

Text Messages Add New Layer of Risk to Deal-Making in the Modern Age

Texting is becoming ubiquitous in this era of 24/7 connectivity, but a recent court decision stands as a strong reminder that those quickly composed texts can be held up as a “writing” sufficient to seal a multi-million dollar deal.

In a decision that comes as a surprise to many observers, the Massachusetts Land Court recently ruled that text messages between two real estate brokers regarding the purchase and sale of a commercial building may constitute a “writing” sufficient to meet the requirements of the Massachusetts Statute of Frauds. In other words, brokers are now on notice that a text message which — either on its own or when read in conjunction with other writings — identifies the subject of the parties’ agreement, shows that they made a contract, states the essential terms of the contract with reasonable certainty, and bears some form of a signature may be the legal equivalent of the four corners of a written document bearing the signature of the parties.

The case, *St. John’s Holdings, LLC v. Two Electronics, LLC*, centered on a negotiation for the sale of a commercial building. The brokers for the parties discussed the deal in person and reduced the terms of the agreement to a letter of intent (LOI), which was further discussed and subsequently revised. The brokers continued to negotiate the \$3.232 million deal via email and text message, including discussions of the purchase price, due diligence period, earnest money deposit and closing date. One of final texts between the brokers stated that the seller wanted the buyer to sign the final LOI first. The buyer’s broker obtained the requested signature and then sent a text message to the seller’s broker stating that the LOI was signed and that he had the earnest money check required by its terms. Each of the texts at issue concluded with the sender’s name.

Ultimately, rather than execute its end of the LOI, the seller’s principal accepted a third party’s offer to buy the building. The jilted buyer sued to enforce its rights as a buyer of the building under a binding letter of intent to purchase.

Court Determination

The Massachusetts Land Court considered whether the brokers’ text messages created a binding contract for the purchase of real estate or were evidence only of mere negotiations. The court observed that the parties frequently communicated electronically and that their conduct throughout their course of dealings clearly evince an appreciation that the final exchange of text messages would memorialize the final LOI as an offer and acceptance.

Further, the court found that the typed signature at the end of the text sufficiently portrayed the sender’s intent to authenticate the message. The brokers’ practice of including their names in messages containing material terms, but omitting names from informal discussions, signaled their intention to authenticate their “signed” statements by electronic means, the court reasoned. The court noted that “[t]he communications between SJH and Two Electronics before the text message evidenced a meticulous attention to provisions that would govern the agreement to purchase the [building].” When read in context of the exchanges between the parties, the court concluded that the text messages at issue constituted a binding offer and acceptance.

Lessons Learned

This decision can be seen as a harbinger of surprising weight on text messages. It is generally understood that email may rise to the level of a writing that satisfies the Statute of Frauds and create a binding contract when all essential terms are present in such communications. Now, we are reminded that text messages can be viewed as akin to email or any other writing. Indeed,



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courts have continually modernized their interpretation of the ancient Statute of Frauds by recognizing that electronic communications have supplanted the traditional four corners of a document in a real estate transaction.

Brokers should take precautions to include qualifying language in all electronic communications that acceptance is subject to final client review and that no agreement can be reached with the use of electronic communication without a statement that “I so contract.” This case may serve as an important reminder to all parties to a negotiation that they would be wise to rely less on the informality of electronic communication and return to more formal, and face-to-face, interactions as they bear down to close a deal.

Of course, this case is just the latest reminder that all parties to a real estate transaction must be very careful with letters of intent. If the parties engage in protracted negotiations leading to a form of LOI that contains the essential terms of a contract to purchase, it is essential to expressly state that it is not intended to be legally binding. Otherwise, the LOI itself can be enforceable against them if the court can find mutual agreement on those terms — even if that agreement is announced with the “ping” of a cell phone rather than in the form of a traditional commercial real estate purchase agreement.

To discuss any questions you may have regarding the issues discussed in this Alert, please contact a member of the Cozen O'Connor's Real Estate Department.