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UNPUBLISHED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.

BANDSTRA, J. (dissenting)

I respectfully dissent. I do not disagree with any of the legal principles employed by the majority opinion but conclude that, on the facts of this case, summary disposition was appropriately granted to defendant on the breach of contract claim because it was barred by the statute of frauds.

The majority finds that the record "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." I find the record clearly demonstrates this was probably the most essential term of the contract from the beginning. Hutton admitted at trial that, when she first solicited Morrison for rights to the *The Scorpio Illusion* in December of 1992, she was told that rights were not available because of a preexisting relationship for audio recording that Morrison had with Books on Tape. During January of 1993, Hutton convinced Morrison that, because Books on Tape was only interested in the rental and library market, the Brilliance proposal might not propose a problem. The parties clearly understood there was a potential problem with Books on Tape but proceeded forward on Hutton's suggestion that it might be resolved. Nothing in the record suggests that this issue, which was clearly in the parties' minds from the start, was anything other than the "deal breaker" that it was described as in Morrison's testimony. It certainly was an essential term of the parties' agreement.

With that established, the majority correctly concludes we must consider whether this issue was resolved and reduced to writing. It never was. Morrison's February 16, 1993, "deal memo"

specifically stated that this issue had to be addressed in a future written agreement. On that same date, Hutton sent a letter to Morrison with a proposed contract that included language regarding the Books on Tape issue. Morrison responded, in a March 18 letter, that the language proposed on this issue was insufficient. Drafting language to satisfy Morrison (and Books on Tape) proved impossible. In a letter dated April 13, 1993, Hutton proposed contract language saying that, although Brilliance would notify its purchasers regarding its agreement not to make sales that would encroach on the rights held by Books on Tape, "the publisher has no means to enforce or police wholesalers and distributors, and publisher's responsibility only extends to such notification. Legal action against any wholesaler or distributor for violation of said prohibition is solely the author's responsibility and expense." This language was not accepted by Morrison.

The record amply demonstrates what the trial court correctly concluded, that the Books on Tape problem was crucial to the contract and the parties were never able to resolve it and come to a written agreement. The statute of frauds clearly applied here to bar the breach of contract action. Summary disposition was appropriately granted on this claim. I would affirm.

/s/ Richard A. Bandstra