

STATE OF MICHIGAN
COURT OF APPEALS

CHRIS SCHROEDER, AARON T. WELLS
MULTI-VISUAL MARKETING, and
SILVER BEACH PRODUCTIONS,

UNPUBLISHED

February 21, 1997

Plaintiffs–Appellants,

v

No. 181559

LC No. 94-401812 CZ

JOBETE MUSIC COMPANY INC.,
GORDY COMPANY, and
MOTOWN HISTORICAL MUSEUM,

Defendant–Appellees.

Before: McDonald, P.J., and White and P.J. Conlin, JJ.*

PER CURIAM.

Plaintiffs appeal the circuit court’s grant of summary disposition to defendants under MCR 2.116(C)(10), dismissing their claims for breach of contract, fraud, estoppel, intentional infliction of emotional distress, and tortious interference with advantageous business relationship on the basis that there was no binding contract. We affirm in part and reverse in part.

I

The facts viewed in a light most favorable to plaintiffs are that plaintiff Schroeder operates a production company and does business under the assumed name of Multi-Visual Marketing, and plaintiff Wells operates a videotaping company under the assumed name of Silver Beach Productions. Defendant Motown Historical Museum, Inc., operates the Motown Museum in downtown Detroit; defendant Jobete Music Company Inc., (Jobete) does business under the assumed name of the Gordy Company; and Esther G. Edwards is the resident agent for the three companies and on the Board of

* Circuit judge, sitting on the Court of Appeals by assignment.

Directors of each. Ewart Abner is an assistant to the chairman of the Gordy Company and is on the Board of Trustees of the Motown Historical Museum.

Motown Record Corporation operated for about thirty years. In 1988, MRC sold its assets to Motown Record Company, a limited partnership in which the Gordy family has no interest. Motown Record Company is part of Music Corporation of America (MCA), a music studio that sells records.

The Gordy family changed the name of what was Motown Record Corporation to the Gordy Company. Gordy/Jobete owns and retains the rights to royalties from motown music, but the master recordings were sold to Motown Record Co./MCA. Motown Record Co./MCA owns the licensing rights to motown recordings.

Plaintiffs' complaint alleged that around January 1992, Schroeder created the idea of producing a thirteen-part television series describing the history of music, entitled "Back Beat." Schroeder created the name "That Motown Sound" for the first show in the series and began working on production of this show. Around April 1992, Schroeder and Wells agreed to cooperate in the production of the "Back Beat" series, under the name of Silver Beach Productions. They later renamed the series "World Beat." Around May 1992, Schroeder contacted Ron Swope, the manager of the Motown Historical Museum, requesting permission to tape interviews in the museum for use in the series. Schroeder provided Swope with a letter describing the series, and Swope obtained permission from Esther Edwards, the resident agent for both the museum and Jobete, and the chair and founder of the Motown Historical Museum, Inc., to tape interviews in the museum and use the tapes in the series. Swope and Schroeder signed an agreement granting plaintiffs permission to tape at the museum. Plaintiffs interviewed a number of motown stars and in June 1992 contacted the legal department at Motown Record Corporation to inquire regarding licensing arrangements whereby they could utilize song and video clips in their documentary. Eric Thomas, an employee of the legal department, directed plaintiffs to Ewart Abner, an employee of the Gordy Company, regarding licensing arrangements. Thomas told plaintiff that "they" liked the project and were interested in talking with plaintiff concerning production of a program on new Motown artists.

In July 1992, Schroeder spoke with Abner and, at Abner's request, Schroeder supplied Abner with written information regarding the series. In July 1992, Schroeder informed employees of the Motown Museum of his contact with Abner, and was assured that Abner was the proper person to deal with regarding licensing arrangements.

