

CONTRACT FORMATION UNDER NEW YORK LAW: BY CHOICE OR THROUGH INADVERTENCE

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CONTENTS

INTRODUCTION	855
I. GENERAL CONTRACT PRINCIPLES.....	856
II. REQUIREMENTS TO ESTABLISH A CONTRACT.....	856
A. <i>Statute of Frauds</i>	856
B. <i>Emails and Electronic Signatures</i>	858
C. <i>Contractual Requirements and Preliminary Agreements</i>	860
III. RECENT DEVELOPMENTS IN NEW YORK CASE LAW	861
A. <i>Contracts Found to Have Been Formed by Email and Other Exchanges</i>	862
B. <i>Contracts Not Found to Have Been Formed by Email and Other Exchanges</i>	864
C. <i>Recent Case Law on Enforceability of Preliminary Agreements</i>	865
CONCLUSION.....	867

INTRODUCTION

Under New York law, many contracts must be in writing and signed in order for obligations to become legally binding. Written communications during the course of contract negotiations are routine, and oftentimes parties do not attach legal significance to such communications. With the proliferation of electronic means of communication, contract negotiations increasingly occur through less-formal channels of communication, such as email and text message. As a result, what one party might consider an informal exchange could nonetheless satisfy the legal requirements of a binding contract. Indeed, a recent decision from the Appellate Division, First Department, held that an agreement reached through informal communications, including emails, could establish an enforceable contract, even where certain terms

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remained to be negotiated.¹

This Article will provide an overview of the developing New York case law regarding the creation of binding obligations through various forms of communication during the course of contract negotiations. This Article will also provide guidance on how parties can seek to avoid unwittingly binding themselves during the course of contract negotiations.

I. GENERAL CONTRACT PRINCIPLES

In order to ensure a meeting of the minds as to the parties' respective obligations, it is certainly preferable to have a contract that is reduced to a signed writing. However, a contract need not always be in writing to be enforceable in New York. A contract is binding if there is an offer, acceptance, consideration, mutual assent, an intent to be bound, and both sides agree on all the essential terms.² While a fully executed document is the most concrete way to prove the existence of a contract and its terms, parties can enter into a binding contract without memorializing their agreement in the form of a signed, written document.³ When New York courts are asked to enforce a disputed contract, they may consider a variety of evidence in ascertaining whether the parties intended to be bound. For example, where the surrounding facts and circumstances indicate that an agreement has been reached between the parties, a court may determine that the contract at issue was implied, even in the absence of a writing.⁴

II. REQUIREMENTS TO ESTABLISH A CONTRACT

A. Statute of Frauds

New York law requires some agreements to be in writing in order for legal rights or obligations to be conferred. The Statute of Frauds, codified in General Obligations Law section 5-701 through section 5-

1. Kolchins v. Evolution Markets, Inc., 128 A.D.3d 47, 49-50, 8 N.Y.S.3d 1, 3 (1st Dep't 2015).

2. Kowalchuk v. Stroup, 61 A.D.3d 118, 121, 873 N.Y.S.2d 43, 46 (1st Dep't 2009).

3. See Bear Stearns Inv. Prods., Inc. v. Hitachi Auto. Prods. (USA), Inc., 401 B.R. 598, 617 (S.D.N.Y. 2009).

4. See, e.g., Yankee Lake Pres. Ass'n v. Stein, 68 A.D.3d 1603, 1604, 893 N.Y.S.2d 300, 302 (3d Dep't 2009) ("Where . . . there is no written contract between the parties, 'a contract may be implied in fact where inferences may be drawn from the facts and circumstances of the case and the intention of the parties as indicated by their conduct.'" (quoting *In re Boice*, 226 A.D.2d 908, 910, 640 N.Y.S.2d 681, 682 (3d Dep't 1996))).

