INADVERTENT CONTRACT FORMATION VIA EMAIL UNDER NEW YORK LAW:

AN UPDATE

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INTRODUCTION

This Article serves as an update to the 2017-18 *Survey* Article on inadvertent contract formation under New York law.[1] As with the previous edition of the *Survey*, the authors here have chosen to focus on cases concerning contract formation over email and other electronic correspondence because of an abundance of decisions on this issue in New York in recent months.

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1. *See generally* Stewart D. Aaron & Jessica Caterina, *Inadvertent Contract Formation Under New York Law: An Update*, 68 SYRACUSE L. REV. 778 (2018) (this article was an update to the 2017 *Survey* of New York Law on inadvertent contract formation).

New York courts have been asked with increasing frequency to consider whether emails indicate a current intent to be bound by contractual terms, and whether such communications can result in legally binding contracts inadvertently being created. Over the most recent *Survey* period, courts have navigated this issue in light of the (now-not-so-recent!) decision by the New York Court of Appeals in *Kolchins v. Evolution Markets*.[2] In 2017, the Court of Appeals affirmed the existence of an enforceable contract to extend an employment agreement by reference to emails and other correspondence between the parties, even where key terms remained to be negotiated between the parties. Several federal and state courts in New York have relied on the reasoning of *Kolchins* to affirm the existence of enforceable contracts in analogous situations. In fact, this *Survey* period saw the reasoning in *Kolchins* extended to find an enforceable agreement between two parties who had sent a series of informal *text messages* to each other.[3] But *Kolchins* and its progeny have not been applied consistently across the board, as courts in New York have evaluated cases with similar facts and come to different outcomes; for instance, whether the lack of a fully-executed agreement bars enforcement of that agreement.[4]

In previous *Survey* articles, the authors have repeatedly emphasized the fast-changing and developing nature of the law in this area. While there are certainly wrinkles and quirks among the New York state and federal courts that have confronted this issue, certain fundamental truths have emerged. For one, attorneys practicing in New York state and federal courts—or in any other circumstances where New York law may fairly apply—should assume that any statements made in the body of an email will be treated as formal correspondence for purposes of a contract formation analysis. The law suggests that the same line of caution should apply to text messages or any other written messages. While we are still waiting for a case concerning Instagram comments or Facebook Messenger messages to come through on the docket, we are confident that, with the appropriate context, a future court may well bind a party to its words on those platforms.

2. *See generally* 31 N.Y.3d 100, 96 N.E.3d 784, 73 N.Y.S.3d 519 (2018) (the Court addressed the formation of contractual obligations via email).

3. Karaduman v. Grover, No. SC47691-18, 2019 N.Y. Slip Op. 50560(U), at 3 (Ithaca City Ct. Apr. 16, 2019) citing People v. Limage, 19 Misc. 3d 395, 400, 851 N.Y.S.2d 852, 857 (N.Y.C. Crim. Ct. Kings Cty. Feb. 5, 2008).

4. *Compare* Meltzer, Lippe, Goldstein & Breitstone, LLP v. Malfetti, No. 18-2982-CV, 2018 U.S. Dist. LEXIS 167150, at *27–28 (E.D.N.Y. Sept. 27, 2018), *aff'd*, 2019 U.S. App. LEXIS 28931, at *5 (2d Cir. Sept. 25, 2019) *with* Steamer v. Vestiaire Collective USA, Inc., 18-CV-10739-JMF, 2019 U.S. Dist. LEXIS 60793, at *2 (S.D.N.Y. Apr. 9, 2019).

Second, we continue to observe courts relying on the inclusion of language—or lack thereof—where one or both parties expressly reserve the right not to be bound in the absence of a formal writing. Time and time again, courts will reward careful lawyering that includes similar language in a preliminary agreement. The flip side of the coin is true as well: if the parties appear to come to a somewhat formalized preliminary understanding with each other, it will be much harder to convince a court *not* to bind the parties to that agreement.

I. RECENT FEDERAL AND NEW YORK STATE CASE LAW FINDING THE EXISTENCE OF BINDING CONTRACTS VIA EMAIL EXCHANGES AND OTHER ELECTRONIC CORRESPONDENCE

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

A. Meltzer, Lippe, Goldstein & Breitstone, LLP v. Malfetti

In *Meltzer*, the parties disputed whether a binding contract had been formed over email where a legal recruiting firm sent an unsigned referral fee agreement via email to the other party, the Chief Financial Officer and Chief Operating Officer of a law firm, who did not sign the agreement but wrote back: "This is fine—providing the Invoices are emailed to me," and began to encourage the recruiting firm to send along new potential attorney hires.[5] The stakes here (as they often are) were high: if a court were to enforce that agreement, it would result in the recruiting firm receiving over $400,000 in referral fees from the law firm.[6] Applying the basic principles discussed in previous *Survey* articles and in the *Kolchins* case, following a bench trial, a federal court decided that the referral fee agreement was enforceable and, accordingly, entered a six-figure judgment against the law firm for the applicable fees and statutory interest.[7]

The plaintiffs here, a law firm and its chairman and chief financial officer ("Laffin"), sought out the services of the defendants, a legal recruiting company and one of its attorney recruiters ("Ben-Asher").[8] The plaintiff firm wanted to hire several new attorneys and was also looking to acquire the health care practice of another law firm.[9] Believing that he

5. 2018 U.S. Dist. LEXIS 167150, at *6.
6. *Id.* at *40–41.
7. *Id.*
8. *Id.* at *3.
9. *Id.* at *3, *7.

