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ANALYSIS

First Department Rules Court of Appeals Decision re Email Settlements 'Not Controlling,' 'Needless Formality,' Part I

"Plaintiff argued that MRLS' intentional programing of its name on top of all faxed documents, satisfied the subscription requirement," writes Elliott Scheinberg.

September 10, 2024 at 02:00 PM

Civil Appeals

By Elliott Scheinberg | September 10, 2024 at 02:00 PM

This article is in honor and in memory of Angela Susan Scheinberg. I was extraordinarily blessed that she was my wife. On 9/11, her life was savagely wrenched from me and from all who knew and loved her. Angela was a paradigm of kindness and integrity, and a beacon of virtue. I also honor every patriotic American murdered that day.

This article was inspired by the language in *Phila. Ins. Indem. v Kendall*, 197 A.D.3d 75, 79 [1st Dept 2021], wherein the First Department stated that the Court of Appeals' precedent, *Parma Tile Mosaic & Marble v Estate of Short*, 87 NY2d 524 [1996], which held that the automatic imprinting by fax machine of the sender's name at the top of each transmitted page does not satisfy the requirement that the writing be "subscribed" pursuant to the statute of frauds, is "…not controlling … the distinction between prepopulated [blocks containing counsel's contact information at the end of the email] and retyped signatures in emails reflects *a* needless formality that does not reflect how law is commonly practiced today."

"Not controlling" and "a needless formality" has likely caught many a reader off guard in light of hierarchical appellate protocol that "[I]ntermediate appellate court[s] [] cannot overrule [a] Court of Appeals' decision [] and are obligated to [rule] based on [] controlling precedent. The remedy [] must come not from this Court, but from the legislature or the Court of Appeals." *New York Civ. Liberties Union v New York City Police Dept.*, 148 AD3d 642, 644 [1st Dept 2017], affd, 32 NY3d 556 [2018]; *Hernandez v City of Syracuse*, 164 AD3d 1609 [4th Dept 2018] ("[I]t is not this Court's prerogative to overrule or disregard a precedent of the Court of Appeals."; *Calcano v. Rodriguez,* 91 A.D.3d 468, 469 [1st Dept. 2012].

However, beyond protocol lies the profound issue regarding the formation and sustainability of electronic contracts. It is the position of this article that the various statutes, state and federal, enacted and amended since *Parma* do not bespeak *Parma's* demise rather, their "intent" broadly "supports and encourages" electronic contracts and signatures—(1): "Section 1 of chapter 314 of the Laws of 2002 of the Electronic Signatures and Records Act (ESRA) (New York); (2) Uniform Electronic Transactions Act (7A [part I] ULA 211 [1999] (Congress)); and (3) Electronic Signatures in Global and National Commerce Act (15 USC Section 7001 et seq., as added by Pub. L. 106–229, 114 U.S. Stat. 464 [E–SIGN] (Congress))"; these statutes neither abrogate nor mitigate common law contract doctrine or the statute of frauds, whose principles are applied on a case by case basis.

The Statute of Frauds, General Obligations Law Section 5–701(a)(2)

General Obligations Law (GOL) Section 5–701(a)(2), the statute of frauds, provides: "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent if such agreement, promise or undertaking [i]s a special promise to answer for the debt, default or miscarriage of another person."

"The purpose of the Statutes of Frauds is to avoid fraud by preventing the enforcement of contracts that were never in fact made" ... To this end, GOL Section 5–701(a) contains two threshold requirements for proving the existence of a binding agreement, promise or undertaking: a writing, and a subscription of the writing by the party to be charged therewith. Since the Legislature selected these objective elements to determine, in the first instance, the existence of an enforceable agreement, promise or undertaking, the absence of a writing or a subscription cannot be remedied by arguing that obligations were nevertheless incurred." *Parma* [at 528].

General Construction Law Section 46, Uniform Commercial Code Section 3-401(2)

General Construction Law Section 46 provides: "The term signature includes any memorandum, mark or sign, written, printed, stamped, photographed, engraved or otherwise placed upon any instrument or writing with intent to execute or authenticate such instrument or writing." The Uniform Commercial Code Section 3-401(2) similarly provides: "A signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature."