Plaintiffs' complaint further alleged that around August 6, 1992, Schroeder contacted Abner and, after a lengthy conversation, Abner stated he was interested in the series, but it would be necessary for him to review some of plaintiffs' work. During August 1992, plaintiffs provided Abner with clips from interviews of motown artists. In response to specific questions regarding the procedure for obtaining licensing rights, Abner instructed Schroeder to go through him for everything, to keep providing him with rough footage, and to keep him informed. Abner informed plaintiffs that he would help with everything, including obtaining licensing rights, and that there was no need for written

documentation at that time. Abner also told plaintiffs that he would provide song or video clips from defendants' files if plaintiffs had trouble locating the material on their own.

The complaint further alleged that Schroeder had numerous contacts with Abner regarding the series, including phone calls to and from his home and while he was traveling, and written correspondence. Plaintiffs continuously provided Abner with footage of "That Motown Sound" as it progressed through production, including an eighteen minute rough edit, and the final rough edit. Plaintiffs received assurances from Abner that he approved the content and quality of "That Motown Sound," that licensing would be approved for the songs and video clips plaintiffs used, and that Abner was the person to continue to deal with regarding licensing. Plaintiffs further alleged that they received numerous assurances from employees of Jobete, Gordy, and the Motown Museum that licensing rights would be granted them, that these representations were false, and that they were made with knowledge of their falsity, and with the intent that plaintiffs should rely and act on the representations, and be deceived and defrauded by them. Further, plaintiffs alleged that defendants' employees remained silent and failed to correct the reasonable beliefs of plaintiffs when it became obvious that plaintiffs were relying to their detriment on the representations that licensing would be granted.

Plaintiffs further alleged that Esther Edwards was informed of the contacts between plaintiffs and Abner, and told plaintiffs to continue working with Abner, since he was the person who could "help with everything," and assured plaintiffs that no written documentation was needed. Edwards also assured plaintiffs that "we" approve of "That Motown Sound."

The complaint alleged that in October 1992, plaintiffs, at no cost to defendants and as a goodwill gesture, edited a different video, which the museum used for tours. Further, it alleged that plaintiffs interviewed numerous motown artists, hired assistants, and contacted numerous distributors regarding the airing of the series, and received many very positive responses which were, however, premised on completion of the video and licensing of the song and video clips.

Plaintiffs' complaint alleged that around January 1993, Schroeder spoke to Abner regarding using footage from the production "Motown 25th Anniversary Show," and Abner instructed plaintiff to use whatever footage he needed and that Abner would assist in getting final approval for use of the footage in "That Motown Sound." Abner again assured plaintiffs that all licensing rights would be granted and that there was no need for written documentation. In April 1993, Ester Edwards gave plaintiffs permission to tape at the upcoming Boyz II Men/Temptations concert. Plaintiffs met Abner at that concert, who allowed plaintiffs access throughout rehearsal and the concert and approved interviews with the groups. Abner also told plaintiffs that he was anxious to review "That Motown Sound," and plaintiffs told Abner they would be sending the rough edit shortly for his review and to finalize licensing arrangements. Abner assured plaintiffs licensing would be granted for all songs and video clips in "That Motown Sound."

The complaint alleged that in May 1993, the project was substantially completed and Schroeder contacted Abner regarding the licensing arrangements. At that time, Abner told plaintiff that "you won't get the licensing, leave it at that." After being questioned on the existence of a conflict of interest, Abner

told Schroeder “I’m not at liberty to discuss that now.” Schroeder then contacted two employees of Motown Record Company, and Rita Zak of Jobete, in an attempt to obtain licensing rights. Motown Record Company informed Schroeder that Jobete had denied licensing rights and that they would follow Jobete’s decision. In July 1993, Zak left a message on Schroeder’s answering machine stating “I’m afraid that we’re not going to be able to license them to you, since the Gordy Company would be the most likely candidate to do such a documentary. We’re not going to license anybody else to do the same sort of thing.”

