *aff’d*, 31 N.Y.3d 100, 96 N.E.3d 784, 73 N.Y.S.3d 519 (2018). There, 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. *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).

5. *Kolchins III*, 31 N.Y.3d at 107, 96 N.E.3d at 788, 73 N.Y.S.3d at 524.

6. *See id.* at 107–08, 96 N.E.3d at 788–89, 73 N.Y.S.3d at 524–25.

by email.⁷ A 2017 case from the U.S. District Court for the Southern District of New York demonstrated that courts are still wrestling with these highly fact-specific contract formation issues; in *Meltzer v. Stier*, a law clerk to the federal magistrate judge who brokered a settlement agreement sent an email to the parties stating that the judge was “pleased the parties ‘have agreed to sign the’” settlement agreement.⁸ However, one party subsequently refused to sign the settlement agreement.⁹ The district court applied a set of factors to determine whether parties intended to be bound to an unsigned or informal settlement agreement articulated by the U.S. Court of Appeals for the Second Circuit in *Winston v. Mediafare Entertainment Corp.*,¹⁰ and considered, inter alia, whether the parties expressly reserved the right not to be bound in the absence of a formal agreement.¹¹ As demonstrated below, courts are reluctant to void an agreement formed over email or other informal means unless one or both of the parties had previously expressly reserved the right not to be bound in the absence of a formal agreement.¹² Nevertheless, the district court in *Meltzer* ultimately declined to enforce the settlement agreement in light of one party’s express refusal to sign the agreement.¹³

As these and other recent decisions from courts in New York demonstrate, the law is actively developing in this area. To err on the side of caution, attorneys practicing in New York’s state and federal courts should assume that any statements made in an email—whether in the body of the email itself, or in a document attached to an email—may be treated as formal correspondence for purposes of a contract formation analysis. In light of *Winston*, parties can protect themselves by expressly reserving the right not to be bound in the absence of a formal agreement.¹⁴ Because courts routinely take into account the sophistication of the par-

7. See, e.g., *Meltzer v. Stier*, No. 15-cv-6184 (KPF), 2017 U.S. Dist. LEXIS 182016, at *5–6 (S.D.N.Y. Nov. 2, 2017).

8. *Id.* at *6.

9. *Id.* at *7.

10. *Id.* at *10 (citing 777 F.2d 78, 80 (2d Cir. 1985)).

11. See *id.* at *12–13.

12. See *Meltzer*, 2017 U.S. Dist. LEXIS 182016, at *15 (citing *Wade v. City of N.Y.*, No. 15-cv-6542 (BMC), 2017 U.S. Dist. LEXIS 101280, at *2 (E.D.N.Y. June 29, 2017)).

13. *Id.* at *23. At least one published opinion from the U.S. Bankruptcy Court for the Southern District of New York declined to enforce an unsigned settlement agreement where the parties did not expressly reserve the right not to be bound in the absence of a formal agreement. *In re Motors Liquidation Co.*, 580 B.R. 319, 357 (Bankr. S.D.N.Y. 2018). The court in *Motors* concluded that, upon a review of the facts, the parties’ clear absence of partial performance strongly weighed against enforcement despite their failure to expressly reserve the right not to be bound in the absence of a formal agreement. *Id.*

14. See 777 F.2d at 81.

ties involved in a given dispute, seasoned litigators and corporate attorneys are often left with no excuse for failing to expressly reserve this right.

I. RECENT FEDERAL AND CASE LAW FINDING THE EXISTENCE OF BINDING CONTRACTS VIA EMAIL EXCHANGES

Over the last *Survey* year, New York courts have continued to hold that email exchanges can create binding contracts, even if one party alleges no agreement was reached.

A. *Kolchins v. Evolution Markets, Inc.*

In *Kolchins*, the Court of Appeals affirmed the First Department's decision enforcing an agreement to extend an employment contract created exclusively over email.¹⁵ The chief executive officer of the defendant sent the plaintiff, a multi-year employee of the company, an email confirming the terms of the plaintiff's new proposed employment contract.¹⁶ The contract would have extended the plaintiff's employment with the defendant for an additional three-year term.¹⁷ The subject field of the email from the chief executive officer stated "In writing," and the text of the email confirmed details of the length of the proposed contract extension, provided the terms of the proposed base salary and bonus, and included an offer from the chief executive officer to answer any questions from the plaintiff.¹⁸ One month later, the plaintiff responded to the chief executive officer's email—also over email—stating, "I accept, pls [sic] send contract."¹⁹ The chief executive officer then responded, stating, "Mazel. Looking forward to another great run."²⁰ Following this exchange, the plaintiff and the defendant's general counsel engaged over the next several weeks "in an unsuccessful attempt to reduce the parties' mutual understanding to a more formal written instrument."²¹

The plaintiff then brought a breach of contract action, asserting that the parties had entered into a valid and binding contract by way of their

15. *Kolchins III*, 31 N.Y.3d 100, 107–10, 96 N.E.3d 784, 788–91, N.Y.S. 3d 519, 524–27 (2018). The 2015–16 edition of this *Survey* discussed the First Department's decision in *Kolchins* in further detail. See 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, 1006–08 (2016).

