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E-Mail May Be Binding, State Court Rules

By C. J. HUGHES

BE careful when clicking "send." That is essentially the message to brokers and their clients from a state court, which ruled recently in a real estate dispute that e-mails can carry the same weight as traditional ink-on-paper contracts.

"Given the vast growth in the last decade and a half in the number of people and entities regularly using e-mail," handwriting and e-mail should now basically be considered one and the same, according to the decision in Naldi v. Grunberg, which was handed down on Oct. 5 by the Appellate Division, First Department of State Supreme Court in Manhattan. The ruling, which attracted little public notice when it was announced, was appealed on Monday to the Court of Appeals, the state's highest court.

"As much as communication originally written or typed on paper, an e-mail retrievable from computer storage" is proof of a deal, according to the court's opinion, which was written by Associate Justice David Friedman.

Though the case involved accusations of breach of contract in a commercial real estate transaction, the decision applies to residential deals as well. Lawyers says the ruling expands the state's Statute of Frauds, a law with roots in 17th-century England that requires all property deals to be agreed to in writing.

In its decision, the five-judge panel also took an expansive view of a 1994 amendment, saying that if e-mail can be used for financial transactions like taking out business loans, it should be good enough for home purchases, too.

For example, a seller or a broker who, in an e-mail, uses a phrase like "$700,000 was more of what I had in mind," he or she "might have a problem," said Robert J. Braverman, a Manhattan real estate lawyer. "You need to be mindful of what it is you are saying in electronic communications," he said.

Though e-mail is hardly a new form of communication, uncertainty persists about how binding it is, which means the ruling in Naldi v. Grunberg could bring some clarity.

Some brokers in the city said that they were unaware of the case and that their firms not have hard-and-fast rules in place about e-mail exchanges.

In most cases a disclaimer can inoculate senders from having e-mail backfire, real estate lawyers said. Mario J. Suarez, a lawyer at Thompson Hine who handles many commercial transactions, suggested that the wording might say the communications "shall not be deemed an offer, as no documents are binding unless and until executed." Kirk Henckels, an executive vice president of Stribling, said he was under the impression that e-mails are "what we used to do over the phone," and that property cannot truly change ownership until a paper document is signed by both parties. Mr. Henckels said the thinking was, "I can call this off unless I've received it back," alluding to a signed contract.

Richard Steinberg, a broker with Warburg Realty, said he had always treated e-mails seriously. He said he had used e-mail as leverage to extract important information in negotiations, with the knowledge that the e-mailed information might be binding.

For instance, if the broker for the seller of a co-op wrote in an e-mail that an apartment measured 2,000 square feet, and then an architect determined it to have just 1,500 feet, Mr. Steinberg said he would call the seller out on it.

"They always respond much more liberally in e-mail than they do in writing," he said. "And guess what? I print it out."

Naldi v. Grunberg involves a dispute over a pair of adjacent brick apartment buildings in Midtown Manhattan, at Nos. 15 and 19 West 55th Street, owned by Michael Grunberg, a major landlord.

In 2007 an Italian developer, Robert Naldi, sought to build a hotel on the property, according to Kevin Nash, his lawyer. In an e-mail, Mr. Naldi offered $50 million for the two nine-story buildings, which have stores on their ground floors and apartments above.

A contract went out for $50 million, and Mr. Naldi, assuming that he was the buyer, began researching how much structural work the 1920s buildings required, Mr. Nash said.

Then, soon afterward, Mr. Naldi learned unexpectedly that Mr. Grunberg had sold the buildings to another hotel developer, Ark Investment Partners, for $52 million, which prompted the suit for breach of contract.

What happened might seem typical in real estate — a seller wants to make the most money he can on a sale, after all — but Mr. Naldi's lawyers dusted off an old e-mail, sent on Feb. 12, 2007, by Mark Spinelli, a broker with Massey Knakal Realty Services.

In it Mr. Spinelli granted Mr. Naldi a right of first refusal, according to a copy of the e-mail published in court documents, meaning that he should have had at least a chance to counter Ark's offer. Mr. Grunberg sought to dismiss the suit, but a lower chamber of the Supreme Court blocked him from doing so, while concluding that e-mail is a legitimate form for deals to take.

Mr. Grunberg then took his case to the higher appellate court, where he had better luck. In the October 2010 ruling, the justices said that the suit should be dismissed because there was no real evidence that the two sides had agreed on a deal. Because Mr. Naldi never acknowledged the e-mail from Mr. Spinelli with one of his own — in essence, because he never pressed "reply" — he could not claim that the right of first refusal had ever been extended to him, the court said.

But like the lower court, the justices affirmed that e-mails are binding in real estate negotiations, which is perhaps the most important implication for buyers and sellers.

The Naldi case is continuing. On Feb. 14, Mr. Nash filed papers in the Court of Appeals. He said Mr. Naldi was still seeking damages, "in an amount to be determined." Mr. Grunberg did not return calls for comment, nor did Andrew N. Krinsky, his lawyer.