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Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203 District Court, Saguache County 2015 CV30020 Plaintiff-Appellant: 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, v. Defendants-Appellees: CIRCLE T LAND COMPANY, LLLP; TONSO FARMS; and STEVEN R. TONSO	▲ **COURT USE ONLY** ▲
Attorney for Plaintiff: Name: ERICH SCHWIESOW, PC By: Erich Schwiesow Address: 603 3rd Street P.O. Box 1974 Alamosa, Colorado 81101 Phone Number: (719) 589-6625 E-Mail: erich@erichschwiesowpc.com Atty. Reg.#: 23385	Case Number: 2016 CA 1035 Division Courtroom
REPLY BRIEF	

CERTIFICATE OF COMPLIANCE

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

The brief complies with the applicable word limits set forth in C.A.R. 28(g).

It contains 2,878 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

☒For the party raising the issue:

It contains under a separate heading (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 (R._____, p.___), not to an entire document, where the issue was raised and ruled on.

☐For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that the brief may be stricken if it does not comply with any of the requirements of C.A.R. 28 or C.A.R. 32

s/ *Erich Schwiesow*

Signature of attorney or party

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INTRODUCTION

Both parties, and the trial court, agree that the Uniform Electronic Transactions Act is central to this case. That act sets forth the circumstances under which electronic records will serve the same purpose as traditional paper records under the law. However, the dispute in this case does not center on the Uniform Electronic Transactions Act, but rather on traditional notions of contract formation, specifically contract formation where further formal documentation is contemplated. The concepts applicable to resolution of the central question in this case long predate the Uniform Act, and indeed long predate electronic communication. This Reply focuses on that area of dispute, and then briefly addresses the standing argument raised in the Answer Brief of Defendants.

1. The Signatures on the Emails Constitute Electronic Signatures

Although Defendants argue the point in their Answer Brief, it is abundantly clear that the emails constituting the written memorandum signed by the seller required by the statute of frauds, C.R.S. 38-10-108, were signed by Steve Tonso on behalf of the Defendants, and that the signature constitutes an "electronic signature" under the terms of the Uniform Electronic Transactions Act, C.R.S. § 24-71.3-102(8). Defendants echo the trial court, in arguing that "Steve Tonso

never intended his emails to be used as a signature to a contract for the sale of his farm." Answer Brief at 5. *See also* page 3 of the Order, R. 102. That issue, however, does not go to whether the emails were signed, but rather to the effect of such signed emails. As noted in Official Comment 7 to C.R.S. § 24-71.3-102, "The act of applying a sound, symbol or process to an electronic record could have differing meanings and effects. The consequence of the act and the effect of the act as a signature are determined under other applicable law." Thus, as far as the Uniform Electronic Transactions Act is concerned, the emails contain an electronic signature, because they were signed by Steve Tonso with the intent to sign them. That he may not have intended his signature on them to constitute entry into a binding contract is determined not under the Uniform Electronic Transactions Act, but under general principals of contract law. C.R.S. § 24-71.3-109(2) ("The effect of an electronic record or electronic signature attributed to a person under subsection (1) of this section is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law").

Part of Defendants' argument that the signed emails do not constitute electronic signatures is the hypothetical raised on page 5 of the Answer Brief that if a name signed at the end of an email constitutes a signature, then there are many

names signed at the ends of emails of persons not parties to this case (for example, "Chad, Dusty, Reyclyn, Paecyn, Sawyer and everyone at Robison Farms") who should be made parties. Therefore, argue Defendants, such a position is absurd. However, a list of names at the end of an email explicitly does not constitute signatures by those persons under the Act. The Act requires that the electronic signature is attributable to a person only if it was the act of the person. C.R.S. § 24-71.3-109(1). There is no suggestion that the string of names appended to Chad Robison's email were the acts of each of those persons. The record is clear, however, that each time Steve Tonso signed his name in the chain of emails, either as "Steve Tonso" or as "Steve," that it was his act doing so. R. 53-60. *See also* Tonso's Affidavit, R. 87, wherein he acknowledges placing his name at the end of the email communications, but states that it was not with the intent to enter into a contract.

It is clear that the email chain constitutes a signed memorandum under the terms of the Uniform Electronic Transactions Act. Whether that memorandum is sufficient under the statute of frauds or other law to constitute a binding contract is for other law to determine.

2. The Parties Agreed to Conduct Their Transaction Electronically, or That is at Least a Question of Fact for the Trier of Fact.

