STATE OF MICHIGAN

COURT OF APPEALS

JONCO TRADING COMPANY INC., a/k/a JONCO PRODUCTIONS INC.,

Plaintiff-Appellant,

and

JOHN SERRA,

Plaintiff,

V

POST-NEWSWEEK STATIONS MICHIGAN INC., d/b/a WDIV,

Defendant-Appellee,

and

ALAN FRANK, STEVEN WASSERMAN, TED PEARSE and KATHY SALAZAR,

Defendants.

UNPUBLISHED
December 7, 2010

No. 293633
Macomb Circuit Court
LC No. 07-002954-CK

Before: SERVITTO, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM.

Plaintiff, Jonco Trading Co. Inc., d/b/a Jonco Productions Inc. (Jonco), appeals as of right an order granting summary disposition to defendant, Post-Newsweek Stations Michigan Inc., d/b/a WDIV (WDIV), in this action alleging breach of contract.[1] Because the trial court properly granted summary disposition in favor of defendant on all counts, we affirm.

[1] The trial court entered an order dismissing the individual defendants, Alan Frank, Steven Wasserman, Ted Pearse, and Kathy Salazar and this disposition is not challenged on appeal.

Defendant WDIV is a television station. Plaintiff Jonco, owned or controlled by John Serra,[2] produced a television show called Builder's Open House that aired on WDIV from 1990 through approximately 2007. Serra began purchasing air-time from WDIV in order to broadcast his Builder's Open House show in 1990. At that time, the parties entered into their first agreement, memorialized in the form of a letter from WDIV to Serra/Jonco, signed by WDIV's local sales manager and by Serra, as president of Jonco Trading. For the period from 1991 to 1994, the record does not contain any written letters of agreement for the broadcasting of Builder's Open House. In 1995, there was a letter of agreement, but it had no signatures by either side. In 1996, there was another letter of agreement, and it was signed by WDIV's national sales manager, but not by Serra. In 1997 and 1998 there were individual letters of agreement, signed by representatives of both contracting parties. The 1999 letter of agreement was not signed by either side. The individual letters of agreement for 2000, 2001, and 2002 were signed by representatives of both contracting parties. There was an unexecuted letter of agreement for 2003. And there appear to be no letters of agreement for either 2004 or 2005. Finally, the last letter of agreement, dated January 23, 2006, was the first proposed agreement to last for three years, through December 31, 2008, and was not signed by either side.

At the time of the proposed January 23, 2006 letter of agreement plaintiff's program, Builder's Open House, was the top-ranked TV show in its time slot. The show allegedly provided millions of dollars of revenue for defendants, and defendants believed that Serra had considered offers from other TV networks. Defendants were interested in a longer-term contract with plaintiff in late 2005. Ted Pearse, vice-president and director of sales for WDIV, wanted to increase the agreement duration to three or five years and he wanted a more formalized commitment with plaintiff because of the duration. Pearse offered to discount the current price paid by plaintiff, by the amount of $1,000 per show for two years. After continuing discussions between the parties, Pearse agreed to reduce an agreement to writing. Shortly thereafter, defendants gave Serra the letter of agreement dated January 23, 2006. The 2006 letter of agreement provided that plaintiff would pay WDIV $8,000 per program (i.e., per week) in 2006 and 2007, and $9,000 per week in 2008. The letter of agreement also formalized the prepayment requirement for broadcasting. The 2006 letter of agreement had, on the second page, signature lines for Pearse, as vice president and director of sales for WDIV, and Serra, in his capacity as representative for Jonco. Serra never executed or returned the proposed January 23, 2006 letter of agreement.

Throughout the relationship between plaintiff and defendant, plaintiff paid the money for the particular week in advance of the broadcast. But in 2006, plaintiff consistently made late payments to defendants, and Steven Wasserman, vice-president and general manager of WDIV, told Serra that plaintiff had to comply with the longstanding arrangement to pay cash in advance. In February 2007, according to Wasserman's assistant, Nancy Pushee, Serra told defendants that he had stopped payment on a check, because there was a problem with the audio portion of the February 25, 2007, broadcast, but the check cleared. According to Pushee, plaintiff later

[2] The parties stipulated to the dismissal of Serra as a plaintiff in the trial court. The trial court entered an order to that effect and this disposition is not challenged on appeal.

informed WDIV that they could not pay cash in advance for the first broadcast in March 2007. Because of the arrearage and payment issues in February 2007 and the failure to pay cash in advance for the first March 2007 broadcast, WDIV cancelled plaintiff's show.