'Parma Tile'

The issue in *Parma Tile* was whether the automatic imprinting by a fax machine of the sender's name at the top of each transmitted page satisfied the requirement that a writing be subscribed under the Statute of Frauds (General Obligations Law Section 5–701). The Court of Appeals held that "a subscription requires an act to authenticate the writing as" that of a party. But what kind of acts qualify?

In *Parma,* Sime Construction, a subcontractor, asked MRLS, the general contractor on the project, to guaranty Sime's purchases of ceramic tiles from plaintiff Parma. MRLS faxed a document to plaintiff, which document plaintiff argued was a guaranty. MRLS contended that it merely faxed an unsubscribed proposal for a guaranty. Plaintiff's copy of the document bore a heading at the top of each page with the name "MRLS Construction," a telephone number, the date and time, an unidentified number and a page number. MRLS had programmed its fax machine to automatically imprint this information on every transmitted page. The heading appeared only on the recipient's faxed copy, not on the originating document. The document was not preceded by a cover letter or any other identifying document.

In reliance on the fax, plaintiff supplied Sime with tiles. Plaintiff sued MRLS for Sime's outstanding invoices. MRLS contended that the document was not enforceable as not having been subscribed pursuant to the GOL, that the heading automatically imprinted on the top of each faxed page served merely as identification and was not intended to serve as a subscription within the confines of the Statute of Frauds. Plaintiff argued that MRLS' intentional programing of its name on top of all faxed documents, satisfied the subscription requirement.

The trial court concluded that MRLS' automatically imprinted heading on plaintiff's copy of the document satisfied the subscription requirement, because an intent to be bound had been demonstrated, and granted plaintiff's motion for summary judgment against MRLS. The Appellate Division affirmed. The Court of Appeals reversed.

The Court of Appeals' Reasoning

The Court of Appeals held [*Parma,* at 527]: "Plaintiff failed to demonstrate that MRLS affixed its 'signature' to the document sent by facsimile machine sufficient to fulfill the subscription requirement. Chief Judge Cardozo observed, a signature for Statute of Frauds purposes may be 'a name, written *or* printed, [but] is not to be reckoned as a signature unless inserted or adopted with an intent, actual or apparent, to authenticate a writing' (*Mesibov, Glinert & Levy v. Cohen Bros. Mfg.*, 245 N.Y. 305, 310 ...). Plaintiff contends that we may infer satisfaction of this requirement because the fax machine had been programmed by MRLS to identify each page of the document with 'MRLS Construction.'"

Parma gave three reasons for rejecting plaintiff's urging to adopt the inference:

- "The act of identifying and sending a document to a particular destination does not, by itself, constitute a signing authenticating the contents of the document for Statute of Frauds purposes."
- The automatic imprinting of "MRLS Construction on every transmitted page was without regard to the applicability of the Statute of Frauds to a particular document."
- The intentional act of programming a fax machine, by itself, does not sufficiently demonstrate to the recipient the sender's apparent intention to authenticate every document subsequently faxed. "The intent to authenticate the particular writing at issue must be demonstrated."

Unstated in *Parma* is Cardozo's further point, "Whether such an intent is to be inferred will be at times a question of law and at others one of fact, according to the circumstances," *Mesibov, Glinert & Levy v. Cohen Bros. Mfg.*, 245 N.Y. 305, 310 [1927].

It merits attention that: "When parties enter into a preliminary agreement, anticipating that a more formal contract will be executed later, the contract is enforceable if it embodies all the essential terms of the agreement. Furthermore, an exchange of correspondence between counsel may constitute a binding stipulation pursuant to CPLR 2104." *Wronka v GEM Community Mgt.*, 49 AD3d 869 [2d Dept 2008]; *Metro. Lofts of NY v Metroeb Realty 1*, 160 AD3d 632, 635 [2d Dept 2018].

