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SEAL

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

ESSEX, ss.

MISCELLANEOUS CASE
NO. 16 MISC 000090 (RBF)

ST. JOHN'S HOLDINGS, LLC,

Plaintiff,

v.

TWO ELECTRONICS, LLC,

Defendant.

**MEMORANDUM AND ORDER DENYING DEFENDANT'S SPECIAL MOTION TO
DISMISS**

At least one dictionary defines a "text message" as "a short message sent electronically usually from one cell phone to another." *Merriam-Webster Dictionary*, www.merriam-webster.com/dictionary/text%message (visited April 12, 2016). The question raised by defendant's Special Motion to Dismiss is whether a text message, all too familiar to most teenagers and their parents, can constitute a writing sufficient under the Statute of Frauds to create an enforceable contract for the sale of land. In its complaint, St. John's Holdings, LLC (SJH) alleges that a text message from a real estate broker for defendant Two Electronics, LLC (Two Electronics) constituted acceptance of a binding offer from SJH to buy Two Electronics' property at 2 Electronics Drive, Danvers, MA (Subject Property). After SJH filed its complaint and the court allowed SJH's ex parte motion for endorsement of a memorandum of lis pendens, Two Electronics filed a Special Motion to Dismiss pursuant to G.L. c. 184, §15, seeking dismissal of the complaint, dissolution of the lis pendens, and an award of attorney's fees and

19

costs. In its motion, Two Electronics argues that no contract was ever formed between the parties because Two Electronics did not accept the offer to purchase and the communications between the parties about the sale of the Subject Property do not satisfy the Statute of Frauds. Based on the undisputed facts and drawing inferences in SJH's favor, the court finds that the text message at issue can constitute a writing under the Statute of Frauds sufficient to bind Two Electronics to an agreement to sell the Subject Property. For the reasons set forth below, the Special Motion to Dismiss will be denied.

Procedural History

On February 12, 2016, SJH filed its complaint, a Motion for Ex Parte Approval of Memorandum of Lis Pendens, and a Motion for Temporary Restraining Order. A hearing on the Ex Parte Motion for Lis Pendens and Motion for Temporary Restraining Order was held on February 12, 2016. The Court allowed the Ex Parte Motion for Lis Pendens and denied the Motion for Temporary Restraining Order.

On March 11, 2016, Two Electronics filed Defendant's Special Motion to Dismiss and Memorandum in Support of Special Motion to Dismiss. SJH filed a Motion for Preliminary Injunction and Memorandum of Law in Support of Motion for Preliminary Injunction on March 18, 2016. Two Electronics filed its Opposition to Plaintiff's Motion for Preliminary Injunction on March 22, 2016. On March 23, 2016, a hearing on the Motion for Preliminary Injunction was held. The Court allowed the Motion for Preliminary Injunction in part, ordering that Two Electronics "shall not convey or otherwise encumber the subject property" before April 27, 2016 (the closing date with the third party purchaser). On March 29, 2016, SJH filed Plaintiff's Opposition to Defendant's Special Motion to Dismiss. A hearing on the Special Motion to Dismiss was held on April 4, 2016, and this matter was taken under advisement.

Standard

General Laws c. 185, § 15, provides, in relevant part, that if a memorandum of lis pendens is approved ex parte, “any party aggrieved thereby may move at any time for dissolution of the memorandum” and that a “party may also file a special motion to dismiss the claimant’s action if that party believes that the action or claim supporting the memorandum of lis pendens is frivolous.” *Id.* Section 15 further provides that the motion “shall be granted if the court finds that the action is frivolous because (1) it is devoid of any reasonable factual support; or (2) it is devoid of any arguable basis in law; or (3) the action or claim is subject to dismissal based on a valid legal defense such as the Statute of Frauds.” *Id.*; *RFF Family Partnership, LP v. Link Development, LLC*, 849 F. Supp. 2d 131, 137 (D. Mass. 2012). “It is worth stressing that the motion to dismiss is directed to the claim or action and not the lis pendens itself.” *Fafard Real Estate & Dev. Corp. v. Metro-Boston Broad. Inc.*, 345 F. Supp. 2d 147, 152 (D. Mass. 2004). “In the event there are un-adjudicated claims remaining after the dismissal of any claim pursuant to which the memorandum of lis pendens was recorded, the court shall order the entry of partial judgment with respect to the claim dismissed pursuant to [§15].” G.L. c. 184, § 15.

