COURT OFAPPEALS, STATE OF COLORADO Colorado Judicial Building 2 East 14th Avenue Denver, Colorado 80203 **DISTRICT COURT, SAGUACHE COUNTY, COLORADO** **Court Address:** PO Box 197, 501 4th Street Saguache, CO 81149 The Honorable Martin Gonzales Case No: 2015CV30020	DATE FILED: October 10, 2016 9:48 AM FILING ID: 1779719F80FEF CASE NUMBER: 2016CA1035
CHAD R. ROBISON, sole trustee, for his successors in trust, under the **CHAD R. ROBISON** living trust, dated July 22, 2013, and any amendments thereto, Plaintiff-Appellant v. **CIRCLE T LAND COMPANY, LLLP; TONSO FARMS;** and **STEVEN R. TONSO** Defendants-Appellees	▲COURT USE ONLY▲
Attorney for Defendant –Appellees Steven Tonso Michael R. Waters Waters, Kubik & Cassens, LLC. 707 South Tejon, Ste. 200 Colorado Springs, CO 80903 Phone Number: (719) 633-6303 FAX Number: (719) 577-4887 Email: mike@jwglawfirm.com Atty. Reg: #10745	Case No.: 2016 CA 1035
ANSWER BRIEF	

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirement of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

1. The brief complies with C.A.R. 28(g) as it contains 3,341 words and does not exceed 30 pages.

2. The brief complies C.A.R. 28(k).

It contains (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

WATERS, KUBIK & CASSENS, LLC.

Michael R. Waters, #10745

TABLE OF AUTHORITIES

CASES

STATUTES

I. STATEMENT OF THE CASE

A. Nature of Case and Proceedings Below

The Appellant's description of the nature of the case and the proceedings in the district court is, for the most part, accurate with the exception of two statements. Appellee expresses a disagreement as to the characterization that the parties had come to an agreement on all of the relevant and essential terms of the transaction. In addition, all references to the parties as including the trust may not be accurate, because Chad Robison communicated as himself and did not identify a trust until after the June 29, 2015 email that was argued as when the "contract" was consummated.

B. Statement of Facts

The Appellant's statement of relevant facts is accurately presented.

II. SUMMARY OF THE ARGUMENT

The email chain and text messages do not form a contract and they do not satisfy the statute of frauds because they are not subscribed by the party by whom the lease or sale is to be made. Steve Tonso and Chad Robison never intended their email exchanges to form a written contract and never intended an email to be a signature with the intent to sign a record. This is why Steve Tonso and Chad Robison have both made reference to and contemplated a signed written contract to

be prepared by their attorneys when there was a final agreement. They never got to that point.

III. ARGUMENT

A. SIGNATURES

Standard of Review

An appellate court reviews a summary judgment *de novo*, pursuant to *Brodeur v. American Home Assurance Co.*, 169 P.3d 139, 146 (Colo. 2007).

Argument

The plaintiff argues the email and text message exchange is the contract in its entirety and covers all terms and conditions for the sale of farmland, warehouses, farm equipment, seed, etc. However, there is no reference within the email correspondence in which the parties agree to use electronic signatures. In fact, on June 29, 2015 Chad Robison's email expresses agreement with Steve Tonso's June 29, 2015 email where Tonso states:

> *"Let's keep kicking the can down the road. Is it time to put together some sort of a contract? I meet with my attorney on 7/22. Let me know where you are on all of this. Sounds like we are getting close."* (R. p. 53-60.)

Chad Robison's response was: *"Ya I think we are, as my dad say, 'put pen to paper"*. (R. p. 53-60.) With this message Chad Robison, in his affidavit, said he had a final agreement.

Chad Robison's acknowledgment of a traditional signature, a wet ink signature, is contrary to his argument for the use of electronic signatures. His assent to putting together some sort of contract with the assistance of an attorney is also contrary to his position.

The email conversation began on June 16, 2015 with Steve Tonso to Chad Robison, not the trust, with:

> *"To follow are the preliminary proposed terms as I understand them....Sales contract will be split into three parts or sections....Closing will be set for as soon after January 1st as is reasonably possible...I am sure that it won't look like this or be this simple when the accountants and lawyers get done with it, but it is a start! I hope this all agrees with what you were thinking and the direction you want to go. Like I said, it is a start. Let's get'er done! This basic formula looks good to me... With best regards, Steve Tonso"*

