

NEW YORK STATE E-DISCOVERY LAW

BY MARK A. BERMAN

The 'Power' of E-Mails and Text Messages

E-mails can be your best friend or worst enemy. New York courts have issued a series of decisions, since the beginning of the year, finding that e-mails, when specific enough, may set forth the terms of a writing sufficient to satisfy New York's Statute of Frauds.

E-mail service of a summons and complaint recently has been authorized under the CPLR where, among other things, prior communications between the parties had been electronic and plaintiff, after due diligence, had been unable to obtain a physical address of the defendant for purposes of service.

Also, near to a litigator's heart, are two new decisions requiring a nonparty law firm to be paid its own attorney's fees for reviewing its e-mails in response to a subpoena. New York courts are continuing to take seriously spoliation of e-mails and the failure to preserve e-mails. Finally, text messages have been found to constitute criminal harassment.

E-Mails May Satisfy Statute of Frauds

In *Stevens v. Publicis, S.A.*, 50 AD3d 253, 854 NYS2d 690 (1st Dept. 2008), the First Department recently held that a series of e-mails setting forth the terms of a proposed modification, together with an e-mail accepting the terms of the agreement and an immediate reply e-mail, memorialized the terms of the parties' agreement to change an employment agreement.¹ The court found the e-mails constituted signed writings within the Statute of Frauds since "plaintiff's name at the end of his e-mail signified his intent to authenticate [its] contents" and which e-mail satisfied the requirement of the employment agreement that any modification be signed by all parties.²

In *Al-Bawaba.com Inc. v. Nstein Technologies Corp.*, 19 Misc3d 1125(A), —



NYS2d___, 2008 WL 1869751 (Sup. Ct., Kings County April 25, 2008), the court reasoned that the "note or memorandum required by the Statute of Frauds may be pieced together out of separate writings, some signed, and some unsigned 'provided that they clearly refer to the same subject matter transaction,'" rejecting the claim, on a motion to dismiss, that an alleged oral three-year agreement violated the Statute of Frauds.³

The court found evidence of a contractual agreement⁴ between the parties that exceeded the threshold of "mere speculation" and, in denying the motion and permitting discovery, noted that additional documents may exist containing terms sufficient to satisfy the Statute of Frauds.⁵ The court also held that the signature of the party on the e-mail constituted a "signed writing" under the Statute of Frauds and that the sender "manifested his intention to authenticate the e-mail" for the purposes of the Statute of Frauds by typing his name at the conclusion of the e-mail referencing the parties' contractual agreement.⁶

Finally, in *Kim v. United Young Artist Foundation Inc.*, 19 Misc3d 133(A), — NYS2d___, 2008 WL 879747, at *1 (Sup. Ct., App. Term April 2, 2008), a recent Appellate Term decision held that "e-mail communications between the parties clearly and explicitly established the payment terms of the parties' agreement."⁷

Summons and Complaint

In *Snyder v. Alternate Energy Inc.*, — Misc3d___, 857 NYS2d 442 (Civ. Ct., New York Co. April 4, 2008), the court noted that the CPLR empowers a court to devise alternative means of serving a summons where the plaintiff sufficiently demonstrates that service cannot be made by a statutorily prescribed method. The court, given the specific facts of the case, exercised such power by permitting plaintiff to serve defendants by e-mail. The court indicated that "cyber-notice" would need to be as reliable as the more conventional service of a "paper" summons and complaint. The court found that, while plaintiff's extensive efforts to serve defendants proved unsuccessful, such attempts were sufficient for the court to consider service by e-mail.

The court held that, for service by e-mail, it is not enough to merely show that a defendant has a computer and an e-mail address. Rather, it must be shown by the totality of the facts that a "court could readily conclude that service by e-mail is 'reasonably calculated, under all the circumstances, to apprise the defendants of the action brought against them.'"⁸ In this case, plaintiff demonstrated that defendant "is regularly online using an e-mail address that by all indications is his."⁹ The court discussed that, although service by publication has a low probability of actually notifying a defendant that an action is being brought against it, service by publication is an acceptable means of notification, and that, e-mail service, to the contrary, "offers a chance of providing actual notice to a defendant of a pending lawsuit."¹⁰

Therefore, after determining that "service by conventional means was impracticable and that the proposed form of alternative service was reasonably calculated to give the defendant notice of action,"¹¹ the court "to better ensure the effectiveness of...notice" ordered service as follows:

- (1) e-mail service must be done on two consecutive dates;
- (2) the e-mail must bear a prominent subject line indicating that legal papers

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