The standard of review for a special motion to dismiss is the functional equivalent of a motion for summary judgment; it requires the court to assess the plaintiff’s claim in light of the record before the court. *Faneuil Investors Group v. Board of Selectmen of Dennis*, 458 Mass. 1, 2-3 (2010); *Gould v. Lancaster Tech. Park Ltd. P’ship*, No. 20051153, 2006 WL 700884, at *1 (Mass. Super. Feb. 17, 2006); *Trolie v. Friedman*, No. 051170, 2005 WL 1683601, *2 (Mass. Super. May 3, 2005). The court does not weigh evidence, assess credibility, or find facts; it may only consider undisputed material facts and apply them to the law. *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991). In viewing the factual record presented as part of the

motion, the court is to draw “all logically permissible inferences” from the facts in favor of the non-moving party. *Willits v. Roman Catholic Archbishop of Boston*, 411 Mass. 202, 203 (1991). The judge must consider the verified pleadings and affidavits in ruling on the special motion and, if the motion is granted, award costs and attorney's fees to the aggrieved party. *McMann v. McGowan*, 71 Mass. App. Ct. 513, 519 (2008); *Lindblad v. Holmes*, No. BACV200400469, 2004 WL 3152376. *3-4 (Mass. Super. Nov. 24, 2004).

Facts

For the purposes of the deciding the Special Motion to Dismiss, the following facts are undisputed or are inferred in SJH's favor:

1. SJH is a Massachusetts limited liability company with a principal place of business located at 301 Edgewater Place, Wakefield, MA. Frederick McDonald, Jr. (McDonald) is the manager of SJH. Verified Complaint (Compl.) ¶¶ 1, 4.
2. Two Electronics is a Massachusetts limited liability company with a principal place of business located at 2 Draper Street, Woburn, MA. Matthew Piccione (Piccione) is the manager of Two Electronics. Two Electronics is the owner of the Subject Property pursuant to a deed recorded in the Essex South District Registry of Deeds (registry) in Book 27435, Page 475. Compl. ¶¶ 2-3, 5.
3. The Subject Property is a one-story commercial building located in an industrial park in Danvers. It is occupied by multiple office users under commercial leases. Defendant's Memorandum in Support of Special Motion to Dismiss (Def. Mem.) Exhibit (Exh.) A, ¶ 3.
4. Stephen Cefalo (Cefalo) is a licensed Massachusetts real estate broker with Stephen Cefalo Real Estate. Cefalo acted as the broker and authorized agent of SJH at all times

- relevant with respect to the Subject Property. Compl. ¶¶ 6-7.
5. Timothy Barry (Barry) is a licensed Massachusetts real estate broker with Barry Realty Group. Barry acted as the broker and authorized agent of Two Electronics at all times relevant with respect to the Subject Property. Compl. ¶¶ 8-9.
 6. SJH first reached out to Barry in December 2015, initially expressing interest in leasing space at the Subject Property from Two Electronics. Def. Mem. Exh. A, ¶ 4.
 7. In January 2016, SJH indicated that they were interested in purchasing the Subject Property. McDonald, Piccione, Cefalo, and Barry met in person to commence initial negotiations surrounding the acquisition of the Subject Property by SJH through a purchase transaction. Compl. ¶10; Def. Mem. Exh. A, ¶¶ 5-7.
 8. Throughout January, the parties met several times. At these meetings, McDonald outlined to Piccione the basic terms of an offer to purchase the Subject Property. Piccione requested that McDonald submit a written offer to purchase with the terms discussed. Piccione also directed McDonald and Cefalo to work through Barry as his broker for the Subject Property. Thereafter, the parties continued negotiating the terms of an offer to purchase the Subject Property. Compl. ¶¶ 10-11; Def. Mem. Exh. A, ¶ 8.
 9. On January 27, 2016, Barry received by email a written "Binding Letter of Intent" from Cefalo, on behalf of SJH, that contained a description of the terms under which SJH would buy the Subject Property, including the purchase price of \$3,232,000, due diligence period, deposit, and the closing date (First LOI). The First LOI was not signed by a representative of SJH. Barry emailed the First LOI to Piccione who reviewed and made certain comments to Barry by telephone about terms he would like revised. Def. Mem. Exh. A, ¶ 10; Exh. B.

