

Promise to transfer home unenforceable

'Memo of understanding' does not create contract

A "memorandum of understanding" sent by a woman's attorney purporting to approve an agreement to convey her interest in Nantucket property to her daughter and son-in-law did not constitute an enforceable contract under the Statute of Frauds, a Land Court judge has ruled.

The memorandum of understanding, or MOU, was attached to an email from the attorney to the son-in-law identifying it as the "agreement" approved by the parties. The defendant mother had not signed the MOU electronically and neither had the lawyer.

Nonetheless, the plaintiff daughter and son-in-law argued that the email and the MOU taken together, with the attorney authorized to act as the mother's agent with the power to bind her to the MOU's terms, constituted a contract.

But Judge Karyn F. Scheier disagreed.

"An attorney's implicit authority in contract dealings is more circumscribed than the broad authority impliedly granted to an attorney representing a client throughout the course of litigation," Scheier wrote in granting the defendants a judgment as a matter of law.

The plaintiffs failed to present evidence or documentation demonstrating the lawyer's authority to bind the mother to the terms of the MOU, such as a special power of attorney, Scheier continued. Even if the lawyer was authorized to bind the mother to a contract, and the plaintiffs had adequately proven such authorization, the MOU lacked an electronic signature from the attorney, she said.

The 18-page decision is *Slover, et al. v. Carpenter, et al.*, Lawyers Weekly No. 14-001-16.

The facts and the law

John J. Bonistalli of Boston, who represented the defendant mother and her brother, who co-owned the property in question, said he was elated by the decision.

"When you represent people who are in a conflict with their family, that is some of the most tense litigation there is, and it really shouldn't happen," he said.

Bonistalli said the decision reinforces the elements of a contract and the requirements of a writing to satisfy the Statute of Frauds.

"Particularly in this day and age, where everything is in an email and so much is communicated back and forth, you can't change the facts of the case to try and win it for your side," he said. "The facts were clear: There was no written agreement, just a lot of talk about a gift."

Meanwhile, Bonistalli said the case is a reminder to attorneys not to litigate a case just because that is what the client wants to do. Here, he said, the plaintiffs were holding his clients hostage through 18 months of litigation in order to get a desired result that the law did not support. Unfortunately, he said, that scenario plays out frequently.

Lawrence P. Heffernan represented the plaintiffs. The Boston lawyer could not be reached for comment prior to deadline.

But Donald R. Pinto Jr., a real estate litigator in Boston, called the case a “timely reminder” of the dangers of preliminary agreements such as MOUs, letters of intent and offers to purchase, in which the parties express certain basic deal points but are not ready to sign a binding contract.

“The Appeals Court and the [Supreme Judicial Court] have been telling parties since the late 1980s that if they don’t intend to be bound by a preliminary agreement, all they need to do is include a simple ‘safe harbor’ provision saying just that,” Pinto said.

In *Slover*, Pinto said, the mother could have saved herself “a world of trouble” and legal fees if the MOU had included such a provision.

“Because it didn’t, that left the door open for her daughter and son-in-law to claim the MOU was a binding contract,” he said.

Boston’s Edmund A. Allcock, who also handles real estate disputes, said the case is “a classic example” of why the Statute of Frauds exists: to prevent people from trying to rely on imperfect negotiations in order to enforce a contract.

The case further illustrates that attorneys can only get themselves in trouble when they create MOUs, he said.

“I don’t understand the point of them,” he said. “They’re typically not supposed to be enforceable documents, but every time a lawyer does one, it leads to litigation. Why have an agreement that sets forth some details about agreeing to something in the future? It’s just pointless.”

Equally interesting was the question about whether the attorney’s email with the MOU attached could constitute the signature necessary to satisfy the Statute of Frauds, he said. Scheier ruled that it could not because there was no electronic signature as currently required by statutes and case law.

“But looking forward, I can see a day coming where the actual receipt and sending of such a message with no formal signature will still constitute the signature,” Allcock said. “That’s something lawyers have to be careful about.”