Decisions Regarding Email Agreements Between Counsel

'Williamson v. Delsener'

In 2009, in *Williamson v. Delsener*, 59 A.D.3d 291, 292 [1st Dept 2009], the First Department held that "The e-mails between counsel, which contained their printed names at the end, constituted signed writings (CPLR 2104) within the meaning of the statute of frauds. Therein the settlement was sufficiently clear and concrete to constitute an enforceable contract ... The e-mail communications indicated that defendant was aware of and consented to the settlement."

'Naldi v. Grunberg'

In *Naldi v Grunberg*, 80 AD3d 1 [1st Dept 2010], plaintiff sued defendant for breach of contract, based on defendant's refusal to honor the right of first refusal allegedly granted to plaintiff in the e-mail of defendant's broker. Defendant appealed from the denial of a motion to dismiss arguing that the right of first refusal was not enforceable under GOL Section 5-703 because it was memorialized in an e-mail only. The Appellate Division began its affirmance stating [at 6]:

"At the outset of our analysis, we reject defendant's argument that an e-mail can never constitute a writing that satisfies the statute of frauds of GOL Section 5–703 ('Conveyances and contracts concerning real property required to be in writing'). Again, this court has held in other contexts that e-mails may satisfy the statute of frauds" [cites omitted] "... We reaffirm *Williamson* and *Stevens v. Publicis, S.A.*, 50 A.D.3d 253 [1st Dept 2008], lv. dismissed 10 N.Y.3d 930 [2008],

below, that 'e-mails may satisfy the statute of frauds.'"

'Naldi'

Following an analysis focused on the enactment of GOL Section 5–701(b), in 1994, when electronic communication was still relatively novel, the Appellate Division observed:

"The legislative history of the original amendment indicates that the background of the bill was that, by 1994, institutions entering into certain complex financial agreements (such as foreign exchange contracts, financial and commodity swaps, and other derivatives) had come to rely on e-mail and other electronic means of communication, rather than paper writings, to memorialize those transactions. As noted in one of the relevant legislative memoranda, '[i]n the marketplace, these agreements are considered binding from the moment agreement is reached.'" [at 8].

"At that time, however, there was a perceived uncertainty whether such agreements were immediately enforceable under the statute of frauds if the parties entered into them through electronic means of communication ... To remove this uncertainty, the Legislature amended GOL Section 5–701 to make clear that a "qualified financial contract ... is legally binding from the moment agreement is reached. Sixteen years later, however, e-mail is omnipresent in both business and personal affairs." [at 9].

"Today, a decade into the twenty-first century, e-mail is no longer a novelty. Although not enacted by New York, the Uniform Electronic Transactions Act (7A [part I] ULA 211 [1999] [UETA]), promulgated in 1999 and enacted by 47 states, the District of Columbia, and the Virgin Islands, 'that [a] contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation' (UETA Section 7[b]) and that '[i]f a law requires a record to be in writing, an electronic record satisfies the law' (UETA Section 7[c]). Moreover, in 2000, Congress enacted the Electronic Signatures in Global and National Commerce Act (15 USC Section 7001 et seq.)" [at 9].

"Any uncertainty that existed in 1994 as to whether the record of an electronic communication satisfied the statute of frauds under New York state law has long since been resolved. In 1999, the New York Legislature enacted the Electronic Signatures and Records Act (ESRA), now article III (formerly article I) of the State Technology Law ... [E]SRA provide[s], in pertinent part [at 9-10]:

"'[U]nless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand' (ESRA Section 304 [2]); and (4) 'In 2002, the Legislature enacted certain amendments to ESRA[, including] the 2002 legislation amended ESRA's definition of the term 'electronic signature' to conform to E–SIGN's definition of the same term:

"Legislative intent. [ESRA] is intended to support and encourage electronic commerce and electronic government by allowing people to use electronic signatures and electronic records in lieu of handwritten signature and paper documents ... [T]he legislature finds that it is in the best interest of the state of New York, its citizens, businesses and government entities for State and federal law to work in tandem to promote the use of electronic technology in the everyday lives and transactions of such individuals and entities. It is with this finding in mind that the following amendments are made to the state technology law."

