Facebook and Lessons from the Statute of Frauds

By Michael A. Sabino and Anthony Michael Sabino

The Statute of Frauds is one of the oldest statutory provisions found in our rich Anglo-American jurisprudence, predating even the founding of our great Republic. First promulgated in 1677 by our English forebears, it has endured for well over three centuries as a prime device to prevent fraud, and has proven greatly adaptable to a changing world.

But what does the Statute of Frauds have to do with the 21st Century marvel known as Facebook? Placing the modern Statute of Frauds, and specifically its New York iteration, in counterpoise to the recent battles over Facebook’s ownership compelled us to review the current statute and its controlling precedents. There we find a great deal of guidance regarding how the Statute sets boundaries as to the consummation of business deals in the 21st Century.

The Battle for Facebook

It is known that the father of Facebook is Mark Zuckerberg. Critical to the instant writing is the ongoing battle for control of the corporation between Zuckerberg and Paul Ceglia. Ceglia has launched multiple litigations, the bottom line of each being that he claims the existence of an ownership agreement between he and Zuckerberg. If true, such a share of ownership would literally be worth billions of dollars. The paramount legal question is elegant in its simplicity; does Ceglia need to have that agreement in writing in order to prevail? Enter the Statute of Frauds.

The Statute of Frauds

The Statute of Frauds has been an integral part of the fabric of law for over three centuries, but it would have been better entitled the “Statute of Anti-Frauds,” as that would be more revealing of its true purpose; to reduce, if not altogether eliminate, fraudulent dealings. It does so by the simple expedient of requiring a writing.

New York (and many other jurisdictions) have added a level of legislative sophistication to the ancient doctrine. In our home jurisdiction, New York’s General Obligations Law is the acknowledged repository of this state’s present codification.

Among other things, New York law demands a writing to prove a contract not to be performed within one year, a guarantee to pay the debt of another, and insisting that a contract to convey an interest in real estate must be in writing. But the proviso that concerns us most in the instant case is the requirement for a writing to prove a claim for compensation arising from the creation of a business or a business opportunity.

The General Obligations Law explicitly states that any contract to pay compensation for services rendered in procuring or negotiating a business opportunity or transaction is void unless it is set forth in a writing signed by the party to be charged. Among other things, the subsection specifies with exactitude that it must be followed with respect to a transaction for a business opportunity concerning the voting stock of a corporation. Thus, what have New York’s leading courts said on the subject?

Guidance From a Future Supreme Court Justice

Probably the most comprehensive analysis of this subsection of New York’s General Obligations Law was bestowed upon us by Supreme Court Justice Sonia Sotomayor, at the time a Southern District Judge, in Springwell Corporation v. Falcon Drilling Co., Inc. That case offered the fairly prosaic situation of whether or not the plaintiff was entitled to a “finder’s fee” for putting See FACEBOOK, Page 19
together an investment banking deal. The plaintiff had pinned its hopes for recovery upon a mere verbal accord.10

The future Supreme Court jurist commenced with the fundamentals; Section 5-701(a)(10) of the G.O.L. insists upon a writing to prove compensation is due for constructing a business opportunity. This is but a subset of the Statute of Frauds’ overarching requirement for a writing that contains all material terms of the agreement.11

Judge Sotomayor made skillful use of existing New York precedents. In addition to the inimitable Morris Cohen,12 she called upon the state court landmark of Minichiello v. Royal Business Funds Corp.,13 agreeing that the Statute of Frauds’ demand for written proof could not be circumvented by positing a cause of action for quantum meruit.14 Then-Judge Sotomayor exemplified the two prongs of the Springwell test. First, New York imposes an inescapable requirement for there to be a writing to prove a claim to monies stemming from a business opportunity, and second, a failure to satisfy the Statute of Frauds cannot be ameliorated by the alternative pleading of quantum meruit.15 Since the plaintiff could only present a mere oral agreement, dismissal was required.16

Strict Enforcement of the Requirement of A Writing

Subsequent cases do even better in demonstrating just how staunchly the New York courts have enforced this proviso of the Statute of Frauds. A seminal example is Zeising v. Kelly,17 where it was alleged that the defendants were about to engage in a business enterprise, and allegedly offered the plaintiff no less than 12% of the common stock of the entity, a voice in management, and a seat on the corporation’s board of directors in return for helping them with coming up with a business plan. The plaintiff agreed, and apparently did significant work, but sans written agreement.18 The defendants subsequently reneged.19 Zeising commenced a suit seeking no less than $20 million, assumedly the dollar value of the 12% stock ownership interest he claimed he was lawfully owed.20 The defendants moved to dismiss, homing in on the plaintiff’s lack of a writing.21

District Judge Richard Casey first noted this controversy clearly fell under the General Obligations Law’s insistence to produce a writing to enforce any accord to give compensation with regard to services rendered in purchasing, selling or creating a business entity or opportunity.22 The plaintiff’s allegation that he was entitled to own a piece of the newly formed corporation “fall[s] squarely with the Statute of Frauds,” and the concomitant strict necessity for a writing.23