10. On January 29, 2016, Barry received by email a second “Binding Letter of Intent” from Cefalo on behalf of SJH (Second LOI). The Second LOI contained revisions of the essential terms in the First LOI and was also not signed by a representative of SJH. Barry emailed the Second LOI to Piccione to review. The only difference between the First and Second Letters of Intent was that the nonrefundable deposit offered by SJH was increased from \$128,000 to \$168,000. Again, Piccione reviewed and made comments to Barry by telephone about certain terms in the letter. In particular, Piccione indicated to Barry that the provision that SJH would pay \$200,000 of the purchase price on a date 60 months after the closing without interest was unacceptable, that the proposed due diligence period was too long, and that SJH’s right to unilaterally extend the closing date for 30 days was unacceptable. Compl. ¶ 12; Def. Mem. Exh. A, ¶ 11; Exh. C.
11. On February 1, 2016, Barry sent an email to Cefalo stating that Two Electronics was “ready to do this,” but that Piccione had three issues regarding the offer in the Second LOI. Barry wrote:
- “The first matter is he would like to give you guys three weeks instead of 4 on the due diligence. Number two, he doesn’t want to give the 30 day extension. And number three, is he would like to have a penalty applied to the deal if the \$200,000 is not paid at the end of 48 months.”
- Compl. ¶ 14, Exhibit (Exh.) 1.
12. On February 2, 2016, Cefalo sent Barry as an email attachment a third written “Binding Letter of Intent” (Final LOI). The Final LOI was also not signed by a representative of SJH. The only revision contained in the Final LOI was the date on which the final \$200,000 of the purchase price would be due and payable to the seller. It was reduced from 60 months post-closing to 48 months post-closing. None of the issues raised in the February 1, 2016 email from Barry to Cefalo were incorporated into the Final LOI.

Compl. ¶¶ 17-18, Exh. 2; Def. Mem. Exh. A, ¶ 12.

13. The Final LOI set forth a method for Two Electronics to accept the offer from SJH:

“Please indicate your agreement to the above summary of discussions by signing and returning a copy of this letter to the undersigned no later than Feb. 4, 2016. If you have any questions concerning the items to be addressed, please feel free to call.”

Compl. Exh. 3.

14. Barry sent an email to Piccione with the Final LOI the same day, which Piccione received at 7:58 PM on February 2, 2016. Piccione states that he did not review the substance of the offer at that time because the document was not signed by SJH. Def. Mem. Exh. A, ¶ 12.

15. Also on February 2, 2016, Two Electronics received a signed offer to purchase the Subject Property from a third party for a purchase price of \$3,080,000. Def. Mem. Exh. A, ¶ 15.

16. At 2:12 PM on February 3, 2016, Barry sent Cefalo the following text message in response to receiving the Final LOI from Cefalo the previous day:

“Steve. It [Two Electronics] wants you [SJH] to sign first, with a check, and then he will sign. Normally, the seller signs last or second. Not trying to be stupid or contrary, but that is the way it normally works. Can Rick [McDonald] sign today and get it to me today? Tim”

Compl. ¶ 20, Exh. 3; Def. Mem. Exh. A, ¶ 13.

17. On February 3, 2016, McDonald executed four original copies of the Final LOI with the deposit check and gave them to Cefalo to deliver to Barry for signature by Piccione.

Compl. ¶ 23.

18. At 4:25 PM on February 3, 2016, Cefalo sent a text message to Barry stating:

“Tim, I have the signed LOI and check it is 424 [PM] where can I meet you?”

Compl. ¶ 24, Exh. 4.

19. Later that day, Cefalo and Barry spoke by telephone and agreed that Cefalo would bring the signed Final LOI and the deposit check to Barry's office for Two Electronics' execution. After, Cefalo met with Barry in person and delivered the four originals of the executed Final LOI and the deposit check to be passed along to Piccione to sign. Compl. ¶ 25.