16. *Kolchins III*, 31 N.Y.3d at 104, 96 N.E.3d at 786, 73 N.Y.S.3d at 522.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Kolchins III*, 31 N.Y.3d at 104, 96 N.E.3d at 786, 73 N.Y.S.3d at 522.

email exchange.²² The Supreme Court, New York County denied the defendant’s motion to dismiss, and the First Department affirmed that decision.²³ On review, the Court of Appeals affirmed the First Department’s decision, concluding that the parties had indeed formed a binding contract over email.²⁴ The Court of Appeals determined the email correspondence from the defendant constituted a valid offer, because the parties had “outlined the core terms” of the agreement over email, apart from a minor, non-substantive outstanding issue.²⁵ The Court of Appeals concluded that the parties’ subsequent exchange following the initial email—including the plaintiff’s email stating, “Mazel,” in response to the defendant’s email stating, “I accept”—sufficiently constituted valid acceptance.²⁶ The Court of Appeals reasoned that “[a]ffording [the] plaintiff the benefit of every favorable inference, this exchange . . . coupled with a forward-looking statement about the next stage of the parties’ continuing relationship—sufficiently evinces an objective manifestation of an intent to be bound for purposes of surviving a motion to dismiss.”²⁷

The Court of Appeals recognized that it was “possible to draw competing inferences based on the totality of the parties’ communications as set forth in this record”—including subsequent correspondence demonstrating that the parties disagreed on certain terms of the contract.²⁸ The Court reasoned that the other correspondence constituted no more than “indefiniteness” as to those terms, which “d[id] not conclusively refute contract formation” and did not “render[] the purported contract invalid as a matter of law.”²⁹

Kolchins makes clear that, under New York law, a binding contract can be formed by an email exchange notwithstanding the fact that the parties tried and failed to memorialize their understanding in a more formal instrument.

22. *Kolchins v. Evolution Mkt. Inc. (Kolchins I)*, No. 653536/2012, 2013 N.Y. Slip Op. 31978(U), at 1–3 (Sup. Ct. N.Y. Cty. Aug. 19, 2013), *modified, aff’d, in part, dismissed, in part*, 128 A.D.3d 47, 8 N.Y.S.3d 1 (1st Dep’t 2015), *aff’d*, 31 N.Y.3d 100, 96 N.E.3d 784, N.Y.S. 3d 519 (2018).

23. *Kolchins II*, 128 A.D.3d at 65, 8 N.Y.S.3d at 13; *Kolchins I*, 2013 N.Y. Slip Op. 31978(U), at 10.

24. *Kolchins III*, 31 N.Y.3d at 107–08, 96 N.E.3d at 789, 73 N.Y.S.3d at 525.

25. *Id.* at 107–08, 96 N.E.3d at 788–89, 73 N.Y.S.3d at 524–25.

26. *Id.*

27. *Id.* at 107–08, 96 N.E.3d at 789, 73 N.Y.S.3d at 525.

28. *Id.* at 108, 96 N.E.3d at 789, 73 N.Y.S.3d at 525.

29. *Kolchins III*, 31 N.Y.3d at 108, 96 N.E.3d at 789, 73 N.Y.S.3d at 525.

B. Lehman Bros. Holdings Inc. Shinhan Bank v. Lehman Bros. Holdings, Inc.

In *Lehman Bros.*, the appellant and respondent had been engaged in litigation in federal bankruptcy court with a court-appointed mediator in one of many cases arising out of the bankruptcy of Lehman Brothers.³⁰ Following settlement negotiations, the appellant emailed the mediator that it had agreed to a settlement total that the mediator had proposed.³¹ The parties engaged in subsequent discussions to formalize this agreement (including receipt of an email from the bankruptcy judge informing the parties that they had reached an agreement), but they never reduced their agreement to a signed writing.³² The appellant eventually opposed the enforcement of the settlement on the basis that the parties were unable to agree on all material terms.³³

Both the bankruptcy court and the district court found that the settlement agreement at the amount proposed by the mediator was enforceable.³⁴ On appeal, the Second Circuit considered whether the appellant had bound itself to an agreement through its email to the mediator.³⁵ Identifying this as a “close case,” the court applied the *Winston* factors to determine whether the parties intended to be bound by a settlement agreement, despite the absence of a document executed by both sides.³⁶

1. Express Reservation of the Right Not to Be Bound

The court found that this factor weighed in favor of finding an intention to be bound because, at the time it emailed the arbitrator, the appellant failed to expressly reserve the right not to be bound in the absence of a writing.³⁷ The court rejected the appellant’s attempt to rely on the language of a subsequent draft agreement, holding instead that only draft agreements circulated prior to agreement are relevant to determine whether to find an intention to be bound.³⁸

30. *Lehman Bros. Holdings Inc. Shinhan Bank v. Lehman Bros. Holdings, Inc.*, 739 F. App’x 55, 56 (2d Cir. 2018).