Plaintiff commenced this action, alleging that defendants breached the 2006 letter of agreement (count I), and asserted counts entitled fraud and misrepresentation (count II), innocent misrepresentation (count III), silent fraud (count IV), tortious interference with contract and business relationship (count V), concert of action (count VI), exemplary damages (count VII), and promissory estoppel (count VIII) (complaint). The last count alleged that WDIV "made promises that it would not unilaterally cancel Plaintiffs' program without notice and without reasonable cause."

Defendants filed a motion for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing, among other things, that there was no genuine issue of material fact and that plaintiff's action was barred by the statute of frauds, MCL 566.132(1)(a), because the last letter of agreement was not signed and could not be performed within a year. Plaintiff responded by arguing that the statute of frauds was satisfied by the presence of the typewritten name of Pearse, and by the presence of WDIV's letterhead. Plaintiff also argued that the doctrine of equitable estoppel was sufficient to preclude the assertion of a defense based on the statute of frauds.

The trial court granted summary disposition to WDIV on all counts except count I for breach of contract, and count VIII for promissory estoppel. The trial court found that the last letter of agreement was not executed, and that reasonable jurors could not find that "a typewritten names [sic] below an unsigned signature line was intended to authenticate the document." Yet, the trial court denied summary disposition of the breach of contract claim, finding a question of fact about whether the statute of fraud defense could be avoided by equitable estoppel. The trial court concluded, regarding the count VIII for promissory estoppel, that the promise alleged was sufficiently clear and definite to support the claim, and denied summary disposition, because defendants failed to present documentary evidence to contradict the alleged promise.

After further discovery, WDIV filed its second motion for summary disposition, under MCR 2.116(C)(10), on the remaining counts. WDIV argued that equitable estoppel could not defeat the statute of frauds defense to the breach of contract claim, because (1) Jonco did not rely solely on the letter of agreement, but on the relationship of the parties, (2) the reliance was not reasonable, and (3) Jonco did not show detrimental reliance. WDIV requested summary disposition of the equitable estoppel claim because there was a lack of evidence in Serra's deposition to support the promise alleged in the complaint.

The trial court agreed with WDIV's arguments, concluding that "plaintiff's alleged reliance on the unsigned writing is not reasonable and justifiable under the circumstances, since plaintiff admits the terms of the parties' agreement were not consistent with the unsigned writing." The trial court also concluded that there was insufficient evidentiary support for the promissory estoppel claim and the promise alleged in the complaint, and concluded that the "unsigned writing allegedly relied upon by plaintiff does not demonstrate defendant promised to indefinitely continue plaintiff's program or that it would not unilaterally, without notice or reasonable cause, cancel plaintiff's program." Specifically, the trial court found that statements Serra testified about, as having been made to him by Pearse, "do not advance a definite and clear

promise by defendant, but merely defendant's opinion and prediction of future events." Therefore, the trial court concluded that "plaintiff's claim of promissory estoppel must fail . . . ." Plaintiff now appeals as of right.

We review a trial court's decision on a motion for summary disposition de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). Statutory construction and application are questions of law that this Court reviews de novo. *McManamon v Redford Charter Twp*, 273 Mich App 131, 134; 730 NW2d 757; 25 IER Cases 727 (2006). Specifically, interpretation and application of a statute of frauds are questions of law, reviewed de novo on appeal. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 458; 733 NW2d 766 (2006). Summary disposition is improper if there remain issues of fact that are material to a claim or defense. MCR 2.116(C)(10); *Campbell v Kovich*, 273 Mich App 227, 229; 731 NW2d 112 (2006). Courts may not make findings of fact, nor weigh credibility, when ruling on a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Plaintiff first argues that the trial court erred in granting defendant's second motion for summary disposition because the statute of frauds, MCL 566.132, is satisfied. Defendant responds that the trial court properly granted its second motion for summary disposition because the January 2006 letter of agreement does not satisfy the statute of frauds and therefore any alleged contract between the parties is void. This issue involves interpretation of the statute of frauds, MCL 566.132. When interpreting a statute, the Court begins the analysis by consulting the specific statutory language at issue. *Provider Creditors Comm v United American Health Care Corp*, 275 Mich App 90, 95; 738 NW2d 770 (2007). The statute of frauds provides, in relevant part:

> (1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:
>
> (a) An agreement that, by its terms, is not to be performed within 1 year from the making of the agreement. [MCL 566.132(1)(a).]