20. Two Electronics accepted the third party's offer to buy the Subject Property by countersigning the written offer on February 3, 2016. Two Electronics and the third party buyer have entered into a written purchase and sale agreement with a closing date tentatively set for April 27, 2016. Def. Mem. Exh. A, ¶ 15.

21. The following day, on February 4, 2016, Cefalo sent a text message to Barry looking for an update on the executed Final LOI. Barry responded with a text message to Cefalo and stated:

"Matt [Piccione] was out of town today. He will get back to us tomorrow."

Compl. ¶ 28, Exh. 4.

22. Two Electronics thereafter refused to execute and deliver to SJH the executed Final LOI. Compl. ¶ 29; Def. Mem. Exh. A, ¶ 13.

Discussion

SJH brought this complaint seeking to enforce its rights as a buyer of the Subject Property pursuant to a binding letter of intent to purchase it alleged it entered into with the owner and seller defendant Two Electronics. SJH submits that the letter of intent was binding based on an exchange of emails and text messages between the parties' real estate brokers that constitute an agreement on all essential terms that satisfies the Statute of Frauds. In its complaint, SJH

pleads three causes of action: (1) Breach of Contract, (2) Declaratory Judgment, and (3) Specific Performance.

The ultimate dispute in this case is whether the parties merely engaged in negotiations regarding the purchase of the Subject Property, or whether their dealings, carried out through electronic communications, gave rise to a binding and enforceable contract for the purchase and sale of the real estate. The issue in this Special Motion to Dismiss is the threshold question necessary to determine if a contract was formed: whether Cefalo's email of the Final LOI and Barry's text message in response constituted a writing containing the essential elements of the agreement and a signature sufficient to bind the parties under the Statute of Frauds.

The formation of a valid contract requires an offer, acceptance of that offer, consideration, and agreement on sufficient terms laying out the rights and obligations of the parties. *Slover v. Carpenter*, 24 LCR 1, 4 (2016); see *Situation Mgmt. Sys., Inc. v. Malouf, Inc.*, 430 Mass. 875, 878 (2000). "An enforceable agreement requires (1) terms sufficiently complete and definite, and (2) a present intent of the parties at the time of formation to be bound by those terms." *Targus Group Int'l, Inc. v. Sherman*, 76 Mass. App. Ct. 421, 428 (2010); see *Situation Mgmt. Sys., Inc.*, 430 Mass. at 878. "If ... the parties have agreed upon all material terms [of the sale], it may be inferred that the purpose of a final document which the parties agree to execute is to serve as a polished memorandum of an already binding contract." *McCarthy v. Tobin*, 429 Mass. 84, 87 (1999) (stating the controlling fact is the "intention of the parties"). While not all terms of the agreement must be specified, the parties must have at least progressed beyond "imperfect negotiation" and a "meeting of the minds" must be reached. *Lafayette Place Assocs. v. Boston Redev. Auth.*, 427 Mass. 509, 517 (1998).

Contracts for the sale of land, whether by oral promise or written agreement, are

enforceable only if they are supported by a writing that includes the agreement's essential terms and is signed by the party against whom enforcement is sought—in this case, Two Electronics. G.L. c. 259, § 1, Fourth (“No action shall be brought ... [u]pon a contract for the sale of lands, tenements, hereditaments or of any interest in or concerning them ... [u]nless the promise, contract or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized.”). Whether a writing satisfies the Statute of Frauds is a question of law. *Schwanbeck v. Federal-Mogul Corp.*, 412 Mass. 703, 709-710 (1992). In the Special Motion to Dismiss, Two Electronics argues that Barry’s February 3rd text message cannot satisfy the Statute of Frauds. SJH argues that it does. Resolving this issue requires determining whether (a) a text message can be a writing under the Statute of Frauds, (b) whether the alleged writing contains sufficiently complete terms and an intention to be bound by those terms, (c) whether the text message is signed, and (d) whether there is an offer and acceptance.