When the court examines all of the emails and text messages it will not find a single reference to an agreement or an expression of intent by either party to use electronic signatures. (R. p. 53-60.) The Uniform Electronic Transaction Act allows an electronic sound, symbol or process, but only when it is executed or adopted by a person with the intent to sign the record. In construing statutory provisions, we should give effect to the intent of the legislature. *PDM Molding Inc. v. Stanberg*, 908 P2d. 542, 545 (Colo. 1995). We must look first to the statutory language itself; giving words and phrases there commonly accepted meaning. Id. Where the language of a statute is plain and the meaning is clear, we need not resort to interpretive rules of statutory construction, but must apply the statute as written. *Univex International, Inc. and CPC, Inc. v. Oryx Credit Alliance, Inc.*, 914

P. 2d 1355 (Colo. 1996). The electronic signature definition requires intent to sign the record. In this case, not only did Steve Tonso contemplate a signed written contract, Chad Robison contemplated the same thing, "*putting pen to paper*".

In the official comment section of the Electronic Signature Act, C.R.S. § 24 – 71.1 – 101 it is noted: "It is important to understand that the purpose of the UETA is to remove barriers to electronic commerce by validating and effectuating electronic records and signatures. It is NOT a general contracting statute – the substantive rules of contracts remain unaffected by UETA. Nor is it a digital signature statute." In the official comment section of the Electronic Signature Act, C.R.S. § 24 – 71.3 – 102 Definitions. 7. "Electronic signature." One may use a digital signature with the requisite intention, or one may use the private key solely as an access device with no intention to sign, or otherwise accomplish a legally binding act. In any case the critical element is the intention to execute or adopt the sound or symbol or process for the purpose of signing the related record." (Also within comment 7.) "The definition requires that the signer execute or adopt the sound, symbol, or process with the intent to sign the record. The act of applying a sound, symbol or process to an electronic record could have different meanings and effects. The consequences of the act and the effect of the act as a signature are determined under other applicable law. However, the essential attribute of a signature involves applying a sound, symbol or process with the intent to do a

legally significant act. It is that intention that is understood in the law as a part of the word "sign", without the need for a definition."

With a clearly defined statute such as C.R.S. § 24 – 71.1 – 101 seq. Along with the numerous official comments there is no need to resort to other states laws on the subject. Steve Tonso never intended his emails to be used as a signature to a contract for the sale of his farm.

Even when the context, surrounding circumstances and conduct of the negotiations are considered, from start to finish both Steve Tonso and Chad Robison had a traditional written contract in mind that would be drafted by an attorney and signed by the parties.

Chad Robison argues when a person places his name at the end of an email it is intended as a signature to a record. If that is the case, then all of the names listed by Chad Robison in his emails are signatures and all persons named should be parties to the purchase. These other people, as they appear in the emails, begin on page 6: "*Chad, Dusty Reyclyn, Paecyn, Sawyer and everyone at Robison Farms.*" On page 2: "*Chad R Robison, sole trustee, for his successors in trust, under the Chad R Robison living trusts, dated July 22, 2013, and any amendments thereto.*" On page 2: *"Chad Robison, Robison farms, Cornerstone bank"*. (R. p. 53-60.) It should also be noted that the plaintiff, as Chad Robison, living trust, does not enter the email chain of correspondence until the second to the last email that was sent

on July 6, 2015. This is contrary to the assertion that Chad Robison was acting throughout as a trustee of Chad R. Robison Trust. It also conflicts with the notion that the trust has a contract with Steve Tonso because the affidavit of Chad Robison represents that a contract was effective, as of June 29, 2015, when the emails refer only to Chad Robison.

B. SUFFICIANCY OF CONTRACT

Standard of Review

An appellate court reviews a summary judgment *de novo*, pursuant to *Brodeur v. American Home Assurance Co.,* 169 P.3d 139, 146 (Colo.2007).

Argument

At the top of each email there is a reference to Proposed Sale Terms. On the subject line of each email sent by Chad Robison he represents: *"Subject: Re: Proposed Sale Terms"* A contract is formed when one party makes an offer and the other party accepts it and the agreement is supported by consideration. *Marquardt v. Perry*, 200 P. 3d 1126, 1129 (Colo. App. 2008). Even where there is unequivocal language suggesting that an offer is intended, such language cannot be taken in isolation from other, qualifying language in the document. *Bourque v. FDIC,* P. 3d 704, 709 (1st Circuit 1994). Indeed, where both unqualified and qualified statements exist the qualification is likely to control. Id. S*umerel v. Goodyear Tire & Rubber Company*, 230 2P. 3d 128 (Colo. App. Div. 5 2009). Each email sent by

Chad Robison contained the qualification 'proposed sale term' and none of them contained reference to a final agreement. If we are going to view the emails as contract language we need to consider all of the language used. Where possible the intent of the parties is to be determined from the language of the written contract itself. *USI Props East, Inc. v. Simpson*, 938 P. 2d 173 (Colo. 1997).