could connect the plaintiffs to some attorneys who would fit nicely into their firm, Ben-Asher sent Laffin his company's standard fee agreement via email.[10] Following a telephone conversation where the two parties agreed to make some changes to payment structure included in the standard fee agreement, Ben-Asher sent Laffin an email stating: "I've attached our fee agreement, as per our discussion, to this e-mail for your review. Please let me know if you have any questions."[11] Attached to the email was a file entitled "Fee Agreement—Meltzer Lippe.pdf," a one-page document that contained Ben-Asher's electronic signature on behalf of his recruiting firm.[12]

The fee agreement document "included the terms which Laffin and Ben-Asher had discussed by telephone."[13] The agreement included a "fee schedule" with a section specifically addressing a "Placement Fee for Group Placements," which, essentially, increased the defendants' fees in the event that Ben-Asher was successful in placing two or more attorneys with the plaintiffs' law firm.[14] The next day, in response to Ben-Asher's email, Laffin wrote back stating "This is fine—providing the Invoices are emailed to me. Any word on the labor atty?"—in reference to the type of attorney that Laffin had wanted Ben-Asher to recruit. [15]

Over the course of the next three months, Ben-Asher successfully placed two new attorneys with Laffin's firm.[16] When Ben-Asher submitted those invoices to Laffin, Ben-Asher's firm had mistakenly not accounted for the changes that the parties made to the agreement over the phone and that were reflected in the fee agreement that Ben-Asher had sent to Laffin.[17] Nevertheless, neither Ben-Asher nor Laffin appeared to catch the error, and Laffin paid both (erroneously calculated) invoices in full.[18]

Laffin then engaged Ben-Asher to recruit a multi-attorney health care law practice to join the law firm.[19] According to Ben-Asher's testimony, when he "received Laffin's request for him to search for a health care law group, he understood that it fell under the 'Group Placements' fee schedule in the Fee Agreement" that would entitle Ben-

10. *Meltzer*, 2018 U.S. Dist. LEXIS 167150, at *4.
11. *Id.*
12. *Id.* at *4–5.
13. *Id.* at *5.
14. *Id.* at *5–6.
15. *Meltzer*, 2018 U.S. Dist. LEXIS 167150, at *6.
16. *Id.*
17. *Id.* at *7.
18. *Id.*
19. *Id.*

Asher's recruiting firm to higher referral fees.[20] Ben-Asher then introduced Laffin to a New Jersey-based health care law firm as a potential candidate to merge with the plaintiff-law firm; Laffin subsequently expressed interest in acquiring this New Jersey law firm and entered into negotiations to acquire it.[21]

When those negotiations were complete, it was publicly announced that the New Jersey firm had formed an "alliance" with the plaintiff-law firm, based on a transaction where one of the plaintiff's partners purchased the New Jersey firm (under New Jersey partnership law, the plaintiff-law firm itself could not make that purchase)—although there was a strong suggestion that two firms had essentially merged together, including evidence that the New York-based lawyers from the new firm moved offices to join the plaintiff-law firm, the chairman of the plaintiff-law firm told employees that he would be managing both firms, and at least one of the New Jersey firm's lawyers had "communicated regularly with and worked on various matters for" the plaintiff-law firm.[22]

Laffin and the plaintiff-law firm took the position that Ben-Asher's recruiting firm was not entitled to the heightened award under the "Group Placements" fee schedule because Ben-Asher had not actually placed new attorneys to work for the law firm; instead, according to the plaintiff, because one of the plaintiff's partners had actually purchased the New Jersey firm to comply with New Jersey partnership law, Ben-Asher had acted as a "broker" rather than as a legal placement recruiter.[23] Accordingly, weeks before the purported "alliance" between the plaintiff-law firm and the New Jersey firm was publicly announced, Laffin wrote an email to Ben-Asher stating: "It now looks like a partner of Meltzer Lippe may be acquiring the stock of Kern Augustine. If you believe you are entitled to a commission please send me a letter or email explaining what you believe you are entitled to and why."[24] Ben-Asher wrote back to explain his understanding that the two firms would eventually merge and that his firm was entitled to fees under the parties' agreement; shortly thereafter, the plaintiff filed a declaratory judgment suit in state court seeking a judgment that the defendant was not entitled to any fees for its work connecting the plaintiff with the New Jersey firm.[25] The defendant removed the case to the Eastern District of New York where, following a

20. *Meltzer*, 2018 U.S. Dist. LEXIS 167150, at *8.
21. *Id.* at *8–9.
22. *Id.* at *10–11, 13–14, 16.
23. *Id.* at *19.
24. *Id.* at *22.
25. *Meltzer*, 2018 U.S. Dist. LEXIS 167150, at *22–24.

trial, the district court issued its findings of facts and conclusions of law pursuant to Federal Rule of Civil Procedure 52.[26]

The court rejected each of the plaintiff's arguments that the fee agreement was unenforceable.[27] The court first recognized that it is "well established in New York that an email exchange may create an enforceable contract."[28] In this case, the record evidence and trial testimony established "an enforceable contract—the Fee Agreement—between [the parties]."[29] According to the court, Laffin "could not have reasonably misunderstood Ben-Asher's intent to create a binding agreement between [the law firm and the recruiting firm] before he began introducing candidates to [the law firm]."[30]

Even if the court were to credit Laffin's testimony that her email responding to Ben-Asher ("This is fine . . .") did not constitute her assent to the agreement, that fact would not "preclude the formation of an enforceable contract."[31] The agreement that Ben-Asher sent to Laffin "contained the essential terms necessary to constitute a contract," including the amendments to the standard fee agreement language that the two had previously discussed on the phone.[32] Ben-Asher, according to the court, had carefully explained that the purpose of his sending the document was "to confirm our mutual understanding" about how the parties were to proceed under the agreement, and it bore Ben-Asher's signature.[33] Laffin, in response, had provided her assent to the agreement by saying "This is fine"—and the rest of her email ("Any word on the labor atty?") constituted her insistence that Ben-Asher begin to perform under the agreement.[34]

The court then rejected Laffin's argument that the agreement was unenforceable because she never signed it.[35] "Given the objective evidence," according to the court, "there was no requirement for Laffin to sign the Fee Agreement for it to be enforceable" because "[a]n

26. *Id.* at *2, *24.