Whether text messages qualify as a writing under the Statute of Frauds is a novel issue in the Commonwealth. In general, writings of relative informality and brevity can satisfy the statute. *A.B.C. Auto Parts, Inc. v. Moran*, 359 Mass. 327, 329 (1971) (finding that an endorsement on a check which indicated the nature of the transaction, parties, property, and purchase price satisfied the Statute of Frauds). The writing need not be a formal contract, but the terms of the writing must be sufficiently complete and definite and the writing must reflect a present intent of the parties at the time of formation to be bound. *Id.* (stating that the “fact that the memorandum is on the back of a check is immaterial”); *Targus Group Int’l, Inc.*, 76 Mass. App. Ct. at 428 (“Sufficient completeness depends upon the substance of the terms approved by the parties.”). The writing must contain directly, or by implication, all of the essential terms of

the parties' agreement. *Michelson v. Sherman*, 310 Mass. 774, 775 (1942). "It is a court's function, therefore, to determine what provisions are essential to an agreement sought to be enforced and whether an omitted provision can be supplied by implication." *Simons v. Simons*, 35 Mass. App. Ct. 705, 709 (1994), citing Restatement (Second) of Contracts § 131, comment g (1979).

To support its position, Two Electronics directs the court to *Singer v. Adamson*, a prior Land Court decision that addressed a similar issue involving emails between real estate agents where the court decided that the emails did not meet the demands of the Statute of Frauds. *Singer v. Adamson*, 11 LCR 338, 342 (2003), *aff'd*, 65 Mass. App. Ct. 1103 (2005). In reaching its decision, the court noted that emails "by their quick and casual nature, tend to lack in many instances the cautionary and memorializing functions a traditional signed writing serves under the Statute of Frauds." *Id.* The Land Court judge further acknowledged that "[e]-mails facilitate rapid, almost instantaneous communication, but in many cases they analogize more closely to telephone calls, or at least to voice mail messages, shot back and forth between parties whose chief goal is prompt response. . . . It is far from obvious that average parties launching e-mails to each other appreciate that their quickly-composed electronic missives are contractual in nature, and will constitute, when assembled into one long 'thread' after the fact, a memorandum of a binding and enforceable agreement. In many instances, the e-mails reveal that the parties are really just 'talking' with the help of the internet, and not sitting down across a virtual table to electronically 'write up' a memorandum of any contractual significance." *Id.*

Singer was decided over a decade ago. Since then the use of electronic communications, particularly in the legal field, has advanced immensely and become commonplace. Several more recent decisions acknowledge that emails may be writings that satisfy the Statute of Frauds and

create a binding contract. *Feldberg v. Coxall*, No. MICV201201649A, 2012 WL 3854947, at * 6 (Mass. Super. May 22, 2012); *Fecteau Benefits Group, Inc. v. Knox*, 72 Mass. App. Ct. 204, 212-213 (2008) (finding the parties intended to be bound by emails settling a fee dispute where they formed a clear and complete agreement including material terms such as the amount of legal fees, a deadline for acceptance, and acceptance without equivocation); *Slover*, 24 LCR at 5 (“Emails between the parties may create a binding contract that satisfies the Statute of Frauds, provided the emails contain all essential terms”). Moreover, the facts in *Singer* are distinguishable from this case. In *Singer*, the court found that the emails lacked specificity on many key terms including the dates of performance, deposit terms, rights to inspection, mortgage and other contingencies. The parties themselves “had no prior history of contracting, no definitive written agreement had been signed by them previously, and they did not communicate directly, even using e-mail.” *Singer*, 11 LCR at 342. These are not the circumstances of the present case.

The facts in *Shattuck v. Klotzbach* are more similar to this matter. *Shattuck v. Klotzbach*, No. 011109A, 2001 WL 1839720, at *3-4 (Mass. Super. Dec. 11, 2001). The court in *Shattuck* denied a seller’s motion to dismiss, holding that email messages exchanged between a prospective buyer and seller satisfied the Statute of Frauds. *Id.* The plaintiff-buyer and defendant-seller had engaged in negotiations concerning the sale of property through their attorneys that were conducted in person, by telephone, and email. Several emails were exchanged addressing specific contractual provisions, including the closing date, purchase price, deposit amount, and waivers of contingencies. *Id.* at *1-2. The court found that these emails reflected detailed attention to many of the provisions that would govern the purchase and sale, and signified a close involvement of the parties’ attorneys in forming the transaction. *Id.* at *3-4.