Plaintiffs alleged that defendants’ refusal to grant licensing rights proximately resulted in plaintiffs being unable to sell or distribute “That Motown Sound” and “World Beat,” and alleged breach of contract, fraud, promissory/equitable estoppel, intentional infliction of emotional distress, and tortious interference with plaintiffs’ business relationships with potential distributors of the series.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that plaintiffs were aware from the outset of the necessity of securing licensing rights to the songs and video clips they intended to use in “That Motown Sound.” The motion further argued that Motown Record Company had the licensing rights. Defendants argued that defendant Motown Historical Museum does not own any rights to any master recordings, video footage or publishing copyrights for materials plaintiffs wanted to use, and that Jobete and/or the Gordy Company owns the publishing rights to the Motown song catalogue, but no longer owns the Motown master recordings, which are owned by Motown Record Company, a company defendants alleged “is not related to any of these Defendants.” Defendants argued that Abner’s promise to “help” plaintiffs obtain licenses to certain songs and video clips did not create an enforceable contract, because there was no mutual assent on all essential terms and no bargained-for consideration. Defendants argued that plaintiffs failed to discuss essential terms for acquisition of the licensing rights or reduce their agreement to writing, never discussed or agreed on the price for licensing rights or even what particular licensing rights they required.

Defendants appended to their motion the written agreement Schroeder entered into with the Motown Museum, a fax from Schroeder to Ester Edwards dated June 3, 1993,¹ and an undated fax from Schroeder to Rita Zak.² The written agreement between Multi-Visual Marketing and the Motown Museum was signed by Schroeder and Swope, and stated “The agreement is to establish the boundaries for which the video footage of the Motown Museum may be utilized,” and provided that the only footage to be used in plaintiffs’ series would be footage that has been approved by museum officials, that footage of the museum would be used exclusively for the series pilot, and that the museum be included in the program credits and given a copy of the program. The agreement further stated that the museum would have no legal right to, or ownership of, the program “Back Beat” and that all video footage shot while on location is the sole property of Multi-Visual Marketing and “Back Beat.” Defendants attached no affidavits to their motion and made limited and selective references to plaintiffs’ deposition testimony.

Plaintiffs attached to their response to defendants’ motion a copy of the written agreement between Schroeder and the Motown Museum and Schroeder’s affidavit, which repeated the factual allegations of plaintiffs’ complaint and, in addition, averred that:

Throughout the entire production, I discussed with the Defendants the positive public relations benefit that the Defendants would receive as a result of the airing of “That Motown Sound.” In addition, per the request of Mr. Swope, we edited and revised a video used at the Motown Historical Museum for review by visitors at the museum. We did not charge for the editing service.

* * *

. . . We were given several ranges [by distributors] of potential gross receipts that could be obtained from either “That Motown Sound” or the “World Beat” . . . series.

Since the initiation of this law suit, I have, on information and belief, been informed that the Defendants have contracted with another business to make a video of the history of Motown music and that many of the individuals we interviewed have also been interviewed for that production.

Also appended to plaintiffs’ response was a statement of a distributor, dated September 27, 1994, stating that he had viewed “That Motown Sound,” opined that it met or exceeded normal commercial standards for this type of video production, and set forth ranges which he opined that gross receipts for “That Motown Sound” pilot would have yielded had the program been released when it was first available in May 1993.

The circuit court granted defendants’ motion, stating from the bench:

All right. As the Court observed earlier on a motion for summary disposition, the Court looks it in the light most favorable, accepts evidence in the light most favorable to the party against whom the motion is made.

In considering all that, the Court still concludes there is not a cause of action here. I don’t find that the words “go to him”, keep me informed,” or “work thru [sic] me” are sufficient to rise to the level of a binding contract.

There was no mention of consideration, it’s—it certainly is arguable whether he was trying to hold on to something, so to speak, that might become good and have first crack at it, but I don’t think that rises to the level of a contract.

I certainly—and I’m not dealing here with some unsophisticated people. I’m dealing with people that are knowledgeable in the industry from what I’ve been told, and it strikes me as unbelievable that they would go thru [sic] all this believing that they had a valid contract.

I don’t find the elements for a contract, so I’ll grant the motion for summary disposition.

And I think it would flow from that, that the promissory estoppel claims, the fraud claims and emotional distress and the final one, tortious interference with a contract wouldn't be maintainable.