27. *Id.* at *28–32.

28. *Id.* at *27 (first citing Brighton Inv., Ltd. v. Har-zvi, 88 A.D.3d 1220, 1222, 932 N.Y.S.2d 214, 216 (3d Dep't 2011); then citing Newmark & Co. Real Estate Inc. v. 2615 E. 17 Realty LLC, 80 A.D.3d 476, 477–78, 914 N.Y.S.2d 162, 164 (1st Dep't 2011); and then citing Kowalchuk v. Stroup, 61 A.D.3d 118, 122, 873 N.Y.S.2d 43, 47 (1st Dep't 2009)).

29. *Id.*

30. *Meltzer*, 2018 U.S. Dist. LEXIS 167150, at *28.

31. *Id.* (citing Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp., 41 N.Y.2d 397, 399, 361 N.E.2d 999, 1001, 393 N.Y.S.2d 350, 351 (1977)).

32. *Id.* at *28–29.

33. *Id.* at *29.

34. *Id.*

35. *Meltzer*, 2018 U.S. Dist. LEXIS 167150, at *29–30.

unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound."[36] Nevertheless, the court suggested that Laffin's email signature block, which included her name, job title, the name of the plaintiff-law firm, and her contact information, helped to "signif[y] the authentication of her email."[37]

The court rejected Laffin's argument that the additional language in her email ("This is fine—*providing the invoices are emailed to me*") constituted a rejection and counteroffer.[38] Rather, "viewed objectively," this language merely added to the agreement, which was silent about to whom or how the invoices would be transmitted between the parties.[39] According to the court, a contract is enforceable when it is "accompanied with a direction or a request looking to the carrying out of its provisions," so long as it "does not limit or restrict the contract."[40]

Finally, the court disposed of the issue by rejecting Laffin's remaining arguments. First, the court explained that every aspect of Laffin's conduct following the email exchange with Ben-Asher constituted her assent to the agreement on behalf of her firm.[41] After the parties exchanged the fee agreement, Laffin worked with Ben-Asher to recruit multiple attorneys and paid the invoices sent by Ben-Asher's firm in full.[42] The court also declined to hold against Ben-Asher the fact that the two previous invoices did not reflect the parties' amendments to the fee agreement: it was clear that the fee agreement was enforceable because Laffin (or anyone else from the plaintiff-law firm) never noticed the errors, and the issue was not raised until the instant dispute was ripe.[43] According to the court, "[t]his unnoticed error does not provide [the plaintiff-law firm] an excuse to avoid the binding agreement."[44]

36. *Id.* (first quoting Flores v. Lower E. Side Serv. Ctr., Inc., 4 N.Y.3d 363, 369, 828 N.E.2d 593, 597, 795 N.Y.S.2d 491, 495 (2005); and then quoting *Newmark*, 80 A.D.3d at 477, 914 N.Y.S.2d at 164).

37. *Id.* at *30 (first quoting Stevens v. Publicis S.A., 50 A.D.3d 253, 255–56, 854 N.Y.S.2d 690, 692 (1st Dep't 2008); and then quoting *Newmark*, 80 A.D.3d at 477, 914 N.Y.S.2d at 164).

38. *Id.* at *29–30 (emphasis added).

39. *Id.* at *30.

40. *Meltzer*, 2018 U.S. Dist. LEXIS 167150, at *31 (first quoting Krumme v. Westpoint Stevens Inc., 143 F.3d 71, 83–84 (2d Cir. 1998); then quoting Valashinas v. Koniuto, 283 A.D. 13, 17, 125 N.Y.S.2d 554, 558 (3d Dep't 1953)).

41. *Id.* (first citing *Brown Bros.*, 41 N.Y.2d at 400–01, 361 N.E.2d at 1002, 393 N.Y.S.2d at 352; then citing John William Costello Assocs., Inc. v. Standard Metals Corp., 99 A.D.2d 227, 231, 472 N.Y.S.2d 325, 327–28 (1st Dep't 1984)).

42. *Id.*

43. *Id.* at *31–32.

44. *Id.* at *32.

B. Rivera v. Crabby Shack

In *Rivera*, Magistrate Gold from the Eastern District of New York faithfully applied the contract formation principles set forth by the Second Circuit in *Winston v. Mediafare Entertainment Corp.*,[45] and the case is representative of the dangers inherent in not including in a preliminary agreement an express reservation of the right not to be bound in the absence of a writing.[46] Add in the extra layer that the settlement agreement at issue here was made to resolve a Fair Labor Standards Act (FLSA) action—which are required to be in writing—and you have a case ripe for the *Survey*![47]

The plaintiffs brought an action under the FLSA and under New York Labor Law, alleging that they were not paid overtime wages for their overtime hours worked at the defendant's restaurant.[48] The case was referred to "court-annexed mediation," and after several months, the Eastern District of New York's Alternative Dispute Resolution Center "reported that the parties had reached a settlement" notwithstanding that the agreement only included a block for counsels' signatures ("[signature]") but was never hand-signed by either party.[49] The parties did not raise any issue with that report until seven weeks later, when the plaintiffs "submitted a letter stating that the parties could not agree on 'the form of the settlement agreement.'"[50] The defendants, in turn, contended that the agreement reported by the court's ADR Administrator was binding on the parties, and the defendant brought an action to enforce it.[51] The parties allegedly disputed the terms concerning the "terms under which attorney's fees would be recoverable in the event of litigation to enforce the parties' agreement."[52]

After a verbatim recitation of the parties' purported settlement agreement, the court first addressed the plaintiffs' argument that the agreement was not enforceable because it was not signed by either party.[53] Applying *Winston*, the court evaluated the "words and deeds of the parties which constitute objective signs in a given set of circumstances" and concluded that "[h]ere, the objective signs indicate

45. 777 F.2d 78 (2d Cir. 1985).