31. *Id.* at 57.

32. *Id.* at 58.

33. *Id.*

34. *Shinhan Bank v. Lehman Bros. Holdings Inc.*, No. 17-cv-03424 (DLC), 2017 U.S. Dist. LEXIS 121926, at *11 (S.D.N.Y. Aug. 2, 2017), *aff’d*, 739 F. App’x 55 (2d Cir. 2018).

35. *Lehman Bros.*, 739 F. App’x at 56.

36. *Id.* at 57, 59 (quoting *Winston v. Mediafare Entm’t Corp.*, 777 F.2d 78, 80 (2d Cir. 1985)).

37. *Id.* at 57.

38. *Id.* at 58 (first citing *Winston*, 777 F.2d at 79–80; and then citing *Ciramella v. Reader’s Dig. Ass’n*, 131 F.3d 320, 321–22 (2d Cir. 1997)).

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2. Partial Performance

The court found that this factor weighed against finding an intention to be bound because the respondent did not engage in any partial performance under the purported agreement.³⁹

3. Agreement to All Terms of the Alleged Contract

The court found that this factor weighed in favor of finding an intention to be bound because the parties had not left any material issues outstanding at the time of the purported agreement.⁴⁰ The court accepted the appellant's argument that there were "a handful of contractual terms that . . . were material and remained open" at the time of the appellant's email to the arbitrator, and observed that, "[i]n the ordinary case, we might find . . . [the appellant's] argument" persuasive.⁴¹ However, the court declined to give weight to those outstanding contractual terms in a vacuum, and instead considered them along with "[t]he circumstances of the [respondent's] bankruptcy" as a whole.⁴² The court found that the appellant's failure to object or express confusion to the bankruptcy judge's email informing the parties they had reached an agreement, along with its "counsel's experience settling cases in" other cases arising out of the Lehman Brothers bankruptcy, each made clear that no material issues were outstanding at the time of agreement.⁴³

4. Regularity with Which This Type of Agreement Is Committed to Writing

The court found that this factor weighed *against* finding an intention to be bound because agreements of this kind, with respect to the Lehman Brothers bankruptcy, almost always had been reduced to writing.⁴⁴ Nonetheless, the court concluded that, while the facts presented a "close" case, the parties had sufficiently demonstrated an intention to be bound.⁴⁵ Accordingly, the Second Circuit affirmed the district court's order enforcing the settlement agreement.⁴⁶

39. *Id.* at 57.

40. *Lehman Bros.*, 739 F. App'x at 58.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 58–59.

45. *Lehman Bros.*, 739 F. App'x at 58–59.

46. *Id.*

C. Jimenez v. Yanne

In *Jimenez*, the First Department reversed the trial court's order denying a motion to enforce a settlement agreement.⁴⁷ The court concluded that an email from one party accepting an offer from the other, when that party had typed its name at the conclusion of the email, satisfied the requirement in the Civil Practice Law and Rules (CPLR) that a settlement agreement be in writing subscribed by an attorney.⁴⁸

In reaching this conclusion, the First Department reiterated its holding in *Newmark & Co. Real Estate Inc. v. 2615 E. 17 St. Realty LLC*, where the court took an expansive view of how an email exchange can create a contract, to conclude that an email sent by one party, when the sending party types its name at the conclusion of that email, may constitute a writing for purposes of the statute of frauds—which requires that certain contracts be in writing in order to be enforceable.⁴⁹ In *Newmark*, a real estate broker sued a landlord to recover a commission fee that was articulated in an unsigned email containing a brokerage agreement that was purportedly fully negotiated.⁵⁰ The First Department determined that the email exchange between the real estate broker and the landlord constituted a “meeting of the minds” and created an enforceable agreement, because it set forth all relevant terms of the agreement, including the particular commission to be charged by the plaintiff.⁵¹

In *Jimenez*, counsel for the plaintiff and the defendants engaged in email correspondence to negotiate an agreement to settle the plaintiff's personal injury claims.⁵² Counsel for the defendants made a settlement offer, and counsel for the plaintiff responded with, “All good. The power of email.”⁵³ Because both counsel did not type their names at the conclusion of the particular emails that confirmed the settlement, the Supreme

47. *Jimenez v. Yanne (Jimenez II)*, 152 A.D.3d 434, 434, 55 N.Y.S.3d 652, 653 (1st Dep't 2017); *Jimenez v. Yanne (Jimenez I)*, No. 150539/11, 2016 WL 1463913, at *1 (Sup. Ct. N.Y. Cty. Apr. 12, 2016), *rev'd*, 152 A.D.3d 434, 55 N.Y.S.3d 652 (1st Dep't 2017).