In addition to the qualifying caption used by Chad Robison both parties used qualitative language in their emails. To further illustrate the absence of a final agreement the first email begins on June 10, 2015, it is from Steve Tonso to Chad Robison. This email begins with a reference to *"preliminary proposed terms"*. It makes reference to a contract to be completed in the future with help of accountants and lawyers. This first email ends with a reference to *"it's a start"*. The responsive email from Chad Robison is dated June 23, 2015. There is a discussion about the sale price and carrying a loan with added topics of the acquisition of life insurance and what the buyer's bank requires. This email concludes on page 4 with a reference to *"probably not covering hundreds of other aspects"*.

On the next day, June 24, 2015, Steve Tonso raises an issue of not enough collateral and asked two questions. On the same day, Chad Robison's email subject line refers to *"proposed sale terms"*. Later on that same day, Steve Tonso replies by stating everything looks good and then expresses a concern about the collateral.

He then makes reference to, *"let's get her done"* Two days later on, June 26, 2015, Chad Robison emails Steve Tonso and informs him that he spoke to the bank regarding the collateral and offers Greg, his banker, to explain. Chad Robison and Steve Tonso are still negotiating.

On June 29, 2015 Steve Tonso emails Chad Robison and discusses the collateral issue. Steve Tonso then concludes: *"everything is still good to go. Let's keep kicking the can down the road. Is it time to put together some sort of a contract? I meet with my attorney on 7/22".* He concludes the email by stating: *"sounds like we are getting close."* On the same day, Chad Robison emails Steve Tonso : *"Ya I think we are, as my dad says "put pen to paper. I think we got all major things covered."*

On July 6, 2015, under the Subject Re: "Proposed Sale Terms" Chad Robison sends an email that refers to:

> *"CHAD R. ROBISON, sole trustee, for his successors in trust, under the Chad R Robison living trust, dated July 22, 2013 in any amendments thereto. 3 Northeast Cove Johnson, Lake, Nebraska 68937".*

The email contained no other content. This is the first time Chad Robison identifies a trust. On July 13, 2015, Steve Tonso emails Chad Robison and informs him of a significant change and the need to stop all actions. Chad Robison's response comes on the next day, under the familiar heading *'proposed sale terms'*

and makes reference to a binding agreement based on *"emails, phone conversations and four personal visits of handshakes"*.

When correspondence is used to create a contract the Colorado Supreme Court has noted that courts scrutinize closely correspondence and telegrams because in many instances such letters are intended merely as preliminary negotiation. *Pierce v. Marland Oil Company,* 278 P. 804, 806 (Colo. 1929). In Pierce the court noted that the essential question is: Did the parties mean a contract by their correspondence or were they only settling the terms of an agreement into which they formally propose to enter after all its particulars had been adjusted and by which alone they intended to be bound? *Gardner v. City of Inglewood*, 282 P. 2d 1084 (Colo. 1955). A contract must be definite in its terms to be enforceable to have an enforceable contract in must appear that further negotiations are not required to work out important and essential terms. *American Mining Company v. Himrod-Kimball Mines*, 230 P. 2d 804 (Colo. 1951). In *Nations Enterprises, Inc. v. Process Equipment Company*, 579 P. 2d 655 (Colo. App. 1978), it was held that a letter proposing to supply certain goods but recognizing further negotiations between the parties were necessary did not constitute an offer capable of acceptance. Instead, it constituted preliminary negotiations soliciting an offer from the opposing party. This principle was used in *Sumerel v. Goodyear Tire and Rubber Company*, 232 P. 3d 128 (Colo. App. Div. 5 2009), where the court found

that Goodyear's emails and attached erroneous charts did not constitute an offer that was properly capable of acceptance. Accordingly, it held for several reasons that there was no agreement that could be enforced. Again, the use of qualifying language showed no definitive offer. *Citywide Bank v. Herman,* 970 F Supp. 960 (Colo. 1997).

C. STANDING

Standard of Review

An appellate court reviews a summary judgment *de novo*, pursuant to *Brodeur v. American Home Assurance Co.,* 169 P.3d 139, 146 (Colo. 2007).