The Answer Brief argues that nowhere in the record is there a written agreement to conduct the transaction electronically. See Answer Brief at 3. However, the Uniform Act recognizes that frequently there will be no explicit agreement to conduct the transaction electronically. As set forth in official comments 3 and 4 to C.R.S.. § 24-71.3-105,

> If this Act is to serve to facilitate electronic transactions, it must be applicable under circumstances not rising to a full fledged contract to use electronics. While absolute certainty can be accomplished by obtaining an explicit contract before relying on electronic transactions, such an explicit contract should not be necessary before one may feel safe in conducting transactions electronically. Indeed, such a requirement would itself be an unreasonable barrier to electronic commerce, at odds with the fundamental purpose of this Act. Accordingly, the requisite agreement, express or implied, must be determined from all available circumstances and evidence . . . In this context it is essential that the parties' actions and words be broadly construed in determining whether the requisite agreement exists. Accordingly, the Act expressly provides that the party's agreement is to be found from all circumstances, including the parties' conduct.

As noted in the Opening Brief, the circumstances surrounding the transaction can give rise to a finding that the parties intended to conduct the transaction electronically even where the parties expressly contemplate preparation of a formal agreement. *See Waddle v. Elrod*, 367 S.W.3d 217, 227-28 (Tenn. 2012), and *Fecteau Benefits Group, Inc. v. Knox*, 890 N.E. 2d 138, 145 (Mass App.

Ct. 2008), where just such an agreement was found. In this case, the parties conducted extensive negotiations electronically, and in fact agreed upon all material terms of the contract through their email communication. Their actions consist of conducting the transaction electronically.

Finding an agreement to conduct transactions electronically in the face of express contemplation of a formal written agreement is analytically the same approach as finding that the parties to an agreement may be bound by letters, telegrams, or other writings even when they expressly contemplate a formalized agreement. Colorado law makes clear that, even when parties initially agree in writing not to be bound in contract until they sign an asset purchase agreement, those parties may later bind themselves without signing a formal agreement. *See James H. Moore & Associates Realty v. Arrowhead at Vail*, 892 P.2d 367, 372 (Colo.App.1994) ("[E]ven if the parties agree to formalize their agreement by a writing, the determination whether they became bound by their agreement before they execute such a writing is dependent upon their intent"). The touchstone inquiry in these situations is whether the parties manifested an intent to be bound in contract. Therefore, even where a contemplation of a subsequent formal writing exists, the ultimate question of whether the parties formed a contract remains "a question of fact to be determined by all of the surrounding circumstances."

Southern Colorado MRI, Ltd. v. Med-Alliance, Inc., 166 F.3d 1094, 1098-99 (10th Cir. 1999)

In *Coulter v. Anderson*, 357 P.2d 76, 80-81 (Colo.1960), the court addressed the purchase of a dude ranch, where the parties had entered into a written agreement that they acknowledged did not address all of the matters to be addressed, and intended a subsequent writing to clear up those issues. The court found that an agreement indeed existed despite the lack of such subsequent writing. The agreement as it existed left a number of manners unaddressed, but the court found that there was little dispute as to those matters: The *Coulter* court cited to 165 A.L.R. 756:

> Many later cases support the general rule (stated in the earlier annotation) that the mere fact that parties to an oral or informal agreement intend that the same shall be reduced to a written or more formal contract will not necessarily prevent present, binding obligations from arising, notwithstanding the contemplated written or formal contract is never drawn up and executed, if the agreement is finally assented to by the parties and covers fully and definitely the terms of the contract; or, as some of the cases, in effect, state the rule, the mere intention to reduce an oral or informal agreement to writing, or to a more formal writing, is not of itself sufficient to show that the parties intended that until such formal writing was executed the parol or informal contract should be without binding force.

357 P.2d at 80. In this case, as argued in the Opening Brief, the parties had reached agreement on every essential term of the contract as required by *Micheli v.*

Taylor, 159 P.2d 912, 913-14 (Colo. 1945). Defendants argue that the agreement was not complete and definite, stating "none of the references from the emails could reasonably be considered complete, certain and definite." Answer Brief at 12. But the only material term Defendants point to as undetermined is the name of the purchaser. As discussed below, this is a red herring, and the name of the parties was clear in their writings. The other three elements required by *Micheli* to be set forth all have been, as argued in the Opening Brief. These include 1) the terms and conditions of the contract (purchase of the Circle T ranching operation for $9 Million, with $6.5 Million down and the balance carried by seller with 12 annual payments of $225 beginning March 1, 2016, buyer to secure payment with a $2.5 Million life insurance policy, and seller to take back a mortgage interest in the storage units and seconds on the farm ground; 2) The interest or property affected (11 specifically identified quarter sections of land and 90 acres of waste land; 3) The consideration (as noted, $9 Million, with $6.5 Million down and the balance carried by the owner at $225,000 per year).