48. *Jimenez II*, 152 A.D.3d at 434, 55 N.Y.S.3d at 653 (quoting N.Y. C.P.L.R. 2104 (McKinney 2012)) (first citing *Forcelli v. Gelco Corp.*, 109 A.D.3d 244, 251, 972 N.Y.S.2d 570, 575 (2d Dep't 2013); then citing *Newmark & Co. Real Estate Inc. v. 2615 E. 17 St. Realty LLC*, 80 A.D.3d 476, 477, 914 N.Y.S.2d 162, 163–64 (1st Dep't 2011); then citing *Stevens v. Publicis, S.A.*, 50 A.D. 253, 255–56, 854 N.Y.S.2d 690, 692 (1st Dep't 2008); and then citing *Rosenfeld v. Zerneck*, 4 Misc. 3d 193, 195–96, 776 N.Y.S.2d 458, 460 (Sup. Ct. Kings Cty. 2004)).

49. 80 A.D.3d at 477, 914 N.Y.S.2d at 164 (first citing N.Y. GEN. OBLIG. LAW § 5-701(b)(4) (McKinney 2012); and then citing *Stevens*, 50 A.D.3d at 255–56, 854 N.Y.S.2d at 692).

50. *Id.* at 477, 914 N.Y.S.2d at 163–64.

51. *Id.* at 477–78, 914 N.Y.S.2d at 164.

52. *Jimenez I*, 2016 WL 1463913, at *1.

53. *Id.*

Court, New York County found that the emails did not qualify as signed writings.⁵⁴

The First Department, giving deference to *Newmark*, reversed the trial court's order and held that the parties' communications satisfied CPLR 2104.⁵⁵ The court focused on the fact that the plaintiff's counsel "had authority to bind" his client and had "typed his name at the end of the email accepting [the] defendants' offer."⁵⁶ The court concluded that "[t]he email communications between [the] plaintiffs' counsel and [the] defendants' counsel sufficiently set forth an enforceable agreement to settle plaintiffs' personal injury claims."⁵⁷

D. New York City & Vicinity District Council of Carpenters v. J.M.R. Concrete Corp.

*J.M.R. Concrete*⁵⁸ is instructive for practitioners who appear in arbitrations governed by the Rules of the American Arbitration Association (AAA). Here, the U.S. District Court for the Eastern District of New York analyzed the AAA's Labor Arbitration Rules to conclude that a signed writing is not necessary to confirm and enforce a settlement agreement.⁵⁹

During an arbitration hearing initiated by the New York City & Vicinity District Council of Carpenters Union against a contractor to resolve a dispute over construction projects, the parties informed the arbitrator that they had reached a settlement agreement.⁶⁰ The plaintiff subsequently emailed the defendant a copy of a draft consent award reflecting the terms agreed to at the arbitration hearing.⁶¹ In response, the defendant

54. *Id.*

55. *Jimenez II*, 152 A.D.3d at 434, 55 N.Y.S.3d at 653 (quoting N.Y. C.P.L.R. 2104 (McKinney 2012)) (first citing *Forcelli v. Gelco Corp.*, 109 A.D.3d 244, 251, 972 N.Y.S.2d 570, 575 (2d Dep't 2013); then citing *Newmark & Co. Real Estate Inc. v. 2615 E. 17 St. Realty LLC*, 80 A.D.3d 476, 477, 914 N.Y.S.2d 162, 163–64 (1st Dep't 2011); then citing *Stevens v. Publicis, S.A.*, 50 A.D. 253, 255–56, 854 N.Y.S.2d 690, 692 (1st Dep't 2008); and then citing *Rosenfeld v. Zerneck*, 4 Misc. 3d 193, 195–96, 776 N.Y.S.2d 458, 460 (Sup. Ct. Kings Cty. 2004)).

56. *Id.* (quoting N.Y. C.P.L.R. 2104) (first citing *Kowalchuk v. Stroup*, 61 A.D.3d 118, 122, 873 N.Y.S.2d 43, 46–47 (1st Dep't 2009); then citing *Forcelli*, 109 A.D.3d at 251, 972 N.Y.S.2d at 575; then citing *Newmark*, 80 A.D.3d at 477, 914 N.Y.S.2d at 163–64; then citing *Stevens*, 50 A.D. at 255–56, 854 N.Y.S.2d at 692; and then citing *Rosenfeld*, 4 Misc. 3d at 195–96, 776 N.Y.S.2d at 460).