On these facts, the court had little difficulty denying the seller's motion to dismiss. *Id.* at *4.

The Superior Court addressed the issue more recently in *Feldberg v. Coxall*. In *Feldberg*, the parties disputed whether a series of emails between their attorneys regarding the sale of property was sufficient to satisfy the Statute of Frauds. *Feldberg*, 2012 WL 3854947, at * 4. The key email at issue was sent by the plaintiffs' attorney with a revised offer attached with changes reflecting conversations between the parties. The draft attached to the email contained a purchase price, described the property, and provided a closing date. *Id.* The defendant's attorney responded asking for a written approval from the bank and ending the email by stating "I think we are ready to go. . . . We are almost there." *Id.* Plaintiffs' attorney did provide a copy of a commitment letter from the bank containing reasonable conditions for plaintiff's mortgage transaction, which the defendant claimed the conditions repudiated the deal. *Id.* The court ultimately concluded that these transactions provided a reasonable and supportable response to the defense of Statute of Frauds. *Id.* at *6. In reaching the decision, the court noted that "[i]n truth, the Courts have not yet set forth rules of the road for 'the intersection between the seventeenth-century Statute of Frauds and twenty-first century electronic mail.'" *Id.*, citing *May Trucking Co. v. Northwest Volvo Trucks, Inc.*, 238 Or. App. 21, 24 (2010). Relying on existing authority in *Shattuck v. Klotzbach*, the court found that the plaintiffs' response to the Statute of Frauds defense had an arguable basis, which was "not difficult on this issue of first impression." *Id.* at *5.

Based on the undisputed facts and drawing inferences in SJH's favor, the Court finds that the February 3rd text message is a writing and that, read in the context of exchanges between the parties, it contains sufficient terms to state a binding contract between SJH and Two Electronics. The communications between SJH and Two Electronics before the text message evidenced a

meticulous attention to provisions that would govern the agreement to purchase the Subject Property. The parties began communicating in December 2015, through their real estate brokers, initially over leasing the Subject Property. Communications between the parties and their real estate agents, including multiple telephone calls, emails, and face to face meetings, continued through January 2016. Over the course of their negotiations Cefalo, as an agent acting on behalf of SJH, sent two binding letters of intent to Barry, after which Piccione reviewed the terms and made revisions that were reiterated back to Barry. Barry systematically conveyed to Cefalo the terms that were acceptable to Two Electronics. The terms discussed included the purchase price, seller financing, the due diligence period, the closing date, and the deposit amount. These back-and-forth communications culminated in Cefalo's attaching of the Final LOI to an email to Barry on February 2nd. The Final LOI set out all essential terms for the purchase and sale of the Subject Property, and stated explicitly that it was binding. Barry sent a text message to Cefalo the following day indicating that the Final LOI was received and made no additional changes to the terms except as to the method of acceptance.

Under the Statute of Frauds, multiple writings relating to the subject matter of the agreement may be read together as long as the writings, when considered as a single instrument, contain all the material terms of the contract and are authenticated by the signature of the party to be charged. *Waltham Truck Equip. Corp. v. Massachusetts Equip. Co.*, 7 Mass. App. Ct. 580, 583 (1979) (reading three papers together as satisfying the Statute of Frauds); *Flynn v. Wallace*, 359 Mass. 711, 717 (1971) (finding that an unsigned deed together with corporate meeting minutes authorizing the sale of property were sufficient to satisfy the Statute of Frauds). The writings may, but need not, incorporate each other by reference. *Tzitzon Realty Co., Inc. v. Mustonen*, 352 Mass. 648, 653 (1967). Parol evidence may be introduced to show that "two or

more papers were so connected in the minds of the parties that they adopted all of them as indicating their purpose.” *SAR Grp. Ltd. v. E.A. Dion, Inc.*, 79 Mass. App. Ct. 1123, at *2 (2011), quoting *Tzitzon Realty Co., Inc.*, 352 Mass. at 653. The text message from Barry to Cefalo implicitly incorporated the Final LOI and the provisions mentioned therein. The text message, together with Cefalo’s email of the Final LOI and the conduct of the parties throughout the course of negotiations, satisfies the writing requirement. The way in which the parties handled the transaction was sufficient for them to appreciate that the text message would memorialize the contractual offer and acceptance.

