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State E-Discovery

Electronic Signatures, Inferences And Access to a Decedent's Emails

By **Mark A. Berman**

SHUTTERSTOCK

When does an electronically transmitted document contain an "electronic signature" for purposes of New York's *Electronic Signatures and Records Act*? The answer is not that straight forward as demonstrated in the recent Third Department decision in *Solartech Renewables v. Vitti*, 2017 N.Y. App. Div. LEXIS 8635, 2017 NY Slip Op 08574 (Dec. 7, 2017). Can an email be used as "documentary evidence" under CPLR Rule 3211(a)(1) against the person who received it who does not possess it or recall receiving the email? Under certain circumstances, the answer is "yes" as demonstrated in *Lisi v. Lowenstein Sandler*, 2017 N.Y. Misc. LEXIS 4426, 2017 NY Slip Op 32411(U) (Sup. Ct. N.Y. Co. Nov. 16, 2017). Finally, discussed below are two cases that construe the recently enacted Article 13-A of the Estates, Powers and Trusts Law which provides for a custodian of electronic records, such Google, to disclose to the personal representative of a decedent's estate a catalogue of electronic communications sent or received by a deceased user.

Electronic Signatures? In *Solartech,* defendant's motion for summary judgment was affirmed on appeal where its proposed side letter was not transformed into an "electronic record" by attaching it to an email, then reverted back to a "non-electronic record" when printed and signed, and thereafter re-transformed into an "electronic record" when the signed copy is scanned and attached to a new email. In the end, where the defendant had typed her name to the emailed proposed side letter, but did not sign it and rather typed her name, the court found that it did not constitute a signature for statute of frauds purposes.

The court noted that the Legislature provided in the

MARK A. BERMAN, *a partner at commercial litigation firm Ganfer & Shore, chairs the Committee on Technology and the Legal Profession and was the immediate past chair of the Commercial and Federal Litigation Section of the New York State Bar Association.*

Electronic Signatures and Records Act (ESRA) that, "unless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand." State Technology Law §304(2). The court noted that an "electronic signature" is defined as "an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record." Id. at §302(3). Further, an "'[e]lectronic record' shall mean information, evidencing any act, transaction occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities." Id. at §302(2). The court then concluded that:

> [u]nder ESRA, plaintiff would have a viable argument that defendant signed the emails she sent, as they are electronic records and she typed her name at the end of each. As confirmed at oral argument, however, plaintiff does not contend that the emails constituted signed documents forming the contract, but that defendant's typed name at the end of the proposed side letter constituted her signature. That document was separately typed and attached to emails for transmission. Although emails are electronic records, not every attachment to an email qualifies as an electronic record under ESRA.

However, the court noted that where an "ordinary typed documents that are scanned and attached to emails," a party could "easily affix a handwritten signature to those documents." Thus, where the defendant provided a "signature line for plaintiff on the proposed side letter and requested that plaintiff's representative sign it to acknowledge acceptance of her conditions," the record demonstrated that "plaintiff's representative must have printed a copy of the proposed side letter and endorsed it with his handwritten signature, then scanned and emailed the signed copy to defendant." The court thus found that such "act did not transform [the side letter] into an electronic record simply by virtue of its attachment to an electronic record (i.e., defendant's email), revert to a non-electronic record when printed and signed, then transform into an electronic record again when the signed copy was scanned and attached to a new email." Accordingly, even though that letter was attached to an email, the court rejected plaintiff's argument that "defendant's typed name at the bottom of the letter constituted a signature."

In the end, where the defendant had typed her name to the emailed proposed side letter, but did not sign it and rather typed her name, the court found that it did not constitute a signature for statute of frauds purposes.

Inferences Drawn From Emails Under CPLR Rule 3211(A)(1). In *Lisi,* the trial court on a motion to dismiss based on "documentary evidence," predicated upon CPLR Rule 3211(a)(1), noted that where the recipient of the email did not deny that he received it, but rather claimed no record or recollection of it, and where the email had been transmitted to an email address that plaintiff had regularly used to correspond with the sender and his attorneys, plaintiff's assertion that the email was not entitled to an assumption of its truth or the benefit of every favorable inference on a Rule 3211(a) motion, was rejected, and the court did "not require an inference that the email was not in fact received, and stated that the "most reasonable inference" to be drawn from plaintiff's asserted inability to locate the email in his records was that the email was deleted.

Obtaining Email Contacts and Calendar Entries of a Decedent. In *Estate of White*, 2017 NYLJ LEXIS 2780 (Surr. Ct. Suffolk Co. Oct. 3, 2017), petitioner, the duly appointed fiduciary of the estate of a decedent, sought an order granting him access to a Google email account of the decedent, to which Google has refused to grant access. Petitioner asserted that decedent may have assets that can only be identified and administered after gaining access to that email account. The court noted that it appeared that the "decedent may have owned a business at the time of his death and that an assessment of this business, including its assets and liabilities, cannot be completed without obtaining access to the information contained in this email account." EPTL Article 13-A, which addresses access to digital assets, is applicable to an administrator acting for a decedent and a custodian of the user who resides in New York at the date of death. The court noted that "[a]lthough it appears that Google, Inc. provides an "online tool" to grant access to "'trusted contacts' after a period of inactivity, it does not appear that the decedent had activated this feature; nor did decedent address disclosure of his digital assets via a will, trust or other record." Petitioner asserted that there is no state or federal law, including, but not limited to, the Stored Communications Act that prohibits disclosure of the contents stored in decedent's email account.

Although the application was unopposed, the court expressed concern "that unfettered access to a decedent's digital assets may result in an unanticipated intrusion into the personal affairs of the decedent or disclosure of sensitive or confidential data, for example, information unrelated to his business or corporation. The court balanced the fiduciary's duty to properly administer this estate, while avoiding the possibility of unintended consequences." As such, the court granted the relief "solely to the extent that Google, Inc. shall disclose the contacts information stored and associated with the email account stated above" and ruled that, if greater access is warranted, application may be made to expand the authority of petitioner.

In *Matter of Serrano*, 56 Misc. 3d 497, 54 N.Y.S.3d 56 (Surr. Ct. N.Y. Co. June 14, 2017), petitioner requested authority to access his deceased spouse's Google email, contacts and calendar information in order to "be able to inform friends of his passing" and "close any unfinished business etc." Petitioner provided the court with an email from Google, responding to his request for this information, in which Google requested a court order specifying that, among other things, "disclosure of the content [of the requested electronic information] would not violate any applicable laws, including but not limited to the Electronic Communications Privacy Act and any state equivalent." The court held that to the extent information about a user's contacts is "information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person," it is considered a catalogue of electronic communication that may be disclosed. The court held that inasmuch as there is no transfer of information between two or more parties when a calendar or contact entry is made, a user's calendar or contact is not a "communication," the disclosure of which by the custodian is prohibited by the Stored Communications Act, it must be disclosed to a personal representative by the custodian of such record. However, authority to request that Google disclose the *contents* of the decedent's email communication was denied by the court without prejudice to an application by the voluntary administrator, on notice to Google, establishing that disclosure of that electronic information is reasonably necessary for the administration of the estate.

GANFER & SHORE, LLP
ATTORNEYS AT LAW

360 Lexington Avenue
New York, New York 10017
212.922.9250
mberman@ganfershore.com