57. *Id.*

58. *N.Y.C. & Vicinity Dist. Council of Carpenters v. J.M.R. Concrete Corp.*, No. 16-cv-711(ENV) (ST), 2018 U.S. Dist. LEXIS 32952, at *1 (E.D.N.Y. Feb. 26, 2018), *adopted by* 2018 U.S. Dist. LEXIS 52218, at *1 (E.D.N.Y. Mar. 27, 2018).

59. *Id.* at *22.

60. *Id.* at *3–4.

61. *Id.* at *4.

emailed the plaintiff, stating, “We agree to the terms in the attached document.”⁶² The plaintiff responded by sending back the signed agreement as an attachment to an email.⁶³ The defendant never responded to this email, and subsequently did not abide by the terms of the agreement.⁶⁴

In determining whether to enforce the arbitration agreement, the court noted that the AAA rules governing the underlying arbitration, do not contain “any requirement that the parties formally sign and execute a settlement agreement” for a consent award to be confirmed.⁶⁵ Accordingly, the court found that the settlement agreement was enforceable.⁶⁶

II. RECENT FEDERAL AND STATE CASES DECLINING TO FIND THE EXISTENCE OF BINDING CONTRACTS VIA EMAIL EXCHANGES

A. Hawkins v. MedApproach Holdings, Inc.

In *Hawkins*, the Southern District of New York considered the characteristics of an enforceable agreement versus an unenforceable preliminary agreement.⁶⁷ There, the parties, who were engaged in active litigation, met and conferred to discuss a potential settlement.⁶⁸ During in-person settlement meetings, the parties reached an agreement on several points.⁶⁹ To memorialize the terms that the parties had agreed on, the parties drafted a two-page agreement which contained the parties’ handwritten notations (including the word “Agreed” next to several terms).⁷⁰ The document was initialed by both parties and their counsel.⁷¹ Thereafter, the plaintiff refused to discontinue its lawsuit, and the defendants filed a motion to enforce the purportedly binding settlement agreement.⁷²

In a report and recommendation, subsequently adopted in full by U.S. District Judge Andrew Carter, U.S. Magistrate Judge Stewart Aaron (the author of previous editions of this *Survey*) recommended that the court deny the motion because the settlement document was preliminary

62. *Id.* at *6.

63. *J.M.R. Concrete*, 2018 U.S. Dist. LEXIS 32952, at *6.

64. *Id.* at *7.

65. *Id.* at *22.

66. *Id.* at *23.

67. *See generally* *Hawkins v. MedApproach Holdings, Inc.*, No. 13-cv-05434 (ALC) (SDA), 2018 U.S. Dist. LEXIS 4697 (S.D.N.Y. Jan. 9, 2018) (Aaron, M.J.) (discussing the different factors of a formal written agreement and analyzing the language of the purported settlement document), *adopted by* 2018 U.S. Dist. LEXIS 43500 (S.D.N.Y. Mar. 15, 2018).

68. *Id.* at *3.

69. *Id.*

70. *Id.* at *3–4.

71. *Id.* at *4.

72. *Hawkins*, 2018 U.S. Dist. LEXIS 4697, at *4–5.

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and non-binding.⁷³ As discussed below, the court placed particular emphasis to the statement “(Subject to attorney review and discussion),” which appeared next to a provision in the purported settlement document.⁷⁴

To determine whether the parties had intended to be bound in the absence of a formal settlement agreement, Judge Aaron applied the four *Winston* factors set forth by the Second Circuit.⁷⁵

1. Express Reservation of the Right Not to Be Bound

The court found that this factor weighed against finding an intent to be bound because it concluded that the aforementioned “(Subject to attorney review and discussion)” provision required “that any settlement [be] conditional upon further discussion between counsel for the parties.”⁷⁶ The court rejected the defendants’ argument that this provision only “contemplated executing additional corporate documents” and did not mean that the parties had additional material terms to agree to.⁷⁷ Accordingly, the court determined that the “subject to” provision constituted an express reservation of the right not to be bound.⁷⁸

2. Partial Performance

The court found that this factor weighed against finding an intention to be bound because there was no substantive partial performance under the agreement.⁷⁹

3. Agreement to All Terms of the Alleged Contract

The court found that this factor weighed against finding an intention to be bound, because several open terms were “left open for review and discussion” at the time of the purported agreement.⁸⁰

73. *Id.* at *10; *see Winston v. Mediafare Entm’t Corp.*, 777 F.2d 78, 80 (2d Cir. 1985).

74. *Hawkins*, 2018 U.S. Dist. LEXIS 4697, at *8.

75. *Id.* at *6–7 (quoting *Winston*, 777 F.2d at 80).

76. *Id.* at *8.

77. *Id.* at *5 (internal quotations omitted).

78. *Id.* at *8.

79. *Hawkins*, 2018 U.S. Dist. LEXIS 4697, at *8–9.

80. *Id.* at *9 (quoting *Grgurev v. Licul*, No. 15-cv-9805 (GHW), 2016 U.S. Dist. LEXIS 156162, at *22 (S.D.N.Y. Nov. 9, 2016)).