46. Rivera v. Crabby Shack, LLC, No. 1:17-CV-04738-SMG, 479 (E.D.N.Y. May 2, 2019).

47. *Id.* at 477.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Rivera*, No. 1:17-CV-04738-SMG, at 477.

52. *Id.* at 478.

53. *Id.* at 479.

that the parties intended to be bound by the agreement they reached at the mediation."[54] The parties' agreement specifically stated that the parties "have reached a settlement, the terms of which appear above."[55] According to the Court, the "text of the Mediation Agreement thus supports the conclusion that the parties understood it to state the material terms of a settlement to which all of them had agreed."[56]

The objective circumstances under which the agreement was signed also supported a finding that the parties intended to be bound by it, and that it was enforceable.[57] The agreement was "executed by counsel during the course of a mediation presided over by a court-appointed mediator"—to the court, that "formality[,]" plus the fact that the Administrator herself reported that the parties had in fact reached an agreement, "supports the inference that the Mediation Agreement was not a tentative or preliminary draft."[58]

Next, the Court relied on the plain fact that "the Mediation Agreement contains no reservation of the right not to be bound in the absence of the contemplated formal settlement agreement."[59] The parties were free to include this language in the agreement and did not.[60] Further, the court observed that the parties had engaged in at least some partial performance "to the extent that the parties began drafting a final agreement and allowed the Court's ADR Administrator to report that the case had settled without correction or comment for nearly seven weeks thereafter."[61]

The Court also explained that, in its view of the agreement, there was no suggestion that the parties had failed to reach an agreement on any material term of the agreement.[62] Instead, the issue over the parties' attorney's fees was one that is not usually included in FLSA agreements, and the instant dispute "involves a hypothetical concern that rarely arises, and one that is frequently not addressed at all in settlement agreements."[63]

54. *Id.* (quoting *Winston*, 777 F.2d at 80).

55. *Id.*

56. *Rivera*, No. 1:17-CV-04738-SMG, at 479.

57. *Id.*

58. *Id.*

59. *Id.* at 480.

60. *Winston*, 777 F.2d at 80.

61. *Rivera*, No. 1:17-CV-04738-SMG, at 480–81 (citing Jackson v. N.Y.C. Dep't of Educ., 2012 U.S. Dist. LEXIS 77305, at *6–7 (S.D.N.Y. June 4, 2012)).

62. *Id.* at 481.

63. *Id.* (citing Rahman v. Kaplan Cornelia, Inc., No. 12-CV-09095-SN, 2014 U.S. Dist. LEXIS 17449, at *18 (S.D.N.Y. Feb. 11, 2014)).

The Court also dismissed the plaintiffs' alternative arguments that the defendant had engaged in bad faith during the negotiations and that the agreement was unenforceable because it included a confidentiality provision, which courts have typically excluded from final FLSA settlement agreements.[64] With respect to the bad faith argument, the court found that the defendants had been forthright and provided significant financial information during the course of the mediation; any arguments sounding in bad faith were, according to the court, completely unsupported by the record.[65] Finally, the court agreed with the plaintiffs that the Second Circuit "has indicated its disapproval of confidential settlements of FLSA settlements."[66] But, according to the court, the proper outcome is for the court to strike a confidentiality provision, rather than disregard the agreement in its entirety.[67] After concluding that the substantive terms of the agreement were acceptable under the court's FLSA precedent, the Court granted the defendant's motion to enforce the agreement.[68]

C. Karaduman v. Grover

In *Karaduman*, the court relied exclusively on the parties' text messages to determine whether one party had agreed to return money to the other.[69] The case reflects a potentially treacherous aspect of contract law: text messages are recognized by courts as having precisely the same import as emails and letters.

The plaintiff, Arzu Karaduman, brought a complaint in Ithaca City Court of Small Claims against her former landlord, William P. Grover, for $1,800, which represented her security deposit and first month's rent deposit for an apartment that was located near Ithaca College.[70] The plaintiff responded to a Craigslist advertisement for the apartment when she was living out of state, and she could not afford to travel and visit the apartment before moving to Ithaca.[71] Accordingly, she reviewed and

64. *Id.* at 482–83 (first citing Garcia v. Good for Life by 81, Inc., No. 17-CV-07228-BCM, 2018 U.S. Dist. LEXIS 117437, at *15–16 (S.D.N.Y. July 12, 2018); then citing Chung v. Brooke's Homecare LLC, No. 17-CV-2534-AJN, 2018 U.S. Dist. LEXIS 80098, at *8 (S.D.N.Y. May 11, 2018)).

65. *Id.*

66. *Rivera*, No. 1:17-CV-04738-SMG, at 483 (citing Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 206 (2d Cir. 2015)).

67. *Id.* ("[T]he inclusion of a confidentiality provision does not preclude enforcement of the Mediation Agreement.").

68. *Id*. at 486.

69. *Karaduman*, 2019 N.Y. Slip Op. 50560(U), at 3.

70. *Id*. at 1.