2016] **Contract Formation Under New York Law** 857

705,⁵ requires a signed writing for certain types of agreements, including: (1) contracts that by their terms are “not to be performed within one year from the making thereof”;⁶ (2) the conveyance of real property;⁷ (3) contracts for the payment of finder’s fees;⁸ and (4) modifications to written agreements which state that they cannot be changed orally.⁹ Courts in New York have consistently held that “[t]o satisfy the statute of frauds, a writing *must* identify the parties, describe the subject matter, state all the essential terms of an agreement, and be signed by the party to be charged.”¹⁰

A plaintiff whose cause of action is barred by the Statute of Frauds may not be without redress. Courts in New York have recognized some other legal theories of recovery in these circumstances.¹¹

5. Article 2 of the New York Uniform Commercial Code also contains a Statute of Frauds provision. N.Y. U.C.C. §§ 1-207, 2-201 (McKinney 2012 & Supp. 2016). The writing requirement of Uniform Commercial Code section 1-207(a) applies to sales of personal property in excess of \$5000, including sales of intellectual property and copyrights. N.Y. U.C.C. § 1-207(a) (McKinney Supp. 2016). The Official Comment to section 1-207 “indicates that § [1-207] applies to the sale of ‘general intangibles’ as defined in § 9-106.” *Grappo v. Alitalia Linee Aeree Italiane, S.p.A.*, 56 F.3d 427, 431 (2d Cir. 1995). This writing requirement applies to “miscellaneous types of contractual rights and other personal property which are used or may become customarily used as commercial security,” including “goodwill, literary rights[,] rights to performance . . . copyrights, trademarks[,] and patents . . .” N.Y. U.C.C. § 9-106 cmt. (Consol., Lexis through 2016 ch. 1-12). *See also Grappo*, 56 F.3d at 431; *Mellencamp v. Riva Music Ltd.*, 698 F. Supp. 1154, 1163 (S.D.N.Y. 1988) (oral agreement to transfer to John Cougar Mellencamp the copyrights for his compositions barred by N.Y. U.C.C. section 1-207(a)).

6. N.Y. GEN. OBLIG. LAW § 5-701(a)(1) (McKinney 2012).

7. N.Y. GEN. OBLIG. LAW § 5-703(1) (McKinney 2012).

8. N.Y. GEN. OBLIG. LAW § 5-701(a)(10) (McKinney 2012).

9. N.Y. GEN. OBLIG. LAW § 15-301 (McKinney 2010).

10. *Urgo v. Patel*, 297 A.D.2d 376, 377, 746 N.Y.S.2d 733, 735 (2d Dep’t 2002) (citing 160 Chambers St. Realty Corp. v. Register of N.Y., 226 A.D.2d 606, 606, 641 N.Y.S.2d 351, 352 (2d Dep’t 1996)) (emphasis added).

11. For example, some courts have permitted recovery on quasi-contractual theories (*i.e.*, for quantum meruit and/or unjust enrichment), so long as there is evidence of some writing, albeit incomplete. *See, e.g.*, *Morris Cohon & Co. v. Russell*, 23 N.Y.2d 569, 574-75, 245 N.E.2d 712, 715, 297 N.Y.S.2d 947, 952 (1969) (enforcing a compensation agreement despite the fact that the writing did not specify the rate of compensation; the Court of Appeals concluded that, read as a whole, the language of the agreement supported a claim for quantum meruit where the writing described “the parties to the contract, the subject matter of the contract and establishe[d] that plaintiff in fact performed” under the contract). Moreover, part-performance can defeat the Statute of Frauds, but only as applied to oral contracts for the sale of real property. *See Messner Vetere Berger McNamee, Schmetterer Euro RSCG Inc. v. Aegis Grp. PLC*, 93 N.Y.2d 229, 235, 711 N.E.2d 953, 956, 689 N.Y.S.2d 674, 677 (1999) (noting that “it would be a fraud to allow one party to a real estate transaction to escape performance after permitting the other party to perform in reliance on the agreement”). Additionally, an estoppel claim can sometimes be used to end run the Statute of Frauds. In order to successfully plead a promissory estoppel claim in New York, a party must demonstrate: “(1) a clear and unambiguous promise; (2) a reasonable and foreseeable reliance by the party to whom the