Alleged agreement

Defendant Josephine Carpenter owns a five-bedroom, 5,000-square-foot single-family home on Main Street in Nantucket, in common with her brother, defendant Walter W. Boyd Jr.

In 2000, the defendants leased the property to Carpenter’s daughter, plaintiff Katherine Slover, and her husband, plaintiff William Slover, for \$48,000 annually in rent through 2011. The lease had a provision allowing for a 10-year extension if both sides agreed. Additionally, personal property co-owned by the defendants would be considered “on loan” to the plaintiffs under the terms of the lease.

In the summer of 2010, the plaintiffs proposed a new long-term lease of 30 or more years. In December 2011, Boyd’s son responded in an email that the lease would not be renewed and that the property would revert to the “common use” for the Boyd and Carpenter families in January 2012.

After the lease expired, the plaintiffs apparently continued to occupy the property without paying rent to the defendants.

In the interim, after unsuccessfully attempting to purchase Boyd's half-interest in the property, the Slovers began discussions with Carpenter's family lawyer, Charles Hobbs of Washington, about Carpenter gift-deeding the defendants her half-interest.

Carpenter was apparently open to the idea and, on April 17, 2013, after some back and forth on tax implications, Hobbs emailed the plaintiffs, stating: "Here is the agreement approved ...by [Carpenter and the Slovers]," apparently referring to the MOU, which was attached to the email. The MOU itself stated that Carpenter would gift deed her half-interest to her daughter and that Boyd intended to sell his half-interest if a price could be agreed upon and Katherine Slover could secure a bank loan to finance it.

Though the MOU had signature lines for Carpenter and both Slovers, Carpenter never signed it.

In October 2013, Boyd — through his attorney, Bonistalli — sent the plaintiffs a notice to quit the property and return his personal property. Several weeks later, Boyd, again through his attorney, stated that he would initiate a summary process action if they failed to vacate the premises.

A few months later, Carpenter wrote to the plaintiffs stating that while she did intend for Katherine Slover to receive her one-half interest in the property, the tax situation would make it difficult for her to do so during her lifetime.

On Aug. 18, 2014, after further negotiations between the plaintiffs and Boyd over the value of the property reached an impasse, the defendants initiated a summary process action in Nantucket District Court.

The plaintiffs responded by filing an action against the defendants in Land Court for specific performance of Carpenter's alleged agreement to gift deed Katherine Slover the property.

The defendants moved for summary judgment.

Statute of Frauds

Scheier rejected the plaintiffs' argument that the MOU, combined with Hobbs' alleged representations, constituted an enforceable contract sufficient to satisfy the Statute of Frauds.

Neither Carpenter nor her counsel signed the MOU, and the plaintiffs presented no evidence to suggest that Hobbs had the power through, for example, a special power of attorney, to bind Carpenter to the terms of the MOU, the judge noted.

"Hobbs himself denied having such authority," Scheier said.

Additionally, the judge said, the conduct of the parties demonstrated that not all parties viewed the MOU as a binding contract. Specifically, the parties had engaged in extensive communications regarding the terms outlined in the MOU and continued to do so after Hobbs had sent it, as demonstrated by correspondence after the MOU was drafted.

At the same time, the MOU referenced future agreements that had not yet been finalized, the judge said.

“While it is true that an action may be brought upon a contract which contemplates another more formal contract ... an agreement to enter into a contract which leaves the terms of that contract for future negotiation is too indefinite to be enforced,” Scheier said.

She further noted that the MOU itself suggested Carpenter intended to convey her interest in the property as a gift. Though the plaintiffs had apparently agreed to pay any taxes attributable to the transfer, Scheier said that did not impact the status of the conveyance as a gift.

“A simple promise to make a gift is unenforceable, and Josephine remained free to change her mind before any physical transfer, as apparently she did,” the judge said.

Accordingly, Scheier concluded, the MOU was not an enforceable contract.

By: Eric T. Berkman