71. *Id.*

hand-signed a PDF copy of the lease sent by the landlord, and sent along $1,800.[72] Notably, the lease did not "require that any modifications be in writing and signed by the parties."[73]

As often happens with college apartments, the plaintiff was "shocked" when she arrived at the apartment and allegedly found that it had peeling paint on the walls, the remnants of recent water damage, and apparently "smelled musty."[74] The court engaged in a detailed factual review of the "photographs and videos" that the plaintiff submitted.[75]

Relevant to this article, however, was the court's analysis of "whether the parties reached an agreement with respect to [the] lease."[76] In particular, the court had to decide whether the parties had reached an agreement according to which the landlord would return a portion of the plaintiff's payment back to her.[77] To reach this issue, the court "reviewed the parties' emails and text messages to determine if there was an accord and satisfaction settling the rights of the parties to the lease."[78] To constitute an accord and satisfaction, the court must find that two components are present: (1) an accord, which "is an agreement that a stipulated performance will be accepted in the future in lieu of an existing claim, and (2) satisfaction, which is an execution of the accord."[79]

The court engaged in a careful and highly detailed review of the parties' text messages. According to the court, this review was appropriate because "[t]ext messages are recognized by courts as having the import of letters and emails."[80] The court then focused on the defendant's statements suggesting that he had agreed to refund the plaintiff her deposit money, minus $300, which the plaintiff had agreed to incur as a compromise:

> During early August, the parties text messaged extensively. In those texts, Ms. Karaduman made it known that she thought the apartment needed updating and that it had a water problem creating a health hazard. Mr. Grover agreed to do "everything that makes [you] comfortable and happy." Ms. Karaduman demanded her deposit back

72. *Id.*

73. *Id.*

74. *Karaduman*, 2019 N.Y. Slip Op. 50560(U), at 1.

75. *Id.*

76. *Id.* at 2.

77. *Id.* at 3.

78. *Id.* at 2.

79. *Karaduman*, 2019 N.Y. Slip Op. 50560(U), at 2 (quoting 19A N.Y. JUR. 2D COMPROMISE, ACCORD, AND RELEASE § 1 (2019)).

80. *Id.* at 3 (citing People v. Limage, 19 Misc. 3d 395, 400, 851 N.Y.S.2d 852, 857 (N.Y.C. Crim. Ct. Kings Cty. 2008)).

> to which Mr. Grover responded, "I don't understand-never had mold problem. "[Y]our first person to say. [W]e will one way other whatever you. I'm sorry you're not happy." Mr. Grover also texted, "Ok I agree I've never had anyone say anything like this I'm good and fair person. I don't want you unhappy we will do what you want to. [S]orry you don't like. [I]t's not like new complex rental." Ms. Karaduman then stated "Thank you for being understanding. I know you kept it for me until now. How about you keep $300 (1/3 month rent) and all the furniture and return the rest of $1800 I paid, which is $1500. You can rent it furnished to someone who needs furniture and I will try to find a place tomorrow. Venmo is fine."[81]

The parties' communications, inevitably, turned sour.[82] The landlord subsequently took the position that he would need to consult with his brother before returning the money to the plaintiff.[83] According to the court, the parties' earlier text messages were clear: the landlord agreed to return $1,500 to the plaintiff, and it was not until after that time that the plaintiff had any notice that other members of the landlord's family were required to consummate a deal.[84] The court did not mince words when it concluded that there was "sufficient proof by a preponderance of the evidence that . . . the landlord[] made an agreement" to return the $1,500 to the plaintiff.[85] The court continued:

> At no time before making the accord did Mr. Grover inform Ms. Karaduman that he had to consult with his brother, and there is no proof, whatsoever, that Mr. Grover did not have full authority to both enter into the lease and reach an accord with Ms. Karaduman. While Mr. Grover may have had second thoughts about his promise to refund $1500.00 and keep $300 and the furniture, Ms. Karaduman has the right to rely on the accord the parties reached.[86]

The court found that the plaintiff had earned the right to rely on the accord that the parties reached—namely to return $1,500 to her—and that the landlord had failed to abide by that accord and was obligated to return the money to the plaintiff forthwith.[87]

81. *Id*. at 2–3.

82. *Id*. at 3.

83. *Id*.

84. *Karaduman*, 2019 N.Y. Slip Op. 50560(U), at 3.

85. *Id.*

87. *Id.* The court ultimately held that the plaintiff had the right to cancel the lease on other grounds, and was entitled to a full refund of the $1,800 she had paid the landlord. *Id.*

87. *Id.* The court ultimately held that the plaintiff had the right to cancel the lease on other grounds, and was entitled to a full refund of the $1,800 she had paid the landlord. *Id.*

D. Lord v. Marilyn Model Management

Here, the plaintiff-appellant, an experienced modeling scout, brought a complaint alleging that he was "induced to leave his job and join defendant by an offer of employment at a salary of $190,000, plus discretionary bonuses and profit sharing."[88] The parties then allegedly negotiated an employment contract dated September 15, 2015, that included, among other terms "a provision for six months' severance if plaintiff were terminated without cause."[89] The agreement, which also stated that it could be signed in counterparts, was signed by the plaintiff in August 2015 and sent by email to two of the defendant-respondent's board members.[90] According to the court, "[o]ne board member promptly replied, by email, 'Welcome aboard. We'll countersign over the next few days.'"[91] The plaintiff-appellant never received a signed copy of the agreement, but began working for the defendant-respondent in September 2015; the plaintiff-appellant was paid a salary, relocated from New York to Paris for the position, and allegedly "performed diligently" until March 2016 when his employment was terminated without cause.[92] The defendant-respondent refused to pay the six months' severance under the provision in the agreement, and the trial court found that the plaintiff-appellant was due no severance because the parties had not reached an enforceable agreement.[93]

On appeal, the First Department unanimously reversed, finding that the allegations of the complaint "sufficiently state a cause of action for breach of contract [and t]hey set forth the parties' intent to enter into a contract and the contract's terms."[94] The court rejected the trial court's conclusion that the fact that the agreement was not signed by the defendant-respondent required dismissal of the complaint; according to the court, "[t]he fact that defendant never signed the agreement is not, at this pleading stage, an impediment to a finding that the parties intended to be bound" because "[t]here is nothing in the agreement stating that it

88. Lord v. Marilyn Model Mgmt., Inc., 173 A.D.3d 606, 606, 104 N.Y.S.3d 622, 623 (1st Dep't 2019).

89. *Id*. at 606–07, 104 N.Y.S.3d at 623.

