Can An E-Mail Exchange Form A Real Estate Contract?

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In today's fast-paced business environment of cell phones, wireless Internet and Blackberry's, sending an e-mail is second nature. Indeed, an argument can be made that e-mail exchanges are taking over for telephone conversations and correspondence by "snail mail." There is no question that an oral conversation between a buyer and seller of real estate which contains all of the necessary elements for a contract of sale would nonetheless violate the Statute of Frauds. *See*, GOL §5-703. But, if instead of an oral conversation those same parties engaged in an e-mail exchange, there very well may be such a question. A 2004 Kings County Supreme Court decision held that such an exchange may not violate the Statute of Frauds and could create a binding contract. A recent Queens County Supreme Court decision, however, held that such an exchange could not form a real estate contract.

In *Rosenfeld v. Zerneck*, 4 Misc.3d 193, 776 N.Y.S.2d 458 (Sup. Ct. Kings Co. 2004), the prospective purchaser commenced an action for specific performance of a real estate contract for the sale of the defendant's home. The contract sued upon was an exchange of e-mails. The defendant moved for summary judgment.

The plaintiffs viewed the defendant's property, told defendant they "loved the house" and offered a $3.5 Million all cash deal. *See, Id*. at 194, 776 N.Y.S.2d at 459. Plaintiffs followed up their conversation by sending an e-mail to defendant. That e-mail set forth that the plaintiffs "wish to confirm our firm $3,500,000 all cash offer, subject [t]o normal property inspections," confirming that they would close about July 1, 2004, and the plaintiffs' names typed in. *See, id.* at fn. 1.

After a subsequent telephone conversation between the parties, the defendant forwarded an e-mail to the plaintiffs. That e-mail set forth that it was "to confirm yesterday's telephone conversation in which I accepted your all cash offer of $3,525,000 for [the property], with no contingencies for financing or sale of your present residence, to close no later than July 1, 2004." The e-mail went on to state that defendant's attorney would prepare a contract of sale and asked for some information. The defendant typed his first name in closing the e-mail. Plaintiffs responded to this e-mail with an e-mail of their own that contained the requested information.*See, Id*. at 194-95, 776 N.Y.S.2d at 459-60.

In determining the motion, Judge Herbert Kramer found a threshold issue to be whether the defendant's typed signature at the bottom of his e-mail satisfied the requirement that a writing be subscribed under the Statute of Frauds [NYGOL §5-701]. Judge Kramer's analysis began with a review of *Parma Tile Mosaic & Marble Co., Inc. v. Estate of Short*, 87 N.Y.2d 524, 640 N.Y.S.2d 477 (1996). In *Parma*, the Court of Appeals held that a fax machine's automatic imprinting of the sender's name at the top of each transmitted page did not "constitute a signing authenticating the contents of the document for Statute of Frauds purposes." The reasons for this was that (i) once the fax machine was programmed, it would automatically imprint the sender's name on every page transmitted, "without regard to the applicability of the Statute of Frauds to a particular document" and (ii) by simply programming his fax machine the sender did not intend to authenticate every document faxed. *Id*. at 528, 640 N.Y.S.2d at 477. Accordingly, it was the sender's intent that was critical to the determination.

In analyzing the e-mail at issue, Judge Kramer noted that the e-mail contained the defendant's typewritten name. The Court held that "the sender's act of typing his name at the bottom of the e-mail manifested his intention to authenticate this transmission for Statute of Frauds purposes and the copy of the e-mail in question . . . constitutes sufficient demonstration of same." *Rosenfeld* at 195-96, 776 N.Y.S.2d at 460. The Court, however, granted defendant's motion and dismissed the complaint. As the e-mail in question did not contain all of the necessary terms for a real estate contract., e.g. it was missing the amount of the down payment and did not refer to how the parties were to treat an existing lease, there was no "meeting of the minds" as to the terms of sale for the real property. *Id*. at 196, 776 N.Y.S.2d at 461.

The issue of whether an e-mail exchange could form the basis of a real estate contract came up again this past October in a Supreme Court Queens County case before Justice Joseph P. Dorsa. In *Vista Developers Corp. v. VFP Realty LLC*, 2007 WL 2982259 (Sup. Ct. Queens Co. 10/8/07), Justice Dorsa held that such an exchange was not a "signed writing" as required by the Statute of Frauds.