What followed was inevitable. Zeising had no writing. Judge Casey had little choice; the plaintiff’s lack of a writing barred him from any recovery as a matter of contract.24

Moreover, the plaintiff’s alternate pleas under quantum meruit and unjust enrichment had to share the same fate.25 The court ruled that a claim made under a theory of quasi-contract cannot prevail once there has been a failure to measure up to the law’s requirement for a writing.26

Next in line of cases is Bronner v. Park Place Entertainment Corp.27 Briefly stated, this plaintiff also alleged that he had arranged an investment opportunity on the basis of a verbal accord. Here District Judge McMahon focused on the lack of a written agreement. The plaintiff had relied solely upon a self-serving letter demanding money from the defendant.28 A unilateral writing is not enough, the court declared, to validate a purported agreement to share in a business endeavor.29

The Statute of Frauds and its modern statutory adoptions exist precisely to “protect[] parties in this situation from mischief by requiring that such ... agreements be in writing, and subscribed to by the party to be charged.”30

Review and Conclusions

The Statute of Frauds has been steadfast in its purpose for over three hundred years; it prevents mischief, chicanery, and outright fraud by demanding written evidence of a transaction. And if a writing is absent, there is no reprieve to be had by the pleading of alternate claims, such as quantum meruit. That modern case holdings are consistent in their stalwart adherence to the statute should come as no surprise.

The essential thread is that anyone seeking to put together any deal, be it a business opportunity or the creation of any profit-driven entity, can only assert a right to a share of ownership by producing a writing signed by the party to be charged and setting forth its essential terms.

Now to Facebook. While we await finality from the New York courts, it can be said that until Ceglia can proffer written proof that he did so comply with the Statute of Frauds, the riches of Facebook shall remain beyond his grasp.

What lessons are taught here? If claimants such as Mr. Ceglia had followed the most basic lessons imparted by the New York statute and the cases decided thereunder, they would this very day be rich beyond their wildest dreams. In your own deals, be mindful of the absolute necessity to have an explicit writing. In closing, we simply say that whatever the transaction, large or small, adherence to New York’s Statute of Frauds is mandatory.

Michael A. Sabino is presently judicial law clerk to the Hon. Kenneth J. Slomienski, Superior Court of the State of New Jersey.

Prof. Anthony Michael Sabino, partner, Sabino & Sabino, P.C., and Professor of Law, St. John’s University, Tobin College of Business, formerly served as judicial law clerk to the Hon. D. Joseph DeVito, United States Bankruptcy Court for the District of New Jersey.

The authors dedicate this Article to the memory of the late Mary Jane Catherine Sabino, Esq.; attorney, professor, author, and, most importantly, beloved spouse of Anthony and mother of Michael and James. All we do, we do with her foremost in our thoughts and forever in our hearts.
Correction April 2013 Nassau Lawyer

The article *Facebook and Lessons from the Statute of Frauds*, published in the April 2013 edition, written by Michael A. Sabino and Anthony Michael Sabino, incorrectly captioned the author's photo. The photos below reflect the correct author's name with the correct photo. We apologize for this misprint.

Michael A. Sabino

Anthony Michael Sabino


3. The English Parliament's original enactment had the more accurate legislative moniker of "An Act for Prevention of Frauds & Perjuries." Perillo, supra, at 39 n.3. It is uncertain what caused the shortening of the law's title, aside from obvious convenience.

4. Perillo, supra, at 40 (footnote omitted) (every state, except Louisiana, has promulgated substantially similar versions of the Statute).

5. See 23A N.Y. General Obligations Law §5–701(a)(1), (2) et seq.

6. Id. at § 5–703(1).


8. Id.

9. 16 F.Supp.2d 300 (S.D.N.Y. 1998). The future Justice was not quite famous at the time, as the opinion misspells her surname as "Sotomayor." Id. at 310.

10. Id. at 301.


15. Id. at 305-06 (citations omitted).

16. Id. at 311. Interestingly, the case was subsequently reinstated, upon the belated uncovering of a writing between the parties that did, in point of fact, evidence the material terms of an accord. Id. at 319.


18. Id. at 340.

19. Id. at 340.

20. Id. at 342-43.

21. Id. at 345.

22. Id. (quoting 23A N.Y. Gen. Obl. Law § 5–701(a)(10)).

23. Id. at 343-44.

24. Id.

25. Id. at 345. Accord Snyder v. Bronfman, 13 N.Y.3d 504 (2009) (Statute of Frauds could not be circumvented by interposing claims for quantum meruit and unfruit enrichment; plaintiff's failure to obtain a written accord memorializing his role in structuring the defendant's acquisition of the Warner Music label was fatal to his causes of action).

26. Id. at 345.


28. Id. at 308-09.

29. Id. at 310.

30. Id. at 311.