4. Regularity with Which This Type of Agreement Is Committed to Writing

Quoting CPLR 2104, the court found that this factor weighed against finding an intention to be bound because New York law generally requires settlement agreements to be signed by both parties.⁸¹

In sum, the court determined that each *Winston* factor weighed against finding that the parties had reached a binding and enforceable settlement agreement, and denied the defendant's motion to enforce the purported settlement agreement.⁸² Practitioners may wish to pay particular attention to the fact that counsel for one party wrote on a preliminary agreement that at least one term was "(Subject to attorney review and discussion)."⁸³ The inclusion of this language, according to the court, made it clear that the parties' preliminary agreement was "conditional upon or depending on" some additional agreement.⁸⁴ Parties may be well-served to consider including this language on preliminary agreements when the litigants are not ready to commit to a final, binding agreement.

B. In re Motors Liquidation Co.

In this case, the court conducted a trial on the narrow issue of whether an unexecuted settlement agreement "negotiated by the parties' highly sophisticated counsel over nearly three months, with twenty-one drafts, and dozens of pages of supplemental documents" was enforceable.⁸⁵

There, the parties had come to an agreement on "all of the material terms of their settlement" and had "signed off" on the written draft of the agreement by email, even though the draft itself had not been signed by each party.⁸⁶ About two days after signing off on the agreement via email, one party received a more favorable offer and informed the opposing party that it would not go forward with the deal—in the bankruptcy court's words, "essentially pulling the rug out from under them at the eleventh-hour."⁸⁷

The bankruptcy court was highly critical of the party that decided not to go ahead with the agreement, stating that the party had "flout[ed]

81. *Id.* at *9–10 (quoting N.Y. C.P.L.R. 2104 (McKinney 2012)).

82. *Id.* at *10; see *Winston v. Mediafare Entm't Corp.*, 777 F.2d 78, 80 (2d Cir. 1985).

83. *Hawkins*, 2018 U.S. Dist. LEXIS 4697, at *4.

84. *Id.* at *8 (internal quotations omitted) (quoting *F.W. Berk & Co. v. Derecktor*, 301 N.Y. 110, 113, 92 N.E.2d 914, 915 (1950)).

85. *In re Motors Liquidation Co.*, 580 B.R. 319, 326 (Bankr. S.D.N.Y. 2018).

86. *Id.* at 327 & n.4.

87. *Id.*

the spirit of the law to promote good faith negotiations and settling of disputes” in its actions.⁸⁸ Notwithstanding the withdrawing party’s conduct, the court declined to enforce the purported agreement “because it contains an unambiguous provision that the Settlement Agreement would not become enforceable until executed.”⁸⁹ Applying the *Winston* factors, the court concluded that because the parties expressly reserved the right not to be bound in the absence of a writing, “this factor alone weighs significantly in favor of not enforcing the agreement.”⁹⁰ The court stated that it had “no choice but to find the unexecuted Settlement Agreement unenforceable.”⁹¹

C. Meltzer v. Stier

In *Meltzer*, the district court declined to enforce an unsigned settlement agreement between the parties that had been brokered by the magistrate judge.⁹²

There, shortly after filing a complaint alleging copyright infringement, the plaintiff engaged with the defendant in multiple settlement conferences led by the magistrate judge.⁹³ Following one fruitful conference, the parties purportedly reached an agreement.⁹⁴ A law clerk to the magistrate judge then emailed the parties a proposed “Stipulation and Order of Settlement” and noted in the cover email that the agreement was “revised as discussed in your call with Judge Francis this morning.”⁹⁵ The settlement agreement attached to the law clerk’s email contained signature blocks for the parties and their respective counsel.⁹⁶ One hour later, the defendant, who was proceeding pro se, replied by stating, “Looks great to me.”⁹⁷

The following day, the defendant sent an email to the magistrate judge’s chambers with the subject line “a concern.”⁹⁸ The defendant ex-

88. *Id.* at 328.

89. *Id.*

90. *In re Motors Liquidation*, 580 B.R. at 363–64; *see also* *Winston v. Mediafare Entm’t Corp.*, 777 F.2d 78, 80 (2d Cir. 1985).

91. *In re Motors Liquidation*, 580 B.R. at 364.

92. *Meltzer v. Stier*, No. 15-cv-6184 (KOF), 2017 U.S. Dist. LEXIS 182016, at *29 (S.D.N.Y. Nov. 2, 2017).

93. *Id.* at *1.

94. *Id.* at *3–6.

95. *Id.* at *4 (internal quotations omitted).

96. *Id.* at *5.

97. *Meltzer*, 2017 U.S. Dist. LEXIS 182016, at *3, *5.