As noted in the Opening Brief, and argued above, even where a specific agreement exists stating there are no agreements unless contained in a formal written contract, the parties can be determined to have come to an agreement. Here, it was inappropriate for the Court to grant summary judgment on that issue in

light of the email exchange contained in the record in this case. The nonmoving party is entitled to all favorable inferences reasonably drawn from the undisputed facts, and all doubts must be resolved against the moving party. *Brodeur v. Am. Home Assurance Co.*, 169 P.3d 139, 146 (Colo. 2007).

3. The Argument about the Identity of the Buyer is a Red Herring

Defendants argue that the first element of *Micheli*, the names of the parties, is not met, because between the June 29, 2015 emails where the parties had come to an agreement (R. 55-54 – reading backwards) and the July 13, 2015 email (R. 53) in which Steve Tonso notifies Chad Robison that the deal is off because he has received a substantially higher offer, Robison sent an email stating "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." R. 54 (capitalizations in original). This is not a change in terms or party, it is just a clarification of the capacity in which Chad Robison was acting as purchaser. It did not receive any response because it did not change any material term the parties were negotiating. The purchaser is still Chad R. Robison (not the Chad R. Robison Living Trust, as argued by Defendants), just in his capacity as trustee.

Defendants also argue that the transaction was closed on June 29, and that the Court may not look to any subsequent correspondence to further elucidate the

transaction between the parties. The whole thrust of Plaintiff's argument is that the emails, taken as a whole, constitute a memorandum in writing of the transaction sufficient to satisfy the statute of frauds, consistent with the approach recognized in *Farmer's Equity Co-op Creamery Ass'n v. United States*, 132 F.2d 738, 739-40 (10th Cir. 1943): "Offers and acceptances by letters and telegrams may constitute an enforceable contract even though reference be made therein to the future execution of a more formal contract." One of those emails is the July 6 email identifying the trustee capacity in which Chad Robison was acting. There is no justification for arbitrarily drawing the line of what emails to consider in determining the writing at June 29, rather than July 6.

All essential terms, including the identity of the buyer and seller, were set forth in the email chain. Defendants have not pointed to a single point on which further negotiation was necessary in order for the parties to have an agreement on all important and essential terms of the contract. For that reason, none of the cases cited by Defendants for the proposition that all terms must be worked out are applicable. Unlike in *Pierce v. Marland Oil Company*, 278 P. 804 (Colo. 1929), here there were no conditions precedent unperformed, and in fact, in reliance on the contract, Plaintiff had sold his farm and home, leased out his other property, and prepared to move to Colorado. R. 6. There was no recognition that further

negotiations were necessary, as in *Nations Enterprises, Inc. v. Process Equipment Company*, 579 P.2d 655, 658 (Colo. App. 1978), where such a recognition was explicitly stated in the correspondence that constituted the alleged contract. There is no error alleged in the terms set forth in the email exchange in this case, as there was in *Sumerel v. Goodyear Tire and Rubber Company*, 232 P.3d 128 (Colo. App. 2009). In short, Defendants have not pointed to a single infirmity in the email chain as a contract other than Steve Tonso's affidavit that he did not intend thereby to enter into a contract. That affidavit is in direct opposition to Chad Robision's affidavit stating that he did understand there to be a contract. Given that dispute, it is improper, resolving all doubts against the moving party, to grant summary judgment in this instance.

CONCLUSION

It is undisputed that the email chain forming the basis of the claimed contract in this case adequately sets forth the agreement between the parties, and constitutes a writing signed (electronically) by the Defendants as Seller. The only questions are ones that are incapable of resolution on summary judgment: 1) Did the parties, through their actions, manifest an intent to conduct their transaction electronically; and 2) Did the parties, through the emails, conversations, and phone

calls, form a contract? Both those questions are questions of fact that are to be determined by all of the surrounding circumstances. *See* C.R.S. § 24-73.1-105 and official comments thereto, and *Southern Colorado MRI, Ltd. v. Med-Alliance, Inc.*, 166 F.3d 1094, 1098-99 (10th Cir. 1999). Accordingly, the trial court's grant of summary judgment was improper, and Plaintiff requests that the entry of summary judgment be reversed and this matter remanded for further proceedings.

RESPECTFULLY SUBMITTED this 31st day of October, 2016.

ERICH SCHWIESOW, PC

By /s/ *Erich Schwiesow*

Duly signed Original at the law offices of Erich Schwiesow, PC

CERTIFICATE OF SERVICE

I do hereby certify that on October 31, 2016, a true and correct copy of the above Reply Brief was e-served on all parties via ICCES

/s/ *Erich Schwiesow*

Duly signed Original at the law offices of Erich Schwiesow, PC