B. Emails and Electronic Signatures

It is generally accepted that an email or electronic signature can satisfy the writing and subscription requirements of the Statute of Frauds.¹² The Federal E-Sign Act (15 U.S.C. § 7001), enacted in 2000, and New York's Electronic Signatures and Records Act (ESRA), which went into effect in 1999, both define an electronic signature as "an electronic sound, symbol, or process, attached to or logically associated with [a contract or other electronic record] and executed or adopted by a person with the intent to sign the record."¹³ ESRA was updated in 2002 to make New York state law consistent with the federal E-Sign law. The revised act provides that electronic signatures will "have the same force and effect" as handwritten signatures.¹⁴

Consistent with ESRA, New York courts have held that electronic signatures are valid to signify assent to contractual obligations. For example, in *Forcelli v. Gelco Corp.*, the Second Department held that an email message where the sending party "purposefully" typed her name in the text of the email—as opposed to concluding an email with an automatically generated signature—constituted a binding settlement agreement under CPLR 2104.¹⁵ In that case, the parties agreed to settle a personal injury suit orally, and one party later confirmed the oral settlement agreement via email.¹⁶ The defendants argued that the email did not constitute a binding written settlement agreement under CPLR 2104, but the trial court granted the plaintiff's motion to enforce the settlement agreement.¹⁷

On appeal, the Second Department held that the email confirmation satisfied the statutory requirement for accepting a settlement offer in

promise is made; and (3) an injury sustained by the party asserting the estoppel as a result of his reliance." *Holmes v. Lorch*, 329 F. Supp. 2d 516, 527 (S.D.N.Y. 2004) (quoting *Reprosystem, v. SCM Corp.*, 727 F.2d 257, 264 (2d Cir. 1984)). New York courts have strictly limited the use of promissory estoppel to overcome the Statute of Frauds to those rare cases when the circumstances render the denial of recovery "unconscionable." *Merex A.G. v. Fairchild Weston Sys.*, 29 F.3d 821, 826 (2d Cir. 1994).

12. *See, e.g., Naldi v. Grunberg*, 80 A.D.3d 1, 6–13, 908 N.Y.S.2d 639, 642–47 (1st Dep't 2010).

13. 15 U.S.C. § 7006(5) (2012); N.Y. STATE TECH. LAW § 302(3) (McKinney Supp. 2016).

14. N.Y. STATE TECH. LAW § 305(3) (McKinney Supp. 2016).

15. 109 A.D.3d 244, 251, 972 N.Y.S.2d 570, 575–76 (2d Dep't 2013). CPLR 2104 provides that "[a]n 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. . . ." N.Y. C.P.L.R. 2104 (McKinney 2012).

16. *Forcelli*, 109 A.D.3d at 246, 972 N.Y.S.2d at 572.

17. *Id.* at 247, 972 N.Y.S.2d at 573.

2016] **Contract Formation Under New York Law** 859

writing and enforced the settlement against the defendants.¹⁸ The court gave significant weight to the fact that the confirmation email was signed “Thanks Brenda Greene.”¹⁹ The court found the fact that the author “purposefully added her name” to the email to be indicative of an intent to be bound, such that the email message could be deemed a “subscribed” writing under CPLR 2104.²⁰

Similarly, in *Stevens v. Publicis, S.A.*, the First Department found that the plaintiff’s employment agreement had been modified by an email exchange.²¹ There, the plaintiff—who was removed from his position as an executive with the company—exchanged a series of emails with a high-level executive wherein the executive suggested that the demoted employee could remain with the company if he met certain business development duties and cultivated certain, current client relationships.²² The executive memorialized in an email his understanding of the terms of the plaintiff’s new role within the organization.²³ The plaintiff responded via email, accepting the executive’s “proposal with total enthusiasm and excitement . . .”²⁴ Throughout the exchange, the typed name of the sender was included at the bottom of each email.²⁵ The plaintiff brought a breach of contract suit after the company did not retain nor offer him the role discussed in the emails.²⁶ In determining whether the parties had in fact agreed to modify the terms of the employment agreement, the First Department looked at the email exchange and concluded that it satisfied the “signed writings” requirement under the Statute of Frauds, because each email contained the typed name of the sender at the foot of the message.²⁷ The court concluded that this demonstrated an “unqualified acceptance” of the modified employment contract.²⁸

18. *Id.* at 249, 972 N.Y.S.2d at 574.

19. *Id.* at 251, 972 N.Y.S.2d at 575.

20. *Id.* at 251, 972 N.Y.S.2d at 575–76.