"Thus, we conclude that E–SIGN's requirement that an electronically memorialized and subscribed contract be given the same legal effect as a contract memorialized and subscribed on paper (15 USC Section 7001[a] [scholarly references omitted]) is part of New York law, whether or not the transaction at issue is a matter "in or affecting interstate or foreign commerce."13 [at 10].

“Even in the absence of E–SIGN and the 2002 statement of legislative intent, given the vast growth in the last decade and a half in the number of people and entities regularly using e-mail, we would conclude that the terms ‘writing’ and ‘subscribed’ in GOL § 5–703 should now be construed to include, respectively, records of electronic communications and electronic signatures, notwithstanding the limited scope of the 1994 amendment of the general statute of frauds.” [at 11]. [“This approach seems to be consistent with the current weight of authority nationwide,” *Naldi,* n.14].

“In most cases … definitions of a ‘writing’ or a ‘signature’ are transferable to the electronic context and the primary issue is whether the writing contains the relevant, required content. As much as a communication originally written or typed on paper, an e-mail retrievable from computer storage serves the purpose of the statute of frauds by providing ‘some objective guaranty, other than word of mouth, that there really has been some deal’ (*Bazak Intl. v. Mast Indus.*, 73 N.Y.2d 113, 120 [1989] … *Bazak Intl. v. Tarrant Apparel Group*, 378 F. Supp. 2d at 383–384 [“because ‘under any computer storage method, the computer system ‘remembers’ the message even after being turned off,’ whether or not the e-mail is eventually printed on paper or saved on the server, it remains an objectively observable and tangible record that such a confirmation exists”]. [at 13].

The foregoing notwithstanding, the Appellate Division, concluded, on the merits, that there was never a meeting of the minds on the terms of the proposed right of first refusal.

Part II continues the historic monitoring of email settlements in the First and Second Departments.

Elliott Scheinberg is a member of the New York State Bar Association Committee on Courts of Appellate Jurisdiction. He is the author of “The New York Civil Appellate Citator” [NYSBA, 3d ed., 3 vols TBA 2024] and “Contract Doctrine and Marital Agreements in New York” [NYSBA, 5th ed., 2 vols 2023]. He is also a fellow of the American Academy of Matrimonial Lawyers and the International Family Law Association.

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ANALYSIS

First Department Rules Court of Appeals Decision re Email Settlements "Not Controlling," "Needless Formality," Part II

"The e-mails from plaintiff and Bloom at the end of their e-mails constituted 'signed writings' within the meaning of the statute of frauds," writes Elliott Scheinberg.

September 11, 2024 at 12:00 PM

Civil Appeals

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Part II continues with the case law regarding email settlement agreements.

'Martin v. Portexit Corp.' and Article 45 of the CPLR

In *Martin v. Portexit Corp.*, 98 AD3d 63, 66-67 [1st Dept 2012], the First Department noted: "State Technology Law Section 306 provides that in any legal proceeding where the CPLR applies, an electronic record or signature may be admitted into evidence pursuant to article 45 of the CPLR."

'Stevens v. Publicis'

Stevens v. Publicis, S.A., 50 AD3d 253 [1st Dept 2008] involved an executive employment agreement. Bloom, the former chairman and CEO of Publicis and plaintiff exchanged a series of e-mails, culminating in a message from Bloom setting forth his understanding of the terms regarding plaintiff's new role at the company:

"Thus I suggested an allocation of your time that would permit the majority of your effort to go against new business development (70%). I also suggested that the remaining time be allocated to maintaining/growing the former Lobsenz Stevens clients (20%) and involvement in management/operations of the unit (10%). This option, it would seem, is in your best interest because it offers the best opportunity for you to achieve your stated goal of a full earn-out. When I suggested this option, you seemed to have considerable enthusiasm for it and expressed your satisfaction with it so I, of course, assumed that it was an option you preferred." [at 254-55].

By e-mail the next day, plaintiff wrote, as pertinent here:

"[I] accept your proposal with total enthusiasm and excitement ... "I'm psyched again and will do everything in my power to generate business, maintain profits, work well with others and move forward." [at 255].