98. *Id.* at *5.

plained that she had learned of the plaintiff's disclosure of relevant information to a reporter concerning the case.⁹⁹ The defendant stated that "this is not germane to the settlement," but that she felt "it is important to put this development on the record."¹⁰⁰ Shortly thereafter, the law clerk wrote to the parties that the magistrate judge was "pleased that the parties 'have agreed to sign the Stipulation,' and instructed [the] [p]laintiff's counsel to send a finalized release to [the] [d]efendant" for both parties to sign and submit to the court.¹⁰¹

After the plaintiff sent the defendant a copy of the release that it had executed, the defendant did not respond.¹⁰² The plaintiff subsequently wrote a letter to the court explaining that "[t]he parties to this action, with the assistance of Magistrate Judge Francis, have settled the action"—but the defendant had subsequently informed the plaintiff that she "need[ed] more time" to determine whether to sign the letter.¹⁰³ Following additional inquiries from the court, the defendant ultimately declined to sign the settlement agreement, and the plaintiff formally moved to enforce it.¹⁰⁴

To determine whether the parties had an intention to be bound such that the settlement agreement should be enforced, the court considered the four *Winston* factors.¹⁰⁵

1. Express Reservation of the Right Not to Be Bound

The court found that this factor weighed against finding an intention to be bound because the text of the purported settlement agreement contained language that would be rendered a nullity in the absence of execution by both parties.¹⁰⁶ For example, the court noted that several provisions of the settlement agreement required the parties to "exchang[e] general releases and dismiss[] [the] case," and that these events could not occur absent execution by both parties.¹⁰⁷ The court further relied on extrinsic evidence to bolster its finding on the first *Winston* factor by noting that the law clerk's email asking the parties to contact Chambers "if [the settlement agreement] is acceptable" indicated "that it was an open question whether the parties would agree to the then-most-recent iteration of

99. *Id.* at *5–6.

100. *Id.* at *6.

101. *Id.*

102. *Meltzer*, 2017 U.S. Dist. LEXIS 182016, at *6–7.

103. *Id.* at *7.

104. *Id.* at *8–9.

105. *Id.* at *10; *see Winston v. Mediafare Entm't Corp.*, 777 F.2d 78, 80 (2d Cir. 1985).

106. *Meltzer*, 2017 U.S. Dist. LEXIS 182016, at *13.

107. *Id.*

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the agreement.”¹⁰⁸

The court further identified that the defendant’s email, stating, “Looks great to me,” had to be balanced against the fact that the defendant was pro se at the time she wrote that email.¹⁰⁹ The court accepted the defendant’s assertion that her email was directed only at a specific paragraph of the settlement agreement, and did not purport to express acceptance of the entire agreement.¹¹⁰ Mindful of the fact that the defendant “was representing herself pro se at the time of this exchange” the court was “reluctant to bind her to an agreement based on a four-word email.”¹¹¹

2. Partial Performance

The court found that this factor weighed against finding an intention to be bound.¹¹² While the court identified that the plaintiff had engaged in partial performance, her stated reasons for performance were not attributable to her reliance on the settlement agreement.¹¹³ For example, the defendant wrote in an email that she took efforts to address alleged copyright infringement that had “nothing to do with [the p]laintiff’s lawsuit.”¹¹⁴

3. Agreement to All Terms of the Alleged Contract

The court found that this factor weighed “moderately” in favor of enforcement because there was no indication in the record that any material terms were left open at the time of agreement.¹¹⁵ The court further relied on the parties’ email exchange with the magistrate judge’s law clerk, which “indicate[d] that the parties reached agreement on the edits to the latest draft of the [settlement agreement] and were not actively negotiating any open terms.”¹¹⁶

108. *Id.* at *14–15.

109. *Id.* at *15 (citing *Wade v. City of New York*, No. 15-cv-6542 (BMC), 2017 U.S. Dist. LEXIS 101280, at *5–6 (E.D.N.Y. June 29, 2017)).

110. *Id.* at *15.

111. *Meltzer*, 2017 U.S. Dist. LEXIS 182016, at *15 (emphasis omitted) (citing *Wade*, 2017 U.S. Dist. LEXIS 101280, at *5–6).

112. *Id.* at *19.

113. *Id.* at *17–19.

114. *Id.* at *17.

115. *Id.* at *20.

116. *Meltzer*, 2017 U.S. Dist. LEXIS 182016, at *21.