Vista was commenced for specific performance of an agreement for the purchase of real estate. Like*Rosenfeld*, the agreement was an exchange of e-mails. The defendants moved to dismiss the Complaint on the basis of the Statute of Frauds.

The parties' principals began negotiating the transaction. There were memos sent between the parties. The defendants then sent an e-mail to plaintiff which set forth, among other things, a purchase price, the down payment amount, a time of the essence closing date and that there would not be any due diligence period. The e-mail included the name of defendants' representative at the bottom. The next day plaintiff's president replied by e-mail that set forth, among other things, "I agree to your terms as stated herein below," and which included his name at the bottom. *Vista Developers* at *1-2. A few weeks later, defendants advised plaintiff that they would be selling the property to another purchaser.

In their motion to dismiss, defendants' relied upon NYGOL §5-703(2), which sets forth that "[a] contract . . . for the sale, of any real property or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing." Defendants argued that the plaintiff could not have a claim for specific performance since there was "no signed writing evidencing a contract for the sale of real property . . . ." *Vista Developers* at *2. Plaintiff countered that the e-mail exchange between the parties' principals was a "signed writing" within the statute of frauds, rendering the agreement enforceable. *Id.*

In beginning his analysis, Justice Dorsa referred to *Satisfaction of Statute of Frauds by E-mail*, by John E. Theuman, J.D., 110 A.L.R.5th 277, §2, par. 2, which indicated that courts have made the determination on a case-by-case basis and have generally not stated a general rule, which may imply that e-mails may satisfy the applicable Statute of Frauds in a proper case. *Vista Developers* at *2-3. Justice Dorsa next cited to a Massachusetts Superior Court Case [*Shattuck v. Klotzbach*, 14 Mass.L.Rep. 360, 2001 WL 1839720] that denied a motion to dismiss a claim to enforce a contract for the sale of property where the e-mail exchange included all of the necessary contractual elements and included the name of the sender which was indicative of the sender's intent to authenticate the content of the e-mail. *Vista Developers* at *3. Justice Dorsa next noted that *The Law of Electronic Commercial Transactions*, ECOMTR P 4.18(4) (August 2007), found that in determining whether the e-mail was "signed," whether the language contained in the e-mail or the procedures surrounding it could demonstrate the sender's intent was more important than a lack of a typed in or inserted signature. *Vista Developers* at *3. Justice Dorsa then analyzed *Rosenfeld*.

Defendants argued that the Court's reasoning in *Rosenfeld* was wrong since *Rosenfeld* relied upon NYGOL §5-701, which is inapplicable to real estate contracts. NYGOL §5-701(b)(4), which sets forth that electronic transmissions may be a writing, only applies to "qualified financial contracts" as that term is defined in NYGOL §5-701(b)(2)(a-i). That definition, however, does not include "conveyances and contracts concerning real property," which is the exclusive province of NYGOL §5-703. Defendants argued that as the amendments regarding electronic transmissions are inapplicable to NYGOL §5-703, they do not apply to real estate sales contracts. *Vista Developers* at *4.

In analyzing defendants' argument, the *Vista* Court referred to the statutory definitions of the relevant terms. NYGOL §5-101 defines the terms used in §5-703, but does not define a "qualified financial contract." "Qualified financial contract" is defined in NYGOL §5-701(b)(2). "Real property" as used in NYGOL §5-703 is defined the same as the term "real property" as used in the Real Property Law, which definition is " . . . co-extensive in meaning with lands, tenements and hereditaments." Additionally, the legislative history of the amendment allowing for the recognition of electronic communication specifically states that such amendment applies "to qualified financial contracts." *Vista Developers* at *4. "Thus, it is apparent that the intent of the legislature was to amend the method for establishing agreements required to be in writing other than those involving contracts and conveyances concerning real property, which are purposely dealt with in a separate subdivision of Title 5 [NYGOL §5-703]." *Id*. Defendants' motion was granted and the Complaint dismissed.

It appears that the reasoning of *Vista Developers* is sound. The specific statute that applies to real estate contracts, NYGOL §5-703, does not allow for electronic communications to be a "writing" within that statute. Moreover, the definition of a "qualified financial contract" does not refer to "real property," or to "lands, tenements [or] hereditaments." As such, unless and until NYGOL §5-703 is amended to broaden its scope to include electronic communications, e-mail exchanges cannot be the "writing" that forms the basis of a real estate sales contract which does not violate the Statute of Frauds.