

News & Types: Real Estate Update

Buyers, Sellers and Brokers Beware! Your Text Messages Could be Binding

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As technology has developed, courts have increasingly been forced to grapple with the question of whether non-traditional means of communication constitute binding contracts. In the context of agreements for the purchase and sale of real estate, this question is particularly thorny, as such agreements are typically governed by the statute of frauds, which requires that they be in a signed writing to be enforceable. Over the years, telegrams (see, e.g., *Yaggy v. B. V. D. Co.*, 173 S.E.2d 496, 502), faxes (see, e.g., *Den Norske Stats Oljeselskap, A.S. v. Hydrocarbon Processing, Inc.*, 992 F.Supp. 913, 915), and more recently emails (see, e.g., *Slover v. Carpenter*, 2016 WL 54899 and *Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289, 295-96) have been found to satisfy the writing requirement of the statute of frauds. But what about text messages, which most people wouldn't consider a "writing" in any conventional sense and which aren't normally transferred to a physical medium apart from the phones through which they're sent? Well, courts have started to weigh in on that question as well. In *St. John's Holdings, LLC v. Two Electronics, LLC*, 2016 WL 1460477, the Massachusetts Land Court found that a text message "can constitute a writing under the Statute of Frauds sufficient to bind" parties to an agreement to sell real estate. This decision may cause consternation among real estate practitioners, buyers and sellers, who often use text messages to propose contract terms on behalf of their clients or themselves.

In *St. John's Holdings, LLC v. Two Electronics, LLC*, St. John's Holdings sought to purchase a one-story commercial building from Two Electronics. Representatives of both parties met in person to discuss the transaction multiple times, and the parties' brokers exchanged proposals for contract terms via emails, text messages and phone calls. These communications led to an agreement between the parties on material terms, and, on February 3, 2016, the broker for St. John's Holdings delivered a signed letter of intent reflecting such terms and a check for the earnest money deposit to the broker for Two Electronics. However, on the same day, Two Electronics accepted a third party's offer to purchase the property by countersigning a written offer. The Massachusetts Land Court found that "the February 3rd text message [was] a writing and that, read in the context of exchanges between the parties, it contains sufficient terms to state a binding contract between [St. John's Holdings] and Two Electronics." The court found that the brokers signed or authenticated such texts by typing their names under the substantive portions of the texts. It stated that the act of the brokers in "[t]yping their names at the end of certain messages containing material terms, but declining to do so for more informal discussions, is indicative that the parties chose to be bound by those signed communications." The court

extended its prior order barring Two Electronics from conveying the property until a further order of the court or an agreement between the parties.

Unlike the Massachusetts Land Court, most courts have not yet addressed the question of whether text messages satisfy the writing requirement of the statute of frauds. Nevertheless, real estate practitioners, buyers and sellers should practice caution in their use of texts and other non-traditional means of communication while negotiating with other parties. A party should not write his or her name under any text message, unless he or she intends such text message to be binding. Out of an abundance of caution, it is advisable for practitioners, buyers and sellers to add a statement that “no agreement regarding the subject matter of these communications is final until wet ink signatures of all principals are applied to a physical instrument” after a conversation via text message in which contract terms are proposed or discussed. Short of implementing these protections, parties to real estate contracts could be exposed to unanticipated liability for seemingly innocuous communications, and the old saying “Buyer Beware” could take on an entirely new meaning.