90. *Id*. at 607, 104 N.Y.S.3d at 623.

91. *Id.*

92. *Id.*

93. *Lord*, 173 A.D.3d at 606–07, 104 N.Y.S.3d at 623.

94. *Id.* at 607, 104 N.Y.S.3d at 623 (first citing Furia v. Furia, 116 A.D.2d 694, 695, 498 N.Y.S.2d 12, 13 (2d Dep't 1986); then citing Kolchins v. Evolution Mkts., Inc., 128 A.D.3d 47, 59, 8 N.Y.S.3d 1, 9 (1st Dep't 2015); and then citing *Brown Bros.*, 41 N.Y.2d at 399–400, 361 N.E.2d at 1001, 393 N.Y.S.2d at 352).

will not be binding until executed by both sides."[95] Rather, the court noted that the agreement did not contain terms requiring a party's assent be in writing.[96] Here, the court relied on the agreement's "all modifications must be in writing" clause for a unique reason.[97] Generally, that type of clause will be used by a court as justification to *not* enforce an agreement that was modified orally.[98] Here, however, the court relied on that language for what it *did not say*: that clause, according to the court, only states that any subsequent amendments must be in writing—"[it] d[id] not state that the parties may convey their assent only by affixing signatures."[99] Accordingly, the First Department reversed the dismissal of the breach of contract claim and remanded the matter back to the trial court.[100]

II. RECENT FEDERAL AND NEW YORK STATE CASE LAW DECLINING TO FIND THE EXISTENCE OF BINDING CONTRACTS VIA EMAIL EXCHANGES AND OTHER ELECTRONIC CORRESPONDENCE

A. Steamer v. Vestiaire Collective USA

In *Steamer*, the Southern District of New York considered whether the parties in a putative class action intended to be bound by a settlement agreement where they had reached a settlement in principle but had failed to memorialize the settlement's terms.[101] During back and forth email negotiations, defense counsel stated he would draft a settlement agreement for review by plaintiff's counsel, if the offered terms were agreeable.[102] After additional negotiations, defendant listed out four points and asked the plaintiff if they were acceptable.[103] The plaintiff agreed to a deal on those terms.[104] During their email negotiations of settlement terms, after the terms had been agreed to in principle, and in

95. *Id*. at 607, 104 N.Y.S.3d at 624 (first citing *Kolchins*, 31 N.Y.3d at 107–08, 96 N.E.3d at 788–89, 73 N.Y.S.3d at 524–25; then citing *Flores*, 4 N.Y.3d at 369, 828 N.E.2d at 597, 795 N.Y.S.2d at 495; and then citing *Kowalchuk*, 61 A.D.3d at 125, 873 N.Y.S.2d at 49).

96. *Id.*

97. *Id.*

98. *See, e.g.*, Bright Radio Labs. Inc. v. Coastal Commercial Corp., 4 A.D.2d 491, 493, 166 N.Y.S.2d 906, 909 (1st Dep't 1957); *see also* Towers Charter & Marine Corp. v. Cadillac Ins. Co., 894 F.2d 516, 522 (2d. Cir. 1990).

99. *Lord*, 173 A.D.3d at 607, 104 N.Y.S.3d at 624.

100. *Id.* at 607, 104 N.Y.S.3d at 623.

101. Steamer v. Vestiaire Collective USA, Inc., No. 18-CV-10739-JMF, 2019 U.S. Dist. LEXIS 60793, at *1 (S.D.N.Y. Apr. 9, 2019).

102. Exhibit "A" at 6, *Steamer*, 2019 U.S. Dist, LEXIS 60793.

103. *Id.* at 4.

104. *Id.* at 3.

correspondence with the court after the terms were agreed upon, the parties had referenced a forthcoming written settlement agreement.[105] Plaintiff's counsel drafted a proposed settlement agreement that, according to defendants, omitted a material and agreed upon term.[106] After seeking acceptance of the written agreement absent the disputed term, the plaintiff notified the court that the parties had not reached a settlement as they had failed to memorialize the terms of their agreement.[107] Thereafter, the defendants filed a Motion to Enforce Settlement to compel plaintiff's compliance with the settlement terms agreed upon over email.[108]

To determine whether the parties had intended to be bound by a settlement agreement in the absence of a mutually executed document, Judge Furman applied the four *Ciaramella* factors set forth by the Second Circuit:[109]

1. Whether there has been an express reservation of the right not to be bound: The court found that this factor weighed against finding an intent to be bound for two reasons.[110] First, the court reasoned that the parties' "communications throughout the settlement process—including submissions to this Court, both before and after the agreement in principle—made clear that both parties expected a written settlement agreement."[111] Second, the court noted that the draft settlement agreements included merger clauses which, in the Second Circuit, are "persuasive evidence that the parties did not intend to be bound prior to the execution of a written agreement."[112]

2. Whether there has been partial performance: The court found that this factor weighed against finding an intention to be bound because defendants provided "no evidence of partial performance of the settlement agreement."[113]

3. *Whether all of the terms of the alleged contract have been agreed upon*: The court found that this factor weighed against finding an intention to be bound because, even though the email exchange between counsel suggested they believed they had agreed to material terms of a

105. *Steamer*, 2019 U.S. Dist. LEXIS 60793, at *2–3.

