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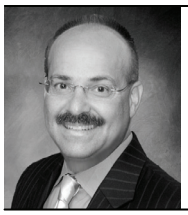

# Nassau Commercial Division Adds E-Jurisprudence

**BY KEVIN SCHLOSSER**

The law relating to electronic communications continues to evolve daily, not only with respect to the ubiquitous issues concerning the preservation and production of electronic discovery, but also as to substantive legal issues. Commentators have recently addressed how the courts have considered the effect of electronic communications on the statute of frauds, service of process, and criminal law violations.[1]

Adding to this evolving e-jurisprudence is a March decision by Justice Stephen A. Bucaria of the Commercial Division, Nassau County Supreme Court, *JSO Associates Inc. v. Price*, 2008 WL 904703 (N.Y. Sup.), 2008 N.Y. Slip Op. 30862 (U). The case involved the effect of e-mail on personal jurisdiction and the statute of frauds.

Justice Bucaria placed significant weight upon e-mail communications from an individual defendant to provide the basis for long-arm jurisdiction over two foreign corporations with which the individual was affiliated. The court also ruled that the e-mail exchanged between the parties satisfied the statute of frauds.

In *JSO Associates*, the plaintiff, a "food broker," sought to recover a finder's fee from two individuals and two foreign corporations. The individual and corporate plaintiffs alleged they introduced defendants to a Canadian corporation that, through its wholly owned subsidiary, ultimately acquired the stock of one of the defendant companies and the assets of the other corporate defendant. Plaintiffs sought "to recover a finder's fee for promoting the transactions and allege[d] that the reasonable value of their services [was] at least $500,000."

Claiming they did not "realize" the plaintiffs expected to be paid for their services, defendants refused to pay the finder's fee requested and, when sued, moved to dismiss on several grounds. As relevant here, defendants claimed New York lacked personal jurisdiction over both the South Carolina corporate defendant as well as the Mexican corporate defendant.

The court first rejected plaintiffs' argument that the Mexican corporate defendant had been "doing business" in New York sufficient to justify general personal jurisdiction over it, noting that "mere sales of a manufacturer's product, through a wholesale distributor in New York, do not make a foreign corporation amenable to suit in this jurisdiction as to claims which do not arise directly from the sale of the product."

Nevertheless, Justice Bucaria found that the Mexican corporate defendant was "transacting business" within New York for purposes of the long-arm statute, CPLR 302 (a)(1), finding support in the Court of Appeals' decisions in *Fischbarg v. Doucet*, 9 N.Y.3d 375, 849 N.Y.S.2d 501 (2007), and *Deutsche Bank Securities Inc. v. Montana Bd. of Investments*, 7 N.Y.3d 65, 818 N.Y.S.2d 164 (2006).

In both of these decisions, the Court of Appeals relied on electronic communications to support New York's exercise of jurisdiction over out-of-state defendants.

In *JSO Associates*, Justice Bucaria found that the individual defendant's e-mail with the plaintiff established a relationship between them, implicating "the privileges and protections of New York law." He further found that the individual defendant was "a fairly sophisticated 'player'" in the relevant industry and thereby "projected himself into New York through his email communications, seeking [plaintiff's] assistance with a contemplated asset sale and stock purchase agreement."

Thus, Justice Bucaria determined that the individual defendant's 16 e-mails sent to the plaintiff in New York regarding the transaction in question could be "of sufficient quality to constitute a 'transaction of business' within the state." The court then analyzed whether the individual's conduct and contacts with New York (through these e-mails) could be attributed to the corporate defendants so as to justify jurisdiction over them.

As to the South Carolina corporate defendant, the court found: "Because of [the individual defendant's] de facto control of [that corporation], a subject of the contemplated acquisition, his engagement of [plaintiff] was clearly undertaken on behalf of that company." Thus, the court concluded that the South Carolina defendant "transacted business in New York through an agent and is subject to personal jurisdiction on a claim arising from the brokerage agreement."

As to the Mexican corporation, the court relied on "apparent authority" because that defendant denied the individual defendant was given express authority to negotiate or enter into the brokerage contract on its behalf. Justice Bucaria found that the Mexican corporation's "acceptance of regular infusions of working capital from [the South Carolina corporation] clothed [the individual defendant] with apparent authority to retain a business broker on behalf of the Mexican corporation," adding that the individual defendant's "email correspondence establishe[d] that [plaintiff] was aware of [the South Carolina corporation's] periodic transfers of funds to [the Mexican corporation] and [his] other involvement in the management of the Mexican company." Thus, as a result of this apparent authority, the court determined that the Mexican company "transacted business in New York through an agent by retaining a business broker."

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Given the fact that there was no other apparent basis for jurisdiction over the two foreign corporations and no other relevant contacts with New York, the court appears to have placed great weight on the e-mails that the individual defendant sent to the New York resident-plaintiff for purposes of exercising personal jurisdiction in New York over the two foreign corporations.

