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Civil Litigation: When is a deal a deal?

By THOMAS KNAB

A construction company submitted a bid to serve as the general contractor for a public/private historic redevelopment project. After being told by the developer that it was the successful bidder, over the next several months the construction company participated in numerous meetings, and exchanged emails, about the project with the developer; prepared necessary project documents; and hired subcontractors. During that same time period, the parties were working to finalize their contract, until a representative of the developer verbally advised the construction company that the contract had been approved and would be signed by the developer. However, the developer never signed the contract and hired a different general contractor for the project.

The construction company said: "We had a deal!" and demanded that the developer pay the money damages recoverable under the unsigned contract upon the developer's "termination for convenience." The developer characterized the ongoing communications as nothing more than negotiations, and refused the construction company's demand on the ground that there was no enforceable agreement because it did not sign the contract. The construction company sued to recover its damages.

The First Department's Dec. 3, 2019 decision in Lerner v. Newmark & Co. Real Estate, Inc. provides guidance for the parties on both sides of this dispute. In Lerner, plaintiff real estate broker alleged that he had entered into a two-year Employment Agreement with defendant real estate company that provided for the payment of certain commissions. The Employment Agreement also provided that most of its terms would survive its termination or expiration.

Plaintiff sued when, following his departure from the company, defendant refused to pay him his share of commissions on transactions he had handled. Plaintiff alleged claims under the Employment Agreement and under a Termination Agreement, which the Court described as a document that did a little more than confirm the Employment Agreement's post-termination provisions. Defendant moved to dismiss the causes of action for breach of contract, unjust enrichment and fraud. Supreme Court granted that motion and denied plaintiff's cross-motion for leave to serve an amended complaint with revised breach of contract and unjust enrichment claims.

On appeal, the First Department reversed Supreme Court to the extent that it denied the motion to dismiss as to the breach of contract and unjust enrichment claims, and granted plaintiff's motion for leave to serve an amended complaint asserting revised versions of those causes of action.

In relevant part, defendant had argued that the Termination Agreement was unenforceable because the parties had not signed it. The Court rejected defendant's argument that the unsigned Termination Agreement could not be enforced, stating that where the evidence supports a finding of an intent to be bound, a contract will be unenforceable for lack of signature only if the parties positively agreed that it should not be binding until reduced to a signed document. The Court compared the Employment Agreement, drafted by defendant, to the Termination Agreement, also drafted by defendant, and noted that while the Employment Agreement contained a provision that made it clear that the agreement would not be enforceable absent the parties' signatures, the Termination Agreement "did not positively state that the parties could assent only by signing." The Court referenced the parties' months-long email exchanges, "during which plaintiff submitted his list of pending transactions, defendant drafted the Termination Agreement and forwarded it to plaintiff, and the parties disagreed about the extent to which transactions listed by plaintiff were covered," as evidence sufficient to support a finding that the parties intended to be bound by the Termination Agreement notwithstanding their failure to sign it.

The Lerner Court cited the Court of Appeals' March 29, 2018 decision in Kolchins v. Evolution Markets, Inc. in support of its holding that despite the fact that the Termination Agreement was unsigned, there was sufficient evidence of the parties' intent to be bound to defeat defendant's motion to dismiss. Like Lerner, Kolchins dealt with a motion to dismiss breach of contract claims where there was no signed agreement. In that case, plaintiff relied upon a series of emails to support his argument that the parties had reached an agreement, and defendant based its motion to dismiss on the same emails, arguing that they constituted documentary evidence that no agreement had been made.

In affirming the denial of defendant's motion to dismiss, the Court of Appeals made clear that the lack of a signed writing did not preclude a finding that an enforceable contract had been made. The Court stated that where parties disagreed on whether a contract was formed, the issue was whether the course of conduct and communications between the parties had created a legally enforceable agreement. The Court held that under such circumstances, it was necessary to look to the "objective manifestations of the intent of the parties as gathered by their expressed words and deeds." The Kolchins Court also stated that while the interpretation of a written instrument is a question of law for the court, when a finding of whether an intent to contract is dependent on other evidence from which differing inferences may be drawn, a

question of fact arises.

The construction company clearly took a risk when it began to work on the project before it had a signed contract in reliance on the developer's "words and deeds," but that is often how things go in the real world. Based on Lerner, Kolchins and similar precedent, the construction company's complaint would likely survive any motion to dismiss the developer might file. But if it wants to recover damages under the "termination for convenience" clause of the unsigned contract, the construction company will ultimately have to prove that the developer intended to be bound even though it never signed that contract.

Thomas F. Knab is a partner of Underberg & Kessler and chair of the firm's Litigation Practice Group. He focuses his practice in the areas of commercial law and litigation, and labor and employment litigation.