106. Brief for Defendant at 2, *Steamer*, 2019 U.S. Dist. LEXIS 60793.

107. *Steamer*, 2019 U.S. Dist. LEXIS 60793, at *1.

108. *See* Brief for Defendant at 2, *Steamer*, 2019 U.S. Dist. LEXIS 60793.

109. *Steamer*, 2019 U.S. Dist. LEXIS 60793, at *1–2.

110. *Id.* at *2–3.

111. *Id.* at *2.

112. *Id.* at *3 (quoting *Ciaramella v. Reader's Digest Ass'n*, 131 F.3d 320, 324 (2d Cir. 1997)).

113. *Id.* (quoting *Ciaramella*, 131 F.3d at 325).

settlement, "the subsequent arguments about the differences between Plaintiff's and Defendants' draft agreements reveal[ed] that they did not."[114] To underscore this point, the court specifically noted two examples of terms that had not been addressed in the email exchange.[115]

4. Whether the agreement at issue is the type of contract that is usually committed to writing: Finally, citing *Ciaramella*, the court found settlement agreements, and in particular settlement agreements with "numerous provisions that will apply into perpetuity," are as a general matter required to be in writing.[116] In concluding that this factor also weighed against finding that the parties intended to be bound, the court noted that the parties' draft settlement agreements included provisions that would apply into perpetuity.[117]

In sum, the court determined that each *Ciaramella* factor weighed against finding that the parties intended to be bound to a settlement without a written agreement, and denied the defendants' motion to enforce the settlement.[118]

B. Caddell Construction Co. (DE) v. Danmar Lines Ltd.

In this case, the court reviewed at summary judgment whether a Purchase Order negotiated in an email exchange between a plaintiff general contractor and a defendant common carrier of goods licensed by the United States Federal Maritime Commission was an enforceable contract.[119] The parties had discussed, negotiated, and revised drafts of the Purchase Order for over two years.[120] The final page of the "Purchase Order Rider," which was "attached to and made a part of the Purchase Order" included a blank signature line for each party.[121] However, due to an unresolved provision, "the Purchase Order was never finalized, signed, or executed."[122]

After determining that the Bills of Lading used during the shipment of goods govern the relationship between the parties, the court considered plaintiff's argument that the Purchase Order governed the parties' relationship as "a separate contract . . . and that the Bills of Lading were

114. *Steamer*, 2019 U.S. Dist. LEXIS 60793, at *3–4.

115. *Id.* at *4.

116. *Id.* (quoting *Ciaramella*, 131 F.3d at 326).

117. *Id.*

118. *Id*. at *2–5

119. Caddell Constr. Co. (DE) v. Danmar Lines Ltd., No. 18-CV-2900-LLS, 2018 U.S. Dist. LEXIS 215007, at *1–2 (S.D.N.Y. Dec. 20, 2018).

120. *Id.* at *1.

121. *Id.* at *2.

122. *Id.* at *3.

thus 'mere receipts.'"[123] Noting that the Purchase Order was never signed or executed, the court considered whether the parties were bound by an unexecuted draft of the Purchase Order.[124]

In analyzing this question, the court cited the principle that "[o]rdinarily, where the parties contemplate further negotiations and the execution of a formal instrument, a preliminary agreement does not create a binding contract."[125] Ultimately, the court determined that "there [was] no evidence of a meeting of the minds with intention to be bound by a draft of the Purchase Order" for several reasons.[126] First, statements made in the emails exchanged between the parties, such as "Attached updated draft," "Please look over it and give me your comments," "I have reengaged our lawyers to revisit the last contract you sent me," and "It should be back in your hands in less than 30 days," showed the "parties' intent to continue revising and negotiating the Purchase Order."[127] Second, the blank signature lines in the document evidenced an intent to "sign and execute the Purchase Order before it would take effect as a binding contract."[128] Finally, despite plaintiff's argument to the contrary, the court found that there was no indication "that the parties operated under the Purchase Order's terms and rates," nor that they had resolved a dispute pursuant to its provisions.[129] Accordingly, the court found that the "parties were not bound by a draft of the Purchase Order or any other separate contract" from the Bills of Lading.[130]

C. Robert M. Schneider, M.D., P.C. v. Licciardi

In *Schneider*, the New York Supreme Court, Greene County, rejected plaintiff's argument that an email exchange between the parties regarding an insurance demutualization check formed an enforceable agreement regarding the distribution of demutualization proceeds.[131] Defendant had previously sold his medical practice to plaintiff.[132] After

123. *Id.* at *8.

124. *Caddell*, 2018 U.S. Dist. LEXIS 215007, at *8–11.

125. *Id.* at *8 (quoting Missigman v. USI Northeast, Inc., 131 F. Supp. 2d 495, 507 (S.D.N.Y. 2001)).

126. *Id.*

127. *Id.* at *9 (citing PCS Sales (USA), Inc. v. Nitrochem Distrib. Ltd., No. 03-CV-2625-SAS, 2004 U.S. Dist. LEXIS 7629, at *26–27 (S.D.N.Y. May 3, 2004)).

128. *Id.* at *9–10 (first citing Longo v. Shore & Reich, Ltd., 25 F.3d 94, 97 (2d Cir. 1994); then citing Newby v. News Mkt., Inc., 170 F. App'x 204, 206 (2d Cir. 2006)).

129. *Caddell*, 2018 U.S. Dist. LEXIS 215007, at *10.