## Statute of Frauds

Justice Bucaria then turned to defendant's argument that General Obligations Law Section 5-701(a)(10), the relevant section of the statute of frauds, barred the action because plaintiffs were seeking compensation "for services rendered in negotiating . . . the purchase, sale, exchange . . . of a business" allegedly without a written, signed contract.

The court first observed that to satisfy the statute of frauds: "The terms of the agreement may be established by a combination of signed and unsigned documents, letters, or other writings provided that the writing establishing a contractual relationship between the parties bears the signature of the party to be charged or his agent and the unsigned document refers on its face to the same transaction as that set forth in the one that was signed," citing *Intercontinental Planning, Ltd. v. Daystrom Inc.*, 24 N.Y.2d 372, 379, 300 N.Y.S.2d 817 (1969).

After reviewing older cases rendered before the "electronic age," Justice Bucaria took a practical, common-sense view of the issue as to whether the e-mails in question were sufficient to satisfy the statute of frauds. Based on the rather mechanical manner in which other courts have analyzed similar issues involving electronic communications, Justice Bucaria's practical approach was not without question.

In *Parma Tile Mosaic & Marble Co. Inc. v. Estate of Short*, 87 N.Y.2d 524, 527, 640 N.Y.S.2d 477, 479 (1996), for example, the Court of Appeals held that a fax transmission from the defendant in which the defendant allegedly guaranteed payment for another did not satisfy the statute of frauds' requirement that the writing be "subscribed" because the defendant did not "sign" the fax. The Court held that the automatic imprinting of the sender's name at the top of the fax transmittal did not constitute "a signature" for purposes of the statute of frauds, nor "an intent, actual or apparent, to authenticate [the] writing."

Similarly, in *Vista Developers Corp. v. VFP Realty LLC*, 17 Misc.3d 914, 847 N.Y.S.2d 416 (Sup. Ct., Queens Co. 2007), the court held that e-mail exchanges between the president of a prospective purchaser and the representative of a prospective seller of real property could not constitute a "signed writing" for purposes of the statute of frauds governing real estate transactions. The court held that because the Legislature specifically added a section to the statute of frauds allowing for electronic signatures only for "qualified financial contracts," it did not intend to allow electronic signatures or communications to satisfy the statute of frauds for other contracts, including conveyances of real property. But see *Rosenfeld v. Zerneck*, 4 Misc.3d 193, 776 N.Y.S.2d 458 (Sup. Ct., Kings Co. 2004) (e-mails can be sufficient to satisfy statute of frauds relating to transactions concerning real property).

## Substance Analyzed

In *JSO Associates*, rather than getting caught up in technical issues as to whether the e-mail contained defendant's "signature" at the bottom, Justice Bucaria analyzed the substance of the relevant e-mails. He held "that where there is no question as to the source and authenticity of an email, the email is 'signed' for purposes of the statute of frauds if defendant's name clearly appears in the email as the sender."

Distinguishing case law "decided in a different technological era, when email and home computers had not even entered the public imagination," Justice Bucaria noted that "the requirement of a signature at the bottom was to minimize the opportunity for fraudulent additions to the memorandum, a practice which is not feasible with electronic communication." He found persuasive a U.S. Court of Appeals for the Seventh Circuit decision in *Cloud Corp. v. Hasbro Inc.*, 314 F.3d 289 (2002), in which the court concluded that "the sender's name on an e-mail satisfies the signature requirement of the statute of frauds."

With these principles in mind, Justice Bucaria found that the e-mails that defendant had sent to plaintiff sufficiently supported the existence of a contract, identified the subject matter of the alleged brokerage agreement and tied in all defendants to the alleged contract. The court also found that in certain of the e-mail, the individual defendant's name appeared as the sender, while in other relevant e-mail the defendant had typed his name at the end "in the traditional letter writing fashion."[2]

## Conclusion

While much has been written on the obligations of counsel and their clients to preserve and produce electronic discovery, the effect of electronic communications on substantive legal issues continues to evolve as well.

Recent case law shows that communications by electronic means can provide significant and powerful consequences in forming enforceable legal rights as well as the basis for jurisdiction over foreign defendants.

## Endnotes:

1. See, e.g., M. Berman, "New York State E-Discovery Law: The 'Power' of E-Mails and Text Messages," NYLJ, June 19, 2008, at p. 3 col. 1; W. Maker, Jr. "Of Keystrokes and Ballpoints: Real Estate and the Statute of Frauds in the Electronic Age," Vol. 80, No. 6, NYSBA Journal, July/August 2008, p. 46; J. Theuman, "Satisfaction of Statute of Frauds by E-Mail," 110 A.L.R.5th 277.

2. If applied, the state and federal laws involving electronic signatures would have likely facilitated and supported the practical outcome reached by the court in *JSO Associates*. See the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§7001-7006, and the New York State Electronic Signatures and Records Act, Article 3 of the state Technology Law. The alleged brokerage agreement would appear to have "affected interstate or foreign commerce" so as to trigger the federal law, while the New York law would appear to have applied as well. Both statutes liberalize the legal effect of electronic signatures.