Bloom replied the same day:

"I am thrilled with your decision. You have my personal assurance that all of us will continue to work in the spirit of partnership to achieve our mutual goal and function together as close senior collaborators in a climate of respect and

dignity for all." [at 255].

Each of the e-mail transmissions bore the typed name of the sender at the foot of the message.

Supreme Court properly relied on this e-mail exchange as an unqualified acceptance of the modification to the agreement, including plaintiff's job responsibilities. The agreement was further confirmed in another e-mail to Hopson, COO of PDNY, in which plaintiff reaffirmed his unconditional acceptance of the modified agreement.

Held: The e-mails from plaintiff and Bloom at the end of their e-mails constituted "signed writings" within the meaning of the statute of frauds.

'Bayerische Landesbank'

In 2013, in *Bayerische Landesbank v 45 John St.*, 102 AD3d 587 [1st Dept 2013], the First Department, "citing *Mark Bruce Intl. v Blank Rome*, 19 Misc 3d 1140[A] [Sup Ct, NY County 2008], affd 60 AD3d 550 [1st Dept 2009]; compare Stevens v Publicis S.A., 50 AD3d 253, 255-256 [1st Dept 2008]", ruled that *the email,* "which contained a pre-printed signature, was not a sufficient writing under the statute of frauds."

'Herz v Transamerica Life Ins.'

In *Herz v Transamerica Life Ins.*, 172 AD3d 1336 [2d Dept 2019], plaintiff's husband (decedent) purchased a life insurance policy naming his wife beneficiary. Following his death, plaintiff brought suit to recover the proceeds of the policy. Plaintiff's counsel accepted a settlement offer of $12,500 in exchange for a release in favor of Transamerica. Plaintiff's counsel agreed to prepare a stipulation to be signed by his client; defense counsel agreed to prepare the release.

About a month later, plaintiff's counsel stated in an email that the release "[l]ooks good. I will get over to client today." About two weeks thereafter, plaintiff's counsel emailed defendant's counsel saying that plaintiff "also requested that we remove 'Transamerica denies allegations set forth.' If this is acceptable I will edit the word doc you sent." Transamerica's counsel responded "[s]he's pushing too far. Transamerica does deny the allegations. That stays in. It should [sic] matter to her or you since Transamerica is not the final arbiter of that question. It will have no bearing on her PI lawsuit. Please get her signature." [at 1337].

Plaintiff subsequently declined to execute a release and stipulation of discontinuance. Supreme Court granted Transamerica's motion to enforce the settlement, finding it valid and enforceable. Plaintiff was directed to execute the release and to file a stipulation of discontinuance. Plaintiff appealed. The Appellate Division affirmed pursuant to CPLR 2104 [an "agreement between parties or their attorneys relating to any matter in an action is not binding upon a party unless it is in a writing subscribed by him or his attorney"] that the emails were subscribed by counsel and set forth the material terms of the agreement. Notably, the settlement was not conditioned on any further occurrence, such as the formal execution of the release and settlement.

'Phila. Ins.'

In *Phila. Ins. Indem. v Kendall*, 197 A.D.3d 75 [1st Dept 2021], Supreme Court held that an apparent email-settlement of respondent's underinsured motorist arbitration claim was invalid because, inter alia, "it was unclear whether respondent's attorney retyped his name on his email agreeing to the settlement. His name appeared in what appeared to be a prepopulated block containing his contact information at the end of the email. "The motion court, in accord with precedent of this court, found that the retyping of a name is required for an email to be 'subscribed' and therefore a binding stipulation under CPLR 2104." The First Department reversed "to clarify that the transmission of an email, and not whether an email 'signature' can be shown to be retyped, is what determines that a settlement stipulation has been subscribed for purposes of CPLR 2104."