130. *Id.* at *11.

131. Robert M. Schneider, M.D., P.C. v. Licciardi, No. 19-0120, 2019 N.Y. Slip Op. 29226, at 6–7 (Sup. Ct. Greene Cty. July 17, 2019).

132. *Id.* at 1.

that sale, plaintiff paid defendant's malpractice insurance premiums while defendant served as an independent contractor for plaintiff.[133]

The court examined the email exchange between the parties to determine whether plaintiff could establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound—as required to establish the existence of an enforceable contract.[134] Prior to the distribution, defendant had emailed plaintiff, "seeking assurance that if [p]laintiff received the entire demutualization check, [p]laintiff would forward the part of the proceeds to [d]efendant equivalent to the portion of time [d]efendant had paid the premium."[135] In response, plaintiff's president notified defendant that, if plaintiff received the demutualization check, it would ensure that defendant received the check, or accurate portion of it, and that plaintiff would "monitor this closely" to ensure that it, too, was reimbursed for its expenses.[136] In a reply email to plaintiff's message, defendant stated "Thank you Rob."[137]

On this record, the court concluded that "[i]n none of the emails did [d]efendant make or agree to any promise that could constitute consideration for an agreement."[138] Therefore, finding no consideration, the court concluded that the email exchange did not amount to an enforceable contract.[139]

D. 3 Delaware Group LLC v. Broome County

In *3 Delaware Group LLC v. Broome County*, a judgment of foreclosure was sought in favor of defendant on real property owned by plaintiffs.[140] Prior to entry of the judgment of foreclosure, plaintiffs' counsel reached out to defendant officials in an attempt to redeem and repurchase the property.[141] After an email exchange between the parties, defendant "ultimately determined that it would not approve a sell-back to plaintiffs."[142] Plaintiffs sought to vacate the judgment of foreclosure and

133. *Id.*

134. *Id.* at 6–7.

135. *Id.*

136. *Schneider*, 2019 N.Y. Slip Op. 29226, at 7.

137. *Id.*

138. *Id.*

139. *Id.* (quoting Maxam v. Kucharczyk, 138 A.D.3d 1268, 1269, 29 N.Y.S.3d 683, 685 (3d Dep't 2016)). The court went on to note that, even assuming the emails did form an enforceable contract, questions of fact existed "as to whether the agreement was voidable by mutual mistake," and thus summary judgment was precluded on that ground as well. *Id.*

140. 167 A.D.3d 1117, 1117, 89 N.Y.S.3d 744, 745 (3d Dep't 2018).

141. *Id.*

142. *Id.*

brought suit for breach of contract, among other causes of action.[143] The Supreme Court, Broome County, denied plaintiffs' motion and plaintiffs appealed to the Appellate Division, Third Department.[144] On appeal, the Appellate Division examined plaintiffs' breach of contract claim.[145]

The court found that dismissal of plaintiffs' breach of contract claim was warranted because the email exchange did not satisfy the statute of frauds.[146] The court examined the email relied on by plaintiffs to establish the existence of a contract to reconvey the property.[147] This email "merely set[ ] forth the amount of delinquent taxes owed, along with a sell-back fee."[148] The court noted that, in relevant part, the statute of frauds requires "that a contract for the sale of real property 'is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged.'"[149] In examining whether the email met those requirements, the court found it "falls far short," as it "fails to 'unequivocally set forth all the essential elements of a contractual relationship such as the price, terms and parties' to the transaction."[150]

CONCLUSION

The cases surveyed in this year's edition of the *Survey* demonstrate what is quickly becoming a fundamental truth: federal and state courts in New York are more and more adept at resolving contract disputes that unfold in high-stakes situations in real time. Mining through loads of email or other less-than-formal correspondence between parties and attorneys is becoming the norm. Nevertheless, we contend that careful, forward-thinking lawyering can save parties time and resources down the line. When the commercial lawyer takes seriously the fact that her words in a quick email concerning a settlement agreement or contract negotiation *will* be used in a subsequent litigation, the attorney can take

143. *Id.*

144. *Id.* at 1118, 89 N.Y.S.3d at 745.

145. *3 Del. Grp. LLC*, 167 A.D.3d at 1118, 89 N.Y.S.3d at 746.

146. *Id.* at 1119, 89 N.Y.S.3d at 746–47.

147. *Id.* at 1118–19, 89 N.Y.S.3d at 746.

148. *Id.*

149. *Id.* at 1118, 89 N.Y.S.3d at 746 (quoting N.Y. GEN. OBLIG. LAW § 5-703(2) (McKinney 2019)).

150. *3 Del. Grp. LLC*, 167 A.D.3d at 1119, 89 N.Y.S.3d at 746 (quoting Calcagno v. Roberts, 134 A.D.3d 1292, 1293, 21 N.Y.S.3d 751, 753 (3d Dep't 2015)) (citations, alterations, and internal quotation marks omitted). The court found that the email also failed to amount to an enforceable contract for the separate reason that RPTL 1166(2) required a majority vote of defendant County's government body, and there was no indication that the representative of defendant who emailed plaintiffs had received such approval. *Id.* Thus, he had no authority to bind defendant. *Id.*

small but crucial steps to preserve her party's position. She can reserve the right not to be bound in the absence of a formal agreement, or she can include certain forward-thinking, contract-implementation language to move the ball forward towards partial performance. Either way, courts appear to reward clarity and punish vague and unspecific assertions.

While a party can be certain to protect its interests by insisting on a fully-executed agreement to proceed in a business or other transaction, New York courts have appeared to embrace an increased willingness to enforce contracts and settlement agreements in the absence of a formal signature or, in some instances, any formal writing.