

Hitting "Send" Can Bind You Don't text and (unwittingly) make a deal!

By Nisha Koshy, Esq.

Technology is advancing at a breakneck pace. Our use of email and text messaging has drastically altered the way we communicate with each other. This is true not just in our personal lives but in our professional lives as well. Remember when it took days or even weeks for communications pertaining to a real estate transaction to be delivered and a response received? This time lag gave the parties to the deal time to carefully collate all the communications ultimately into one formal Purchase & Sale Agreement. Today, however, when an email or text is sent, the expectation is often that a response will be arriving immediately. As a result, you may not necessarily be giving the proper time and attention to the potential consequences of your hasty communications.

In today's commercial real estate world, it is entirely commonplace for brokers, sellers, buyers and developers to communicate with each other and with their respective clients via email and text. Understandably, everyone wants to get over the finish line as expeditiously as possible. Communicating electronically helps. You should be mindful, however, that you may unwittingly become obligated to carry out a sale of property based on terms laid out in an email or text chain.

Indeed, in 2016, a Massachusetts court determined that text messages between a seller's and a buyer's real estate agents could create a binding contract (St. John's Holdings, LLC v. Two Electronics, LLC, 2016 WL 1460477). In that case, the texts, when read together, outlined the terms of the deal. The buyer subsequently delivered a signed Letter of Intent based on those terms. The seller attempted to get out of the deal by refusing to sign the Letter of Intent and, instead, signed a Purchase & Sale Agreement with a third party. The seller argued the parties

had merely been engaged in negotiations. The buyer contended the parties' messages gave rise to a binding contract to sell the property to the buyer. The court sided with the buyer, finding that the text strings, when read together, sufficiently outlined the terms of the parties' deal and evidenced that the seller intended to sell, and the buyer intended to buy, the property on those terms.

Although this is a simplified summary of the facts, the bottom line is that brokers, developers, sellers and buyers should be aware that their electronic communications may create contractual obligations. To avoid this pitfall, when emailing or texting regarding a real estate deal, it is essential that you clearly identify all contingencies that remain to be met and all essential terms remaining to be negotiated, and expressly outline the exact method by which an offer can be formally accepted and thus become binding. To further protect yourself, you should consider adding your real estate legal counsel to the communications so he or she can help you negotiate the deal's essential terms and ensure that you are not potentially binding yourself to a deal when you are not yet ready to commit.

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