"Our Supreme Court has declined to adopt narrow and rigid rules for compliance with the statute of frauds." *Kelly-Stehney & Associates, Inc v MacDonald's Industrial Products, Inc (On Remand)*, 265 Mich App 105, 111; 693 NW2d 394 (2005), citing *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 367; 320 NW2d 836 (1982). A case-by-case approach is used to determine whether sufficient writings exist to satisfy the statute of frauds. *Forge v Smith*, 458 Mich 198, 206; 580 NW2d 876 (1998). "Some note or memorandum having substantial probative value in establishing the contract must exist; but its sufficiency in attaining the purpose of the statute [of frauds] depends in each case upon the setting in which it is found." *Opdyke Investment Co*, 413 Mich at 368 (citation omitted). The writing requirement of the statute of frauds may be satisfied by several writings made at different times. *Kelly-Stehney*, 265 Mich App at 114. This Court in *Kelly-Stehney* concluded that a writing need not include all the essential elements of a contract, but rather, the court should evaluate on a case-by-case basis whether the notes and memoranda have substantial probative value in establishing a contract. *Id*.

Our review of the record reveals that defendant prepared a written letter of agreement dated January 23, 2006 in accordance with the parties' course of dealing over the years. While it may have reflected the parties' intended promises regarding the agreement to produce and broadcast television shows, neither party executed the agreement. There is no doubt in the record that the 2006 letter of agreement between plaintiff and defendant called for a term extending through 2008. An agreement that, by its terms, is not capable of being performed within one year from the making of the agreement is deemed void under the statute of frauds unless the agreement was in writing and signed by the party to be charged with the agreement. MCL 566.132(1)(a); see *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 441; 505 NW2d 275 (1993), mod on other grounds by *Patterson v Kleiman*, 447 Mich 429, 433-434; 526 NW2d 879 (1994). Therefore, under a strict interpretation of the statute of frauds, the parties' agreement would be void. *Id*.

But that is not the end of our analysis. As we stated above, Michigan courts have "declined to adopt narrow and rigid rules for compliance with the statute of frauds," and have instead adopted a case-by-case approach. *Kelly-Stehney*, 265 Mich App at 111. In *Kelly-Stehney*, the parties entered into and executed a three-year manufacturer's agreement under which the plaintiff would receive a three percent commission on its sales. At the conclusion of the three-year contract the defendant orally proposed to renew the contract for three additional years on the same terms except that the plaintiff's commissions would decrease on a sliding scale. *Id*. at 107. Three years later, at the conclusion of the oral renewal, defendant terminated the contract. The plaintiff then filed suit against defendant, arguing that it should have received commissions at a higher percentage rate pursuant to the original agreement between the parties during the previous three years. *Id*. The trial court rejected the plaintiff's claim, concluding that the plaintiff assented to lower commissions. This Court determined that the statute of frauds was satisfied based on the defendant's written checks, post-oral agreement writings validating the terms including the change in commission, the plaintiff's acceptance of the checks without protest thereafter, and other similar items demonstrating the parties' acceptance of the oral renewal, citing the facts that the plaintiff not only cashed the reduced commission checks, but that Stehney agreed to the modified terms because he did not want the defendant to terminate the agreement. *Id* at 119-121. This Court found that these recited factors taken together with completed performance of the three-year renewal including the party admissions that Stehney agreed to the modified terms because he did not want the defendant to cancel the contract were sufficiently probative of the parties' intent to contract. *Id*. Ultimately, this Court held that to satisfy the statute of frauds, a writing need not contain all the terms of the agreement to be enforceable, and the writing may be considered with the admitted facts and extrinsic evidence showing the surrounding circumstances observing as follows:

> We should always be satisfied with some note or memorandum that is adequate, when considered with the admitted facts, the surrounding circumstances, and all explanatory and corroborative and rebutting evidence, to convince the court that there is no serious possibility of consummating a fraud by enforcement. When the mind of the court has reached such a conviction as that, it neither promotes justice nor lends respect to the statute to refuse enforcement because of informality in the memorandum or its incompleteness in detail. [*Id*. at 114 (internal quotation marks, brackets, and citation omitted).]

