STATE OF MICHIGAN

COURT OF APPEALS

BRILLIANCE CORPORATION,
a Michigan Corporation

Plaintiff-Appellant,

v

ROBERT LUDLUM, an individual and
HENRY MORRISON, INC., a corporation,

Defendants-Appellees.

UNPUBLISHED
November 8, 1996

No. 186643
LC No. 93-083696 CK

Before: Doctoroff, C.J., and Hood and Bandstra, JJ.

PER CURIAM.

Plaintiff, Brilliance Corporation, appeals as of right from the trial court's dismissal of plaintiff's breach of contract claim. Plaintiff sought a license to market an audio version of the novel *The Scorpio Illusion*, written by defendant Robert Ludlum. Plaintiff negotiated with Ludlum's literary agent, defendant Henry Morrison, and plaintiff contended that an agreement was reached. Defendants denied that a contract had been formed, thus plaintiff filed suit against defendants seeking damages for breach of contract and promissory estoppel. The trial court granted defendants' motion for directed verdict on plaintiff's breach of contract claim, finding that the claim was barred by the statute of frauds. The jury returned a verdict of no cause of action on plaintiff's promissory estoppel claim. On appeal, plaintiff argues that there was sufficient evidence presented at trial to establish a question of fact as to whether the unsigned proposed contract and the letters from Morrison were sufficient writings to satisfy the statute of frauds. We reverse and remand for a trial on the merits.

Pursuant to Michigan's statute of frauds, an agreement which, by its terms, is not to be performed within a year, is void unless the essential terms of the agreement are reduced to writing and signed by the party to be bound. *See* MCL 566.132(1)(a); MSA 26.922(1)(a); *Opdyke v Norris Grain*, 413 Mich 354, 364 n 1; 320 NW2d 836 (1982). Reviewing the evidence in a light most favorable to plaintiff, we find that there was sufficient evidence to create a question of fact regarding whether the statute of frauds was satisfied. On March 18, 1993, Morrison sent a signed letter to plaintiff which expressly contained the parties' agreement as to the copyright issues. While the letter did

not expressly delineate the essential agreed-upon terms regarding advances, royalties, and bonuses,[1] it incorporated by reference the proposed contract which contained those terms. Together, these writings contained all the essential terms and were sufficient to satisfy the statute of frauds. *See* Restatement Contracts, 2d, § 132, p 342; Restatement Contracts, 2d § 132, comment c, p 343; *Stanton v Dachille*, 186 Mich App 247, 259; 463 NW2d 479(1990). Thus, the trial court erred in dismissing the case based on the statute of frauds.

Defendants, however, argue that, even if the trial court erred in granting their motion for directed verdict pursuant to the statute of frauds, the error does not require reversal. In supporting its position, defendants raise two arguments.

First, defendants argue that the trial court's decision granting defendants' motion for directed verdict was independently justified on the grounds that plaintiff failed to sufficiently establish a meeting of the minds on the essential terms of the transaction. We disagree. The testimony at trial clearly established that, as of February 16, 1993, Morrison and plaintiff had agreed upon all essential terms other than copyright issues, which were subsequently settled by Morrison's letter of March 18, 1993. On February 25, 1993, Morrison's assistant sent plaintiff the final unbound galley of *The Scorpio Illusion* and expressly granted Brilliance permission to record therefrom. Brilliance immediately began production of its unabridged audio version of Ludlum's book. We review the relevant circumstances surrounding the transaction in question, including the writings, oral statements and the parties' other conduct, under an objective standard. *Rood v General Dynamics Corp*, 444 Mich 107, 119; 507 NW2d 591 (1993); *Kamalnath v Mercy Hospital*, 194 Mich App 543, 548; 487 NW2d 499 (1992). Following a careful review, we find that there was sufficient evidence to create a question of fact as to whether there was a meeting of the minds.

Morrison testified that, in his mind there could be no final agreement unless the parties agreed upon language that would protect the exclusive territory of Books on Tape.[2] Contrary to defendants' assertion, Morrison's testimony did not establish that there was no meeting of the minds. First, what Morrison believed in his own mind is purely subjective. Under Michigan law, a party's subjective beliefs are insufficient to show that a meeting of the minds did not occur. *Heritage v Wilson*, 170 Mich App 812, 819; 428 NW2d 784 (1988). Second, Morrison's testimony that, as of February 25, 1993, there were no longer any significant areas of disagreement left between the parties, suggests that the method of enforcing Brilliance's promise not to sell in the rental and library markets was not an essential term of the contract.

Next, defendant argues that the jury's finding that there was no clear and definite promise sufficient to establish plaintiff's promissory estoppel claim was essentially also a rejection of plaintiff's contract claim. We disagree. A promise is an essential element of both a contract and a promissory estoppel claim. See Restatement Contracts, 2d, §1, p 5; *Marrero v McDonnell Douglas*, 200 Mich App 438, 442; 505 Mich App 275 (1993). However, unlike contract theory, promissory estoppel is an equitable theory used to make a promisor liable on a promise where there is no bargained for consideration to support a contract. *Marrero, supra* at 438. This Court has repeatedly held that a

promise which supports a claim of promissory estoppel must be "clear and definite." *Kamalnath, supra* at 552. However, these strict requirements of clarity and definiteness do not apply to promises which form the basis of a contract. See *Band v Hazel Park Development Co*, 337 Mich 626, 628; 60 NW2d 333 (1953). Thus, because Michigan law applies a heightened "clear and definite" standard to promises used to support claims of promissory estoppel, the jury's finding that there was no "clear and definite" promise in the case at bar does not preclude a finding that there was a promise sufficient to establish an enforceable contract. Accordingly, plaintiff should be allowed to present his breach of contract claim to a jury.

Reversed and remanded for trial on the merits.

/s/ Martin M. Doctoroff
/s/ Harold Hood

[1] The parties had agreed that, in exchange for a six year license to produce an unabridged audio version of the *Scorpio Illusion*, Ludlum would receive a "$15,000 advance against royalties of 4.5% of retail price to 25,000 copies, and 7% thereafter [and] . . . a $5,000 bonus, payable when the hardcover book hits the NY Times Bestseller List."

[2] Books on Tape is a company with which defendants had already signed a contract to record and market an audio tape of the Ludlum novel. Books on Tape had a business niche largely concentrated in libraries and the rental market. Thus, defendants sought to limit plaintiff's contract to sales in other markets.