4. Regularity with Which This Type of Agreement Is Committed to Writing

The court found that this factor weighed against finding an intent to be bound.¹¹⁷ The court held that the complexity of an agreement is relevant to determining whether it is usually committed to writing, and determined that a relatively “short agreement such as this one can be so complex as to support a finding that it is of the sort that should be reduced to writing.”¹¹⁸

D. Solartech Renewables, LLC v. Vitti

In furtherance of a project to develop solar power generators, the plaintiff in *Solartech* sought a real estate broker to purchase a piece of real property.¹¹⁹ The defendant, who owned a parcel of real property in the desired area, began negotiations with the plaintiff.¹²⁰ Following these negotiations, the plaintiff sent the real estate broker an email attaching an offer letter containing the set price for the property, an exclusivity period, and other formal information.¹²¹

The defendant responded via email noting that, per its conversation with the plaintiff’s representatives, a proposed side letter it drafted was included as an attachment.¹²² In this email, the defendant stated that it was prepared to accept the plaintiff’s offer letter, on the condition that the plaintiff accept the terms of the defendant’s side letter.¹²³ Notably, the side letter included the defendant’s typed name and a space for the plaintiff’s signature.¹²⁴

The following day, the defendant sent an unsolicited email to the plaintiff stating that it had rejected the plaintiff’s initial offer and that it was not prepared to move forward with the deal.¹²⁵ On the same day, the plaintiff printed and physically signed the defendant’s side letter, presumably accepting the counteroffer, and sent it to the defendant.¹²⁶ Unbeknownst to plaintiff, the defendant had subsequently entered into an

117. *See id.* at *22 (quoting *Winston v. Mediafare Entm’t Corp.*, 777 F.2d 78, 83 (2d Cir. 1985)).

118. *Id.*

119. *Solartech Renewables, LLC v. Vitti (Solartech II)*, 156 A.D.3d 995, 995, 66 N.Y.S.3d 704, 706 (3d Dep’t 2017).

120. *Id.*

121. *Id.* at 995–96, 66 N.Y.S.3d at 706.

122. *Id.* at 996, 66 N.Y.S.3d at 706.

123. *Id.*

124. *Solartech II*, 156 A.D.3d at 996, 66 N.Y.S.3d. at 706.

125. *Id.*

126. *Id.*

agreement with another company.¹²⁷ The plaintiff then brought suit to enforce the terms of the defendant's counteroffer.¹²⁸

The defendant argued that the counteroffer should not be enforced because her typed name at the bottom of the counteroffer letter does not satisfy the statute of frauds.¹²⁹ The defendant argued that typing her name at the bottom of a letter did not constitute a "signature" for purposes of the statute of frauds.¹³⁰ The Third Department agreed, and affirmed the trial court's dismissal of the case.¹³¹ The court reasoned that the letter, attached to an email, did not constitute an "electronic record" pursuant to New York's Electronic Signatures and Records Act.¹³² Importantly, however, the court noted that it may have reached a different decision if the counteroffer was contained in the body of the actual email, and not in a separate attachment.¹³³

CONCLUSION

The cases surveyed in this *Survey* illuminate one important point: the important legal issues of *whether* and *to what extent* a contract can be formed over email, as applied by state and federal courts in New York, is not always clear. Further complicating this point, these issues are being actively litigated in an area of the law that is developing in real time.

The cases surveyed do demonstrate that email communications confirming the existence of a contract by setting forth the material terms of the agreement are routinely (and perhaps increasingly so) enforced as binding contracts. Courts routinely hold attorneys and parties to their words—sometimes quite strictly—such that parties contracting in state and federal courts in New York would be wise to exercise extreme caution and care when engaging in electronic communications relating to any

127. *Id.*

128. *Solartech Renewables, LLC v. Vitti (Solartech I)*, No. 12-2580, 2016 WL 10906771, at *1 (Sup. Ct. Ulster Cty. May 17, 2016), *aff'd*, 156 A.D.3d 995, 66 N.Y.S.3d 704 (3d Dep't 2017).

129. *Id.*

130. *Id.* at *1–2.

131. *Solartech II*, 156 A.D.3d at 1000–01, 66 N.Y.S.3d at 709–10; *Solartech I*, 2016 WL 10906771, at *3.

132. *Solartech II*, 156 A.D.3d at 1000, 66 N.Y.S.3d at 709. New York's Electronic Signatures and Records Act (ESRA), which went into effect in 2000, defines an electronic signature as "an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record." 9 N.Y.C.R.R. § 540.4(b) (2018). The ERSA, which was updated in 2002, provides that electronic signatures will "have the same validity and effect" as handwritten signatures. 9 N.Y.C.R.R. § 540.4(a).

133. *See Solartech II*, 156 A.D.3d at 999–1000, 66 N.Y.S.3d at 709.

proposed contract. As demonstrated by *Hawkins* and *Lehman Bros.*, this caution should extend to attorneys settling their cases in state and federal courts in New York, as there may be serious implications for the enforceability of a settlement agreement based on a stray sentence written over email or added to a proposed agreement.¹³⁴

While New York courts continue to hold that parties can enter into a binding contract or settlement agreements without memorializing their agreement in the form of a written document, as always, a fully executed document remains the most surefire way to prove the existence of any contract and its terms.

134. See discussion *supra* Sections I.B, II.A.