II

Plaintiffs argue that the circuit court erred in granting summary disposition on their breach of contract claim because either an express or implied contract existed between them and defendants. When deciding a motion for summary disposition under MCR 2.116(C)(10), the court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it in the light most favorable to the nonmoving party. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993); *Dagen v Hastings Mutual Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987). Giving the benefit of every reasonable doubt to the nonmoving party, the lower court must determine whether a record might be developed which would leave open an issue upon which reasonable minds could differ. *Farm Bureau Ins Co v Stark*, 437 Mich 175, 184-185; 468 NW2d 498 (1991).

The essential requirements for the formation of a contract are: 1) parties competent to contract; 2) a proper subject matter; 3) legal consideration; 4) mutuality of agreement; 5) and mutuality of obligation. *Campbell v Judges' Retirement Bd*, 378 Mich 169, 180; 143 NW 755 (1966). A valid contract requires a "meeting of the minds on all the essential terms." *Kamalath v Mercy Hospital*, 194 Mich App 543, 548; 487 NW2d 499 (1992).

Defendants argued below that there was no mutual assent on all essential terms because the parties failed to discuss the terms for acquisition of the licensing rights and did not reduce their agreement to writing, and further argued that there was no bargained-for consideration.³

Plaintiffs argue that the question whether there was mutual assent was a question of fact not properly resolved on defendants' motion, and that, in order to have found no meeting of the minds, the circuit court had to address issues of credibility, intent and state of mind. We conclude that plaintiffs presented sufficient evidence to raise genuine issues of fact precluding summary disposition of the contract claim.

Plaintiffs' complaint alleged, and Schroeder's affidavit averred, that as plaintiffs began working on the project, they contacted a representative of Motown Record Corporation's legal department, Eric Thomas, who advised Schroeder to contact Abner regarding licensing rights for use in "That Motown Sound," and that Abner and Edwards represented to plaintiffs on a number of occasions throughout plaintiffs' work on "That Motown Sound" that Abner was the proper party through which to secure licensing rights and that such rights would be secured. While defendants rely on Schroeder's account of Abner promising to help obtain rights, Schroeder also testified that on repeated occasions Abner said he would deliver the licensing. Plaintiffs asserted that defendants viewed and expressed approval of plaintiffs' work at various stages and urged plaintiffs to continue. Plaintiffs raised a genuine issue of fact whether a contract existed under which, in exchange for the public relations and publicity defendants would receive from the television pilot "That Motown Sound," defendants agreed to allow plaintiffs to

film on location and promised that Abner would secure licensing rights for portions of various songs and video clips plaintiffs would eventually need to complete the documentary, when the project reached that stage. Further, plaintiffs' complaint alleged that Abner himself represented to plaintiffs that he would provide song or video clips from defendants' files to plaintiffs if plaintiffs had trouble locating said material.

Additionally, plaintiffs alleged that it was Jobete Music Company that notified them that they would not receive licensing rights, and that Motown Record Corporation told them that it would follow Jobete's denial. Under these circumstances, a jury could view with skepticism defendants' argument that they had no power to grant, or control of the decision whether to grant, plaintiffs licensing rights because they had sold those rights to Motown Record Corporation. When viewed in a light most favorable to plaintiffs, the record suggests interplay and communications between defendants and Motown Record Corporation pertinent to the licensing rights plaintiffs sought. We conclude that plaintiffs raised a genuine issue of fact regarding whether a contract was formed and breached.

Plaintiffs also raised a genuine issue of fact regarding whether they relied to their detriment on Abner's and Edwards', among others', representations that they would secure the necessary licensing rights. Defendants did nothing to disabuse plaintiffs of this belief, and plaintiffs continued to work on the pilot film for fifteen months, apparently through completion, expending approximately \$20,000. Promissory estoppel arises in equity when 1) there is a promise 2) that the promise should have reasonably expected to induce action of a definite and substantial character on the part of the promisee 3) which in fact produces reliance of that nature 4) under circumstances such that the promise must be enforced if injustice is to be awarded. *Barber v SMH (US), Inc*, 202 Mich App 366, 375-376; 509 NW2d 791 (1993). We conclude the circuit court improperly dismissed plaintiffs' promissory estoppel claim.