'Phila.', Facts

Before, during and after the arbitration hearing, the parties sought to settle Kendall's claim. The arbitrator awarded Kendall $975,000; the same day, the decision was emailed to Kendall's counsel and faxed to Philadelphia's counsel. However, neither counsel received the decision and they continued to negotiate. Three days later the parties reached a settlement agreement for $400,000; respondent's counsel emailed petitioner's counsel: "Confirmed—we are settled for 400K." Below this appeared "Sincerely," followed by counsel's name and contact information. Shortly thereafter, petitioner's counsel emailed in reply, attaching a general release, adding, "Get it signed quickly before any decision comes in, wouldn't want your client reneging." Respondent's counsel answered, "Thank you. Will try to get her in asap." [at 77].This email concluded with the same valediction, name, and contact information as had respondent's counsel's earlier email.

After respondent's counsel received the arbitrator's decision and before respondent signed the release, counsel rejected the $400,000 settlement and demanded payment of the $975,000 arbitration award. Supreme Court found that it did not appear that respondent's attorney had subscribed his email for purposes of CPLR 2104 by retyping his name in addition to his prepopulated contact information block. Petitioner brought a special proceeding to enforce the agreement and to vacate the arbitral award.

Respondent's counsel did not actually represent to the court that the contact information block was prepopulated but the court implicitly placed the burden on Philadelphia to prove that counsel retyped his name. Supreme Court also found that Kendall's failure to sign the release was a necessary occurrence to finalize the settlement, this fact was recognized by Philadelphia's counsel's email in which she urged Kendall's counsel to get her to sign the release quickly, lest she "reneg[e]."

'Parma' Is 'Not Controlling'

The First Department's anaysis began [at 78]:

"The Court of Appeals has not opined on whether emails can satisfy CPLR 2104. In 1996, the Court of Appeals [in *Parma]* did find that a preprogrammed name on a fax transmission did not fulfill the subscription requirement ... However, the *Parma* court wrote in a different era, when paper records were still an important modality, maybe the most important modality, of recording information in law and business. Since that time, the electronic storage of records has become the norm, email has become ubiquitous, and statutes allowing for electronic signatures have become widespread. For these reasons, and those that follow, we find that *Parma* is not controlling."

The First Department referenced the Second Department's decision in *Forcelli v. Gelco*, 109 A.D.3d 244 [2d Dept. 2013], which upheld a settlement agreement that had been documented solely in an email, "as persuasive authority" in accord with *Jimenez v. Yanne*, 152 A.D.3d 434 [1st Dept. 2017] ("The email communications between counsel sufficiently set forth an enforceable agreement to settle plaintiffs' personal injury claims ... Furthermore, counsel typed his name at the end of the email accepting defendants' offer, which satisfied CPLR 2104's requirement that settlement agreements be in a 'writing subscribed by him or his attorney' in order to be enforceable (CPLR 2104; *Forcelli* [at 251] ...).") *Phila.* summarized *Forcelli* [at 79]:

"The Second Department held that the parties' counsels' emails created a binding settlement agreement. As for CPLR 2104's subscription requirement, the court held that the defendant's counsel's email containing her printed name at the end thereof supported the conclusion that she effectively signed the email message: 'we note that the subject email ... ended with ..., 'Thanks Brenda Greene,' which appears at the end of the email text. This indicates that the author purposefully added her name to this ... email message, rather than a situation where the sender's email software has

been programmed to automatically generate the name of the email sender, along with other identifying information, every time an email ... is sent.' The rule espoused by *Forcelli* and our own precedent is that an email in which the party's or its attorney's name is retyped at the end of an email is sufficiently subscribed for purposes of CPLR 2104.

"We now hold that this distinction between prepopulated and retyped signatures in emails reflects a needless formality that does not reflect how law is commonly practiced today. It is not the signoff that indicates whether the parties intended to reach a settlement via email, but rather the fact that the email was sent."

'Phila.' Reviews History of Electronic Signatures

As in *Naldi,* the First Department, again, referenced ESRA: "[U]nless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand."

"The statutory definition of what constitutes an 'electronic signature' is extremely broad under the ESRA, and includes any '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' (State Technology Law Section 302[a]). [I]f an attorney hits 'send' with the intent of relaying a settlement offer or acceptance, and their email account is identified in some way as their own, then it is unnecessary for them to type their own signature. This rule avoids unnecessary delay caused by burden-shifting 'swearing contests over whether an individual typed their name or it was generated automatically by their email account' (Princeton Indus. Prods. v. Precision Metals, 120 F. Supp. 3d 812, 820 [N.D. Ill. 2015])." [at 80].

