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A Signed Text Message Can Result in a Binding Real Estate Contract

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by Peter F. Carr, II

Practice Tips

The commonplace reliance upon and acceptance of text messaging in commercial dealings has forced courts to examine the legal implications of texting within the seminal rule that a contract concerning real estate shall not be enforced “[u]nless the promise, contract or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized.” G.L. c. 259, § 1, Fourth. At the trial court level, courts have embraced the concept of “contract by text message” for real estate so long as additional key elements are established. One, the text message must either contain or incorporate by express reference all material terms of an agreement concerning land. Two, the text message must conclude with the signature of the “party to be charged” or its authorized agent. A formal signature or even a complete first and last name is not required. However, the sequencing is critical. The cases to date largely have turned on whether the name of the sender appears at the end of the text message to signify the authentication of its preceding substance. The text message is sufficiently signed and binding provided that it concludes with a “mark” to indicate that the sender adopts the message.

Recent cases from the Land Court bear out these core concepts. In a commercial real estate dispute that hinged on text message exchanges between the parties’ brokers, a judge denied a special motion to dismiss a lis pendens that was issued in favor of the plaintiff buyer seeking to enforce a sales contract. *St. John’s Holdings LLC v. Two Electronics, LLC*, 24 LCR 190, 16 MISC 000090 (RBF), 2016 WL 1460477 (Mass. Land Ct. April 14, 2016), *aff’d*, 92 Mass. App. Ct. 1114 (2017). Although the defendant seller ultimately prevailed at trial, the Court steadfastly held that the text message of the seller’s broker

satisfied the signed writing requirement of the Statute of Frauds. The text message incorporated by reference the final letter of intent for the purchase and sale of the property following ongoing negotiations between the parties. The contract was deemed signed and accepted by the seller when the seller's broker concluded the text message with the inclusion of his first name. The Court held, "In the context of these exchanges between the parties, the court infers that the text message sent by [Tim, the seller's broker] was intended to be authenticated by his deliberate choice to type his name at the conclusion of his text message." In another case, the Court similarly found compliance with the Statute of Frauds because, "[t]he broker's writing her first name 'Laurie' at the end of the text message constitutes a signature for the purpose of the Statute of Frauds." However, the Court ruled that the text message did not contain or incorporate sufficient material terms to form a contract. *Fiore v. Lindsey*, No. 17 MISC 000533 (RBF), 2017 WL 5969332 (Mass. Land Ct. Nov. 29, 2017). In contrast and underscoring the critical nature of the sequencing, text exchanges between brokers did not satisfy the Statute of Frauds where none of the operative texts concluded with the names of the brokers, even though those names appeared in the bodies of the messages. *Donius v. Milligan*, 24 LCR 440, 443, No. 16 MISC 00277 (HPS), 2016 WL 3926577 (Mass. Land Court July 25, 2016). The Court denied relief because the "text messages here are not signed by either the proposed buyer or seller, nor are they signed by the agents." In addition, the Court ruled that the substance of the text messages evidenced mere negotiations.

Although no appellate court has yet addressed squarely text messages in the context of the Statute of Frauds, the prior appellate decisions affirming the binding nature of informal email exchanges coupled with the expanding usage of electronic communications arguably signal that reviewing courts are likely to embrace the theories established at the trial court level. Accordingly, to avoid being bound to an agreement involving land that may never have been intended, parties should insist upon more formal means of communicating with clear documentation, at least as negotiations proceed. A party involved in a transaction may be wise to limit or eliminate all text messaging with a counterparty during the course of negotiations, or to include written disclaimers to memorialize that text messages will not be accepted as part of a deal. At a minimum, parties must avoid a course of conduct which creates the presumption that a text message is sufficient to express offer and acceptance. Otherwise, as the judge observed in *St. John's Holdings*, "a text message, all too familiar to most teenagers and their parents, can constitute a writing sufficient under the Statute of Frauds to create an enforceable contract for the sale of land."

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