21. 50 A.D.3d 253, 255, 854 N.Y.S.2d 690, 692 (1st Dep’t 2008).

22. *Id.* at 254–55, 854 N.Y.S.2d at 691–92.

23. *Id.*

24. *Id.* at 255, 854 N.Y.S.2d at 692.

25. *Id.*

26. *Stevens*, 50 A.D.3d at 256, 854 N.Y.S.2d at 692.

27. *Id.* at 255–56, 854 N.Y.S.2d at 692.

28. *Id.* at 255, 854 N.Y.S.2d at 692.

C. Contractual Requirements and Preliminary Agreements

The requirement that a contract be in writing, including any amendments or modifications, can also be created by the parties through contractual language. For example, in *Moulton Paving, L.L.C. v. Town of Poughkeepsie*, the Second Department held that, where the parties to an agreement explicitly agreed that it would not be binding upon them both unless it had been reduced to writing and signed by both parties, the absence of a signed agreement required the plaintiff's breach of contract claim to be dismissed.²⁹

Nevertheless, parties engaged in contract negotiations in New York should take care not to inadvertently create binding contracts by way of preliminary agreements. Memorializing terms that have been agreed to during negotiations, but prior to finalization of the entire contract, can unwittingly lead to enforceable, contractual obligations. Three cases from the U.S. District Court for the Southern District of New York in the late 1980s and early 1990s, each enforcing a preliminary agreement, remain instructive on this point today.³⁰ In all three cases, the court found the various defendant-borrowers had made commitments to negotiate in good faith with Teachers Insurance, and accordingly breached that duty by seeking to relieve themselves of their duties under the various agreements.

Judge Pierre Leval—while sitting in the Southern District of New York prior to his elevation to the U.S. Court of Appeals for the Second Circuit—identified a framework for the enforceability of two types of preliminary agreements: Type I and Type II. Judge Leval classified a Type I preliminary agreement as a fully “binding preliminary commitment” where parties come to a “complete agreement,” but need only to commit that agreement to writing.³¹ The later commitment to writing is suggested to be a formality, as it is completed when “the parties desire a more elaborate formalization of the agreement.”³² Type II

29. 98 A.D.3d 1009, 1011–12, 950 N.Y.S.2d 762, 765–66 (2d Dep't 2012). *See also* Frutico, S.A. v. Bankers Tr. Co., 833 F. Supp. 288, 294 (S.D.N.Y. 1993) (court finding that, where each subsequent draft agreement “stated that it was a condition precedent to the consummation of the transaction contemplated by the proposed agreement set forth in the draft that the parties execute and deliver the agreement prior to its becoming effective,” the contract was unenforceable because the parties did not execute and deliver the agreement, regardless of other writings exchanged between them).

30. *Teachers Ins. & Annuity Ass'n of Am. v. Butler*, 626 F. Supp. 1229 (S.D.N.Y. 1986); *Teachers Ins. & Annuity Ass'n of Am. v. Tribune Co.*, 670 F. Supp. 491 (S.D.N.Y. 1987); *Teachers Ins. & Annuity Ass'n of Am. v. Ormesa Geothermal*, 791 F. Supp. 401 (S.D.N.Y. 1991).

31. *Tribune*, 670 F. Supp. at 498.

32. *Id.*; *see* *Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc.*, 145 F.3d 543, 548 (2d Cir.

preliminary agreements were defined as those “binding preliminary commitment[s]” wherein the parties commit to agree on “major terms, while recognizing the existence of open terms that remain to be negotiated.”³³ Unlike Type I, the agreement here “does not commit the parties to their ultimate contractual objective[,] but rather to the obligation to negotiate the open issues in good faith in an attempt to reach the alternate objective within the agreed framework.”³⁴

In the last few years, the New York Court of Appeals has cast doubt on the utility of characterizing preliminary agreements into the two categories identified by Judge Leval.³⁵ Rather than adopt a “new category” from the appellate division, the Court of Appeals held that the relevant inquiry in this context is “whether the agreement contemplated the negotiation of later agreements and if the consummation of those agreements was a precondition to a party’s performance.”³⁶ A subsequent First Department case, *Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, noted that the *IDT* Court “rejected the Federal Type I/Type II classifications as too rigid” and subsequently applied the new *IDT* test to find the agreement had “made a number of references to future definitive documentation” and was unenforceable with no attached good-faith duty.³⁷

III. RECENT DEVELOPMENTS IN NEW YORK CASE LAW

There have been recent case law developments in the area of contracts created by email communications. Indeed, New York courts have increasingly been asked to interpret emails and determine whether they indicate a current intent to be bound, which can result in a legally binding contract being inadvertently created by what one of the corresponding parties considered to be an informal exchange. There also have been recent case law developments regarding preliminary agreements.