Settlement Negotiations via Email

Citing judicial "unease about the casual nature of email," as "most email users have on occasion sent emails that they did not mean to transmit, or that they regretted soon after transmission," the First Department underscored that email-settlement offers "are a specific subcategory of email on a subject freighted with ethical obligations," [at 80-81]:

"A lawyer has ethical obligations to communicate all settlement offers to a client and to counsel the client on the consequences of settlement. New York's Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.2(a) states that "[a] lawyer shall abide by a client's decision whether to settle a matter." Rule 1.4(a)(iii) requires a lawyer to "promptly inform the client of ... material developments in the matter including settlement or plea offers." These ethical obligations help to ensure that an attorney considers their authority before communicating settlement offers and acceptances to opponents, whatever the mode of communication."

Phila. emphasized that the situation therein did not involve an "errant key stroke" that launched an email with potential legal consequences. To the extent that such a possibility exists, it becomes the responsibility of the sender "to take prompt action to rectify the error," which confirms Judge Cardozo's cautionary instruction in *Mesibov*: "Whether such an intent is to be inferred will be at times a question of law and at others one of fact, according to the circumstances." [at 310].

Settlement Offers May Still Be Challenged

Phila. further stated: "While we jettison the requirement that a party or a lawyer retype their name in email to show subscription, that does not mean that every email purporting to settle a dispute will be unassailable evidence of a binding settlement" [at [81]:

- "First, there may be issues of authentication. Email accounts can be hacked. An email from an attorney's account is presumed to be authentic, but that is a rebuttable presumption. Just as a party may attack a

hardcopy settlement offer or acceptance as a forgery, a party that claims an email was the product of a hacker (or of artificial intelligence, or of some other source) may rebut its authenticity."

- "Second, an email settlement must, like all enforceable settlements, set forth all material terms. That condition is satisfied here where the sole issue is how much respondent would accept to settle her claim. Respondent argues that the settlement was conditioned on the respondent signing the release. We disagree. The Release and Trust Agreement was to be further documentation of the binding agreement constituted by the parties' counsel's emails agreeing to settle respondent's claim for $400,000 rather than something on which that binding agreement was contingent ... The email exchange exhibits offer and acceptance; in this context, an expression of concern that a party might renege presupposes the existence of an agreement."

Notably, *Phila.* makes no reference to *Naldi.*

'Rawald v. Dormitory Auth.'

The facts in *Rawald v. Dormitory Auth.*, 199 AD3d 477 [1st Dept 2021] mirror those in *Phila.* The settlement occurred by way of email. Plaintiffs' counsel stated, "This is to confirm settlement in the sum of $275,000. Please send release language and parties to be released." Later that day, plaintiffs' counsel sent a follow-up email, stating, "Please confirm we are settled." Sea Crest's counsel responded, "Confirmed. I'll have release information to you ASAP."

However, shortly after the settlement, defendants learned that their summary judgment motions had been granted and the action had been dismissed. Sea Crest disavowed the settlement. The emails, were "subscribed" within the meaning of [CPLR 2104], as the sender was identifiable and there was no contention that Sea Crest's counsel did not send any of the emails intentionally. See *Phila.* The emails also contained all material terms, since the sole issue was how much plaintiffs would accept in settlement of their claim. The email thread preceding the settlement confirmed Sea Crest's intention to settle irrespective of the outcome of defendant's motions for summary judgment.

Conclusion

While *Parma* encourages acceptance of electronic signatures, its message remains on course as it protects the principles of contract doctrine and the statute of frauds.

Elliott Scheinberg *is a member of the New York State Bar Association Committee on Courts of Appellate Jurisdiction. He is the author of "The New York Civil Appellate Citator," [NYSBA, 3d ed., 3 vols TBA 2024] and "Contract Doctrine and Marital Agreements in New York," [NYSBA, 5th ed., 2 vols 2023]. He is also a fellow of the American Academy of Matrimonial Lawyers and the International Family Law Association.*

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