Two Electronics asserts that even if the communications between the agents constituted a writing, the text message from “Tim” was not a signature that binds Two Electronics under the Statute of Frauds. For the purposes of the Special Motion to Dismiss the parties stipulated that the real estate agents were duly authorized agents acting on behalf of their respective companies. The signature of a duly authorized agent, rather than the party to be charged, is sufficient to be binding. *Slover*, 24 LCR at 4, citing *A.B.C. Auto Parts, Inc.*, 359 Mass. at 329. While the legality of a signature in a text messages has not been addressed by courts in the Commonwealth, several cases address the validity of electronic signatures.

Several courts have found the requirements for a signature to satisfy the Statute of Frauds to be relatively minimal. “A memorandum is signed in accordance with the Statute of Frauds if it is signed by the person to be charged, in his own name, or by his initials, or by his Christian name alone, or by a printed, stamped or typewritten signature, if in signing in any of these methods he intended to authenticate the paper as his act.” *Irving v. Goodimate Co.*, 320 Mass. 454, 458 (1946). “Emails between the parties may create a binding contract that satisfies the Statute of Frauds, provided the emails contain all essential terms, even in the absence of a formal

signature.” *Slover*, 24 LCR at 5; *Feldberg*, 2012 WL 3854947 at *6 (allowing certain parts of an email to satisfy the signature requirement of the Statute of Frauds); *Shattuck*, 2001 WL 1839720 at *4 (stating email negotiations may satisfy the Statute of Frauds even when the emails lacked a formal script signature). The typed name at the end of an email is indicative of a party's intent to authenticate because the sender of an email types and sends the message on his own accord and types his own name as he so chooses. *Id.* Moreover, courts have relied on the Uniform Electronic Transactions Act, G.L. c. 110G, which applies “to transactions between parties each of which has agreed to conduct transactions by electronic means.” *Feldberg*, 2012 WL 3854947 at *6, citing G.L. c. 110G, §5. Whether parties have agreed “is determined from the context and surrounding circumstances, including the parties’ conduct.” G.L. c. 110G, §5. When parties use email to conduct the negotiations it “arguably constitutes an agreement to conduct transactions by electronic means.” *Feldberg*, 2012 WL 3854947 at *6. An electronic signature is “an electronic ... symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.” *Id.*, citing *May Trucking Co.*, 238 Or. App. at 35.

In the February 3rd text message from Barry to Cefalo, Barry signed his name “Tim” at the end of lengthy message requesting that SJH sign first. This form of signature is consistent with the previous emails between Barry and Cefalo, which contained typewritten signatures at the end of each message, not a formal script signature or a signature block. In the February 1st email from Barry to Cefalo, Barry signed his name “Tim.” Likewise, Cefalo signed his name “Steve Cefalo” at the end of the February 2nd email to Barry in which he sent the Final LOI. A series of unsigned text messages between Cefalo and Barry followed over the next few days, which were briefer and less formal, requesting updates on the status of the executed Final LOI.

These communications are evidence that each of the parties opted into electronic means to conduct their transaction. Typing their names at the end of certain messages containing material terms, but declining to do so for more informal discussions, is indicative that the parties chose to be bound by those signed communications. In the context of these exchanges between the parties, the court infers that the text message sent by Barry was intended to be authenticated by his deliberate choice to type his name at the conclusion of his text message. Unlike subsequent text messages of a more informal nature, where Barry did not choose to use a signature, the use of his signature at the end of the February 2nd text message is evidence of his intent to have the writing be legally binding.

Finally, Two Electronics contends that even if the text message and emails are sufficient to satisfy the Statute of Frauds, it argues that no contract ever arose because Two Electronics did not accept the offer in the manner specified by the Final LOI by February 4th. The Final LOI required a signature by Two Electronics first to constitute an acceptance of SJH's offer to purchase. Since Piccione never signed the Final LOI at any time, Two Electronics asserts that the offer was deemed rejected and no contract for the sale of the Subject Property was ever formed.