1998).

33. *Tribune*, 670 F. Supp. at 498.

34. *Id.*

35. See *IDT Corp. v. Tyco Grp., S.A.R.L. (IDT)*, 13 N.Y.3d 209, 918 N.E.2d 913, 890 N.Y.S.2d 401 (2009). The Court noted that while it “do[es] not disagree with the reasoning” adopting the two-type categorization from Judge Leval in *Tribune*, it “do[es] not find the rigid classifications into ‘Types’ useful.” *Id.* at 213 n.2, 918 N.E.2d at 915 n.2, 890 N.Y.S.2d at 403 n.2.

36. *Id.*

37. *Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 427, 894 N.Y.S.2d 47, 50 (1st Dep’t 2010).

A. Contracts Found to Have Been Formed by Email and Other Exchanges

New York courts are increasingly holding that emails can create binding contracts, even in situations where one party alleges no agreement was reached. In *Eastern European Trading, Corp. v. Knaust*, the First Department considered a breach of contract claim where the plaintiff sought to recover money under an agreement “for consulting services and commissions,” even though no written agreement was ever memorialized.³⁸ The court denied the defendant’s affirmative defenses, acknowledging that while “there is no written agreement between the parties, the email communications in which defendant acknowledged owing money” for services to the defendant “supports a claim alleging the existence of a binding agreement between the parties.”³⁹ In confirming the existence of a binding contract between the parties, the court also gave weight to the fact that the defendant made a partial payment to the plaintiff of \$10,000 of a \$50,000 invoice for specified services.⁴⁰

In another recent case, numerous writings were pieced together to find an enforceable contract. In *Agosta v. Fast Systems Corp.*, the Suffolk County Commercial Division found sufficient evidence of a legally binding agreement where the parties did not execute a formal contract, but continued to communicate via email regarding the contract’s terms.⁴¹ The plaintiffs moved for partial summary judgment, arguing that, because the parties had not executed a fully integrated contract, the Statute of Frauds therefore barred the purported agreement.⁴² The court disagreed, finding that, while there was no integrated, written agreement between the parties, the parties’ course of conduct, including the email exchanges, inferred an intent to enter into a contract.⁴³ Additionally, the court held that the parties’ signed and unsigned writings, when read together, were sufficient to establish the parties’ agreement.⁴⁴

In *Kolchins v. Evolution Markets*, the First Department addressed the issue of “whether the parties’ emails and other correspondence can be viewed as constituting a binding offer and acceptance of an extension of

38. 128 A.D.3d 589, 589, 11 N.Y.S.3d 112, 112–13 (1st Dep’t 2015).

39. *Id.* at 589, 11 N.Y.S.3d at 113.

40. *Id.*

41. No. 19067-13, 2015 N.Y. Slip Op. 50107(U), at 9, 14 (Sup. Ct. Suffolk Cty. 2015).

42. *Id.* at 13–14.

43. *Id.* at 8.

44. *Id.* at 6 (noting that “it is well established that the statutorily required writing need not be contained in a single document, but may be furnished by piecing together other, related writings”).