Argument

The trust argued, an agreement had been reached by June 29, 2015 through the email exchange with the closing reference from Chad Robison to *"put pen to paper"*. (R. p. 60). Chad Robison signed as an individual in his affidavit and stated he did not consider there to be any issues left to address. There is no reference to Chad Robison acting as a trustee in the emails, yet that is who the Plaintiff is, a trust. The first reference to the trust comes in an email after June 29, 2015. The first reference to a trust occurs on July 6, 2015. If an agreement was reached before a reference to the living trust enters the emails the Plaintiff has no standing. A party has standing to bring a claim if the party incurred an injury to a legally protected interest as contemplated by regulatory, statutory or constitutional

provisions. Standing is a threshold jurisdictional question. *Ainscough v. Owens*, 90 P. 3d 851, 855 (Colo. 2004). Again, Chad Robison's affidavit stated the agreement was set forth in emails and they covered every important topic. The identity of the buyer is an important topic. The Plaintiff – Appellant, a trust, named in this action, has no standing.

D. NO FINAL CONTRACT

Standard of Review

An appellate court reviews a summary judgment *de novo*, pursuant to *Brodeur v. American Home Assurance Company,* 169 P.3d 139, 146 (Colo. 2007).

Argument

When the Plaintiff, as a trust cites *Micheli v. Taylor*, 159 P. 2d 912 (Colo. 1945), it identifies four elements that must be contained in the memorandum, which must be shown on its face or by reference to other writings. It is important to note, the Plaintiff has already represented the entire contract is contained within emails. The first element that must be contained in the memorandum 'is the names of the parties, vendor and vendee'. Because the Plaintiff acknowledges the contract was final as of June 29, 2015, the vendee is Chad Robison and possibly all the other names who were referenced in the emails. The name of the party not mentioned until after the agreement is the Plaintiff, the trust. There is no reference to other writings to explain the trust reference. The names and intention of the

contracting parties cannot be determined with reasonable certainty from the language of the instrument, therefore the first element is missing.

Micheli v. Taylor, supra. also comments upon the statute of frauds and it said, to be subject to specific performance a contract must be complete, certain and definite in its material terms. The emails exchanged do not refer to a complete, certain and definite agreement. Instead the email exchanges employ terms such as:

> *"kicking the can down the road, some sort of written contract, meeting with a lawyer later in the month, it sounds like we are getting close, let's put pen to paper and I think we got all the major things covered."*

An agreement to agree in the future is generally unenforceable because the court cannot force parties to come to an agreement. *Di Francesco v. Particle Interconnect Corporation*, 309 P. 3d 1243 (Colo. App. 2001). The general rule is that when parties to a contract ascribe different meanings to a material term of the contract, the parties have not manifested mutual assent. No meeting of the minds has occurred, and there is no valid contract. *Carpenter v. Hill*, 131 Colo. 553, 283 P. 2d 963 (Colo. 1955). However, an exception to the general rule is observed when the meaning either party gives to the documents language was the only reasonable meaning under the circumstances. In such cases, both parties are bound to the reasonable meaning of the contract's terms. *Sunshine v. M. R. Mansfield Realty, Inc.*, 570 P. 2d 847 (Colo. 1978). None of the references from the emails could reasonably be considered complete, certain and definite. The emails cover

many topics, some specific, some vague. Getting close to a final written contract is not enough. Signing a final written contract is the only way to satisfy the statute of frauds. There is a reason why the statute of frauds exists.

IV. CONCLUSION

Once a moving party makes a convincing showing that there are no genuine issues of material fact, then the opposing party must set forth specific facts demonstrating that there is a genuine issue for trial. The Plaintiff had not done this. The Plaintiff's presentation of a contradictory affidavit did not present a genuine issue of material fact. "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be a *genuine issue* of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 247 – 48, 106 S. Ct. 2505, 91 L. 2d 202 (Colo. 1986); *Roberts v. American Family Mutual Insurance Company*, 144 P. 3d 546, 548 (Colo. 2006). In addition, the issue in dispute must be "genuine." In this case the Plaintiff failed to present a genuine issue of material fact and by doing so failed to show compliance with the statute of frauds.

Under the statute of frauds, any contract for the sale of land or interests therein must be expressed in a writing signed by the selling or granting party. C.R.S. § 38 – 10 – 108. Such a contract must identify the parties to the transaction,

the terms and conditions, a description of the property and the consideration. *Schreck v. T & C Sanderson Farms, Inc.*, 37 P. 3d 510, 513 (Colo. App. 2001). The trial court appropriately found no contract and the collection of emails and text messages did not comply with the statute of frauds.

RESPECTFULLY SUBMITTED this 10th day of October, 2016.

WATERS, KUBIK & CASSENS, LLC.

Michael R. Waters, #10745

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via ICCES, this 10th day of October, 2016, addressed to the following:

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