Two Electronics is correct that an offeror has full power over its offer and the mode of acceptance of that offer. *Host v. Gray*, 21 LCR 156, 158 (2013), citing *Lawrence v. Rosenberg*, 238 Mass. 138, 141 (1921). If the acceptance varies from the terms of the offer, there is no binding contract. *David J. Tierney, Jr., Inc. v. T. Wellington Carpets, Inc.*, 8 Mass. App. Ct. 237, 240-241 (1979). An "acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms." *Mass. Housing Finance Agency v. Whitney House Assoc.*, 37 Mass. App. Ct. 238, 241 (1994), quoting Restatement (Second) of Contracts § 61; *Moss v. Old Colony Trust Co.*, 246

Mass. 139, 148 (1923) (“It is elementary law that an offer must be accepted in the terms in which it is made in order to become a binding contract, and that a conditional acceptance or one that varies from the offer in any substantial respect is in effect a rejection and is the equivalent of a new proposition.”). When an offeree “accepts” the offer, but adds to such acceptance certain conditions not contained in the original offer, it has made a counteroffer requiring acceptance by the original offeror in order to create a binding contract. See Restatement (Second) of Contracts § 59; *Tull v. Mister Donut Dev. Corp.*, 7 Mass. App. Ct. 626, 631 (1979) (documents revised “in more than trifling detail” stood as a counteroffer); *Peretz v. Watson*, 3 Mass. App. Ct. 727, 728 (1975); *Doctor Franklin Perkins School v. King Philip Regional School Dist.*, No. 0602089A, 2009 WL 2506273, at * 4 (Mass. Super. June 26, 2009) (“If a party purports to accept an offer but the acceptance varies an essential and material term of the offer, then there is no binding agreement or shared intention between the parties. Rather, the acceptance was not more than a counter offer.”) (internal citations omitted). To establish that a contract was formed on the basis of a counter-offer, a party must establish that the offeree's counterproposal was accepted or assented to by the original offeror. *Ritchie v. Shay*, No. 628, 1991 WL 51307, at *2 (Mass. App. Div. March 18, 1991) (finding that the purported acceptance of a purchase and sale agreement that differed from the terms of the offer operated “as a rejection of the original offer and a counteroffer, which if not accepted by the original offeror, does not ripen into a completed contract.”).

SJH's offer required a particular method of acceptance—a signature by Two Electronics and the return of the signed offer by February 4th. Barry's text message requiring SJH's signature prior to signing was a material change in the contract terms that constituted a counteroffer. The counteroffer had the same terms as the Final LOI, except that it needed to be

accepted by SJH first. Cefalo spoke to Barry by telephone on February 3rd, the same day the text message was sent, confirming that SJH would sign the Final LOI first. McDonald did sign the Final LOI first. By 4:25PM the same day, Cefalo had the executed LOI and the deposit check ready for delivery and to be signed by Piccione. This act constituted SJH's acceptance of the counteroffer, at which point Two Electronics was bound.

It follows that Two Electronics has not met its burden on the Special Motion to Dismiss. SJH's claims are not frivolous or devoid of any factual support or basis in law within the meaning of G.L. c. 184, § 15(c). The Final LOI contains all the specific terms of a purchase and sale agreement. The text message from Barry to Cefalo, together with Cefalo's email of the Final LOI, read in the light most favorable to SJH as the nonmoving party, gives rise to the kind of writing which satisfies the Statute of Frauds.

Conclusion

For the foregoing reasons, Two Electronics' Special Motion to Dismiss is DENIED. The Court's March 23, 2016 Order that "defendant Two Electronics LLC shall not convey or otherwise encumber the subject property at 2 Electronics Drive, Danvers, Massachusetts" is extended until further order of the Court or agreement of the parties. A status conference is set down for April 29, 2016 at 10:15 am.

 SO ORDERED

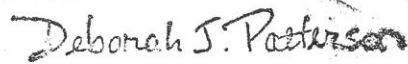
By the Court (Foster, J.)

Attest:

Deborah J. Patterson, Recorder

A TRUE COPY

ATTEST:



RECORDER

Dated: April 14, 2016