2016] **Contract Formation Under New York Law** 863

the [plaintiff's] 2009 Employment Agreement, such that in the absence of a formal contract they created a legally enforceable contract."⁴⁵ There, an energy-markets trader sued his former employer for breach of his employment agreement.⁴⁶ The employer moved to dismiss, arguing, among other things, that the employment agreement had expired and had never been renewed.⁴⁷ The trial court denied the employer's motion.⁴⁸ On appeal, the First Department considered whether the parties' emails and other correspondence sufficiently constituted a binding offer and acceptance of an extension of the plaintiff's employment contract, "such that in the absence of a formal contract they [nonetheless] created a legally enforceable contract."⁴⁹ The court explained that "[a]s a general rule, in order for an acceptance to be effective, it must comply with the terms of the offer and be clear, unambiguous and unequivocal."⁵⁰

In *Kolchins*, the relevant language featured an email from plaintiff stating, "I accept [please] send [the] contract[.]" followed by defendant's email a month later, stating "Mazel, looking forward to another great run."⁵¹ Based on this exchange, the court held that "there was nothing unclear, ambiguous or equivocal about plaintiff's . . . email" and that "it appears to constitute an effective acceptance."⁵²

The First Department rejected the employer's argument that the parties' "long train of correspondence"—which never formalized the employment contract renewal—precluded enforcement of the terms of the renewed agreement.⁵³ While the employer showed that the parties failed to reach agreement on certain additional contract terms, the court nonetheless noted that "all the terms contemplated by the agreement need not be fixed with complete and perfect certainty for a contract to have legal efficacy."⁵⁴

Notably, Justice David Friedman dissented, arguing that an examination of the totality of the parties' conduct and communication showed that the parties clearly broke off their negotiations and were

45. 128 A.D.3d 47, 49–50, 8 N.Y.S.3d 1, 3 (1st Dep't 2015).

46. *Id.* at 49, 8 N.Y.S.3d at 3.

47. *Id.* at 57, 8 N.Y.S.3d at 7.

48. *Id.* at 50, 8 N.Y.S.3d at 3.

49. *Id.* at 50, 8 N.Y.S.3d at 3.

50. *Kolchins*, 128 A.D.3d at 59–60, 8 N.Y.S.3d at 9 (quoting *King v. King*, 208 A.D.2d 1143, 1143–44, 617 N.Y.S.2d 593, 593 (3d Dep't 1994)).

51. *Id.* at 59, 8 N.Y.S.3d at 9.

52. *Id.* at 60, 8 N.Y.S.3d at 9.

53. *Id.* at 60, 8 N.Y.S.3d at 10.

54. *Id.* at 61, 8 N.Y.S.3d at 10 (citing *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 74 N.Y.2d 475, 483, 548 N.E.2d 203, 206, 548 N.Y.S.2d 920, 923 (1989)).

unable to agree on all material terms.⁵⁵ Justice Friedman stated that “the majority recites many well-established propositions of the law of contracts with which I fully agree.”⁵⁶ However, he went on to explain why he did not believe, based on the evidence submitted to the court, that the parties ever agreed on the essential terms of a contract renewal.⁵⁷ Accordingly, even though *Kolchins* may support future findings of legally binding contracts via email negotiations, Justice Friedman’s thorough discussion of the factual issues at hand in *Kolchins* could provide future litigants in New York with potential arguments against the formation of a disputed contract.

B. Contracts Not Found to Have Been Formed by Email and Other Exchanges

When New York courts are asked to enforce a disputed contract they may consider a variety of evidence in ascertaining the parties’ intent to be bound. Recent decisions in New York demonstrate that emails alone simply cannot, under certain circumstances, constitute a contract.

In *Dahan v. Weiss*, the Second Department held that the Statute of Frauds barred recovery for breach of contract on the theory that the grantee of real property agreed to assume plaintiff’s existing mortgages on the properties, where the writings at issue were insufficient to demonstrate that the grantee agreed to assume a mortgage at the time the deed was transferred.⁵⁸ There, the plaintiff unsuccessfully argued that handwritten statements from the closing, and certain email messages—which were attached to the complaint as exhibits—constituted sufficient evidence of a binding agreement under the Statute of Frauds.⁵⁹

The court disagreed, noting that New York General Obligations Law section 5-705 provides in relevant part that “[n]o grantee of real property shall be liable upon any indebtedness secured by a mortgage” unless, “simultaneously with the conveyance, the grantee executes a writing before a notary agreeing to assume and pay the mortgage debt.”⁶⁰ The *Dahan* court reasoned that it was clear from the allegations in the complaint and attached exhibits that the defendants did not execute a notarized written agreement to assume the mortgage allegedly held by the

55. *Kolchins*, 128 A.D.3d at 65–66, 8 N.Y.S.3d at 15–16 (Friedman, J., dissenting).