The circuit court also erred in granting summary disposition on the fraud claim. Plaintiffs raised genuine issues of fact regarding whether defendants made a material misrepresentation which was known to be false or was made with reckless disregard for its truth or falsity -- that Abner was the proper person to and would secure for plaintiffs the licensing rights -- and whether plaintiffs were intended to rely on the misrepresentation, acted in reliance on the misrepresentation, and suffered injury. *Arim v General Motors Corp*, 206 Mich App 178, 195; 520 NW2d 695 (1994). Even assuming that defendants' statements related only to future promises or expectations, as defendants argue, an exception to this rule is that future promises may form the basis of fraud if it can be shown that the promise was made in bad faith with no present intention to perform. *VanMarter v American Fidelity Fire Ins Co*, 114 Mich App 171, 184; 318 NW2d 679 (1982). Defendants maintained below that they could not have secured licensing rights for plaintiffs because those rights are owned by Motown Record Company. As such, we conclude that for purposes of a summary disposition motion plaintiffs raised a genuine issue of fact whether defendants' assurances to plaintiffs that Abner would secure licensing rights for them were made in bad faith and without an intention to perform.

We affirm the circuit court's grant of summary disposition as to the tortious interference and intentional infliction claims. Defendant's alleged conduct would not constitute interference with plaintiffs'

relationship with potential distributors. And, plaintiffs failed to plead or argue that plaintiffs suffered severe emotional distress as a result of extreme and outrageous conduct of defendants. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602, 608-609; 374 NW2d 905 (1985).

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Gary R. McDonald

/s/ Helene N. White

/s/ Patrick J. Conlin

¹ The June 3, 1993, fax from Schroeder to Ester Edwards states:

Dear Mrs. Edwards:

I hope you had a nice memorial weekend. I wanted to touch base with you concerning the documentary and the Marv Johnson video.

We are re-editing the program to add parts about Marv Johnson's death and made corrections in the places where you mentioned.

I know that you originally allowed us to tape at the museum because it would be a great advertisement/promotion for the museum. As I had promised, I want to add information to the program to promote the museum. This program will be seen by millions and I think it would be very nice to promote the museum.

We are working with a few people in the job of licensing all of our vintage video footage and the music. There is a great deal of interest in this program and we hope to be through as soon as possible.

As you know, this has truly been a "labor of love" and we have spent any savings that we have to complete this project, so if you have any suggestions or could help in any with the sync licenses from Jobet, [sic] it would be greatly appreciated and of course will [sic] finish this project sooner.

Please call me if you have any questions and if you would, please call or fax me what you would like the program to say about the museum. I know that you will be happy

with the national exposure for the museum and the Motown Historical Society. My fax is

Thank you so much for your kind advice and help. I look forward to speaking with you soon.

Sincerely,

Chris Schroeder

² The second fax, from Schroeder to Rita Zak, is undated but bears a “received” date stamp of August 10, 1993:

Dear Rita:

It was nice speaking with you the other day and as per our conversation, I have sent you brief information on the program and a list of songs that we will need to get licensing. As you can see, we do not need the entire song, just 30-60 seconds of each.

Over the past year we have produced a documentary on the Motown music and artists. We have worked with many of the artists and the Motown Historical Society in Detroit a number of times throughout this process.

The program features interviews with such people as Martha Reeves, Kim Weston, The Temptations, Abdul Fakir, Bobby Rogers, Barrett Strong, Pervis Jackson, Mary Wilson, and the last interviews of Mary Wells and Marv Johnson before their deaths.

We would need to get licensed for domestic and international home video and cable broadcast.

If you have any questions, please give me a call at Thank you so much for your assistance.

Sincerely,

Chris Schroeder

³ We observe that the failure to raise want of consideration in the answer and affirmative defenses is a waiver. MCR 2.111(F)(3); *Campbell v St John Hospital*, 434 Mich 608, 615-616; 455 NW2d 695 (1990).