56. *Id.* at 65, 8 N.Y.S.3d at 13.

57. *Id.* at 68, 8 N.Y.S.3d at 15–16.

58. 120 A.D.3d 540, 542, 991 N.Y.S.2d 119, 120 (2d Dep’t 2014).

59. *Id.* at 541, 991 N.Y.S.2d at 120.

60. *Id.* at 542, 991 N.Y.S.2d at 120.

2016] **Contract Formation Under New York Law** 865

plaintiff at the time the properties were conveyed.⁶¹ Thus, the court determined, section 5-705 barred the plaintiff from recovering on the theory that the defendants agreed to assume their existing mortgage on the properties as alleged in the complaint.⁶² Contrary to the plaintiff's contention, the court concluded that the various writings attached to the complaint, taken together, were insufficient to memorialize the existence of an agreement.⁶³

Additionally, in *Chapman, Spira & Carson, L.L.C. v. Helix BioPharma Corp.*, the First Department found that an alleged contract failed to satisfy the Statute of Frauds provision for contracts to pay compensation for services rendered during certain negotiations, so as to permit a breach of contract claim.⁶⁴ There, in the absence of a signed writing, the court considered emails in which the defendant agreed to pay the plaintiff according to industry standards for its services.⁶⁵ The court found that, while the emails "evidenced the fact of plaintiff's employment [by defendant]," because the emails lacked any reference to the agreed-on compensation, they were insufficient to establish evidence of a binding contract.⁶⁶ While the court concluded that the breach of contract claim should have been dismissed on Statute of Frauds grounds, the related quantum meruit claim survived.⁶⁷

C. Recent Case Law on Enforceability of Preliminary Agreements

There also have been recent cases addressing the issue of the enforceability of preliminary agreements. The First Department recently held that, even where parties acknowledge that they intend to finalize the details of an agreement at a later date, a preliminary agreement nonetheless might be binding.⁶⁸ In *Art and Fashion Group*, the plaintiffs alleged that they entered into an oral joint venture agreement with the defendants.⁶⁹ The plaintiffs further alleged that despite receiving certain benefits under the agreement, the defendants failed to remit the plaintiffs' share of revenue from the campaigns created by the joint venture and asserted causes of action for breach of the agreement, unjust enrichment,

61. *Id.*

62. *Id.* at 542, 991 N.Y.S.2d at 120–21.

63. *Dahan*, 120 A.D.3d at 542, 991 N.Y.S.2d at 120.

64. 115 A.D.3d 526, 528, 982 N.Y.S.2d 93, 95 (1st Dep't 2014).

65. *Id.* at 527, 982 N.Y.S.2d at 94.

66. *Id.* at 528, 982 N.Y.S.2d at 95.

67. *Id.*

68. *Art & Fashion Grp. Corp. v. Cyclops Prod., Inc.*, 120 A.D.3d 436, 438, 992 N.Y.S.2d 7, 10 (1st Dep't 2014).

69. *Id.* at 437, 992 N.Y.S.2d at 9.

fraud, and conversion/property damage.⁷⁰

The court disagreed with the defendants' assertion that an exchange of emails between the parties showed, as a matter of law, that no joint venture agreement was reached and that the parties were merely engaging in preliminary negotiations.⁷¹ The court recognized that, while "parts of the emails suggest that all of the details of the joint venture were not fully agreed upon, the emails, when read in their entirety, [did] not conclusively refute plaintiffs' allegations that an oral joint venture agreement had in fact been reached."⁷² As an example, the court looked to an email that stated that the production company created by the parties via the joint venture agreement was "*already operating* in AFG's [office] space" and was expected to be "cashflow positive by the end of [the year]."⁷³

The court noted that this same email referenced "formalizing the establishment" of the production company, which the court found suggested that the company "was already in existence."⁷⁴ The court also looked at an email in which the plaintiffs' representative addressed one of the defendants as "[p]artner," [made] reference to "stabiliz[ing] the [c]ompany," and "expressed concern about two managerial changes within the past year."⁷⁵ The court concluded that these emails were "consistent with plaintiffs' claim that a joint venture had been formed."⁷⁶

There also have been recent decisions rejecting breach of contract claims arising under preliminary agreements. In *Northern Stamping, Inc. v. Monomoy Capital Partners, L.P.*, the First Department found no actionable preliminary agreement existed in circumstances where the operative letter agreements provided: "[a]ll other terms of this Letter constitute statements of present intention adopted to facilitate the negotiation of definitive agreements, do not constitute a contract or agreement and are not to be enforceable against Monomoy."⁷⁷

Similarly, the Third Department recently held in *Estate of Wyman*, that an agreement to agree, where material terms are left to future

70. *Id.*

71. *Id.* at 438, 992 N.Y.S.2d at 10 ("Even where the parties acknowledge that they intend to hammer out details of an agreement subsequently, a preliminary agreement may be binding." (quoting *Richbell Info. Servs. v. Jupiter Partners, L.P.*, 309 A.D.2d 288, 298, 765 N.Y.S.2d 575, 584 (1st Dep't 2003))).

72. *Id.*

73. *Art & Fashion Grp.*, 120 A.D.3d at 438, 992 N.Y.S.2d at 10 (emphasis added).

74. *Id.* at 438–39, 992 N.Y.S.2d at 10.

75. *Id.* at 439, 992 N.Y.S.2d at 10.

76. *Id.* at 439, 992 N.Y.S.2d at 11.

77. 129 A.D.3d 448, 449, 11 N.Y.S.3d 29, 31 (1st Dep't 2015).

2016] **Contract Formation Under New York Law** 867

negotiations, is unenforceable.⁷⁸ In *Wyman*, the petitioner argued that the Surrogate’s Court erred in granting summary judgment to the respondent because a series of emails between the decedent and the respondent amounted to an enforceable contract that, pursuant to New York Real Property Law section 240-c(3)(a), severed the joint tenancy on a piece of property owned by both parties.⁷⁹ The Third Department disagreed, finding that, “[e]ven assuming that the correspondence . . . evinces decedent and respondent’s agreement to transfer the property to decedent’s sole ownership, the material term of the consideration in exchange for such a transfer was left for future negotiation.”⁸⁰ Specifically, because the correspondence did not “contain any agreement as to price—or any agreement as to how to determine same—it failed to set forth ‘any objective method for supplying th[at] missing term’”⁸¹

CONCLUSION

As technology continues to advance and other forms of communication proliferate, parties should be ever mindful of the words they use in contract negotiations lest they inadvertently create binding contractual obligations. Recent decisions by New York courts support the notion that the exchange of electronic correspondence can form the basis for a binding contract, even where negotiations continue after the exchange. In light of the developing case law in this area, parties negotiating contracts in New York should be aware that any correspondence—however informal—discussing a contract’s terms may be interpreted as a “meeting of the minds” sufficient to bind the parties to the terms of the agreement. Accordingly, negotiating parties should use caution with statements that could be taken out of context, and should endeavor to use contract terms—i.e., “offer,” “agree,” and “accept”—carefully. Negotiating parties also should make clear whether proposed terms remain subject to contingencies, and state unequivocally whether they wish for a final agreement to be memorialized in a formal writing prior to the contract taking effect. Moreover, parties should consider including a contract provision stating that emails cannot amend or waive any contractual provisions.

In the context of preliminary agreements, where material terms have been negotiated, parties should be mindful of Judge Leval’s guidance in

78. 128 A.D.3d 1157, 1158, 8 N.Y.S.3d 493, 494 (3d Dep’t 2015).

79. *Id.*

80. *Id.* at 1159, 8 N.Y.S.3d at 495.

81. *Id.* (quoting *Wilson v. Ledger*, 97 A.D.3d 1028, 1029, 949 N.Y.S.2d 515, 517 (3d Dep’t 2012)).

Tribune, that a “party that does not wish to be bound at the time of the preliminary exchange of letters can very easily protect itself by not accepting language that indicates a ‘firm commitment’ or ‘binding agreement.’”⁸²

82. *Teachers Ins. & Annuity Ass’n of Am. v. Tribune Co.*, 670 F. Supp. 491, 499 (S.D.N.Y. 1987).