Here, on its face, the 2006 letter of agreement was defendant's offer to be bound. Plaintiff never signed the document indicating their own willingness to be bound. A valid contract requires an offer, acceptance, consideration, and mutual agreement to all of the contract's essential terms. *Kloian*, 273 Mich App 452-453. An offer is "the manifestation of willingness to enter into a bargain . . . ," while "an acceptance sufficient to create a contract arises where the individual to whom an offer is extended manifests an intent to be bound by the offer . . . ." *Id*. at 453-454 (citations and quotation marks omitted). Plaintiff never signed the agreement and Serra testified explicitly that it was his understanding that the 2006 letter of agreement was *not* the contract between the parties.

Under Michigan law, where there is no express integration clause, "[p]arol evidence is admissible to establish the full agreement of the parties [to a contract] where the document purporting to express their intent is incomplete." *Greenfield Construction Co, Inc v Detroit*, 66 Mich App 177, 185; 238 NW2d 570 (1975). Serra testified by deposition that the January 2006, letter was only *part* of the agreement between WDIV and Jonco. Serra testified that there were other parts of the agreement between the parties evidenced by "the words that were spoken between Mr. Pearse and myself and all of the people at Channel 4 [WDIV]," and by "our relationship." Serra referred to the "tone" of statements by WDIV staff, including "John, you're family here, you are here for the long haul, this is something you have become [as] part of our lineup. You are an institution." Serra testified that he and Pearse agreed that WDIV would not sell air time to builders, or to advertisers for builders, other than to Jonco. Serra interpreted these statements as establishing "exclusivity." Though, Serra contended that Jonco was permitted to buy airtime from other broadcasters. Serra also testified that, although the January 2006 letter gave Jonco 1.5 hours of studio time to produce the program that would then be broadcast, "that was something that didn't happen on this – on this contract . . . ." Serra also testified that, although the letter of agreement required Jonco to pay cash for the broadcast, in advance of the broadcast, WDIV did not expect Jonco to do so.

Plaintiff relies on *Kelly-Stehney*, but the instant case is distinguishable from that case. In *Kelley-Stehney*, the defendant orally proposed and the plaintiff orally agreed to continue the terms of their previous contract modifying only the commission rate. In that case, a subsequent exchange of memoranda between the parties set forth the change in the commission rate. The defendant then regularly issued signed checks to the plaintiff, and the plaintiff cashed the commission checks that were calculated at a lower rate for the entire three-year term of the agreement without protest. Here, there was no anchoring agreement that reflects the relationship between the parties on all of the asserted terms. Instead, defendant, the party to be charged, sent the 2006 letter of agreement to plaintiff as an offer for a new contract. Indeed the offer letter included a discounted price for the first two years of the contract. The discount was different than previous agreements and a modification of their method of doing business.

Plaintiff never executed the 2006 letter of agreement indicating their acceptance of the terms of the offer. Further, unlike *Kelley-Stehney*, plaintiff have pointed to no other writings authored during the relevant period that together with the unsigned 2006 letter of agreement would constitute a contract under the statute of frauds. In *Kelley-Stehney*, the party to be charged, the defendant, issued signed commission checks for the entire contract term and ancillary writings, behaviors, and admissions rounded out the agreement. Here, neither of the parties admit to the terms of the other parties' understanding. There are no writings referencing

plaintiff's testimony concerning the terms. Plaintiff sporadically sent checks to defendant to pay for past performed broadcasts which was not in accord with the terms of the 2006 letter of agreement stating that plaintiff was to pay for broadcasts in advance. Serra testified that while the letter of agreement required plaintiff to pay cash for broadcasts, in advance of the broadcasts, it was his understanding that defendant did not actually expect plaintiff to pay in advance. Rather than admitting to the terms of the 2006 letter of agreement, like the plaintiff did in *Kelley-Stehney*, plaintiff here denies the terms. And finally, the parties in *Kelley-Stehney* performed the entire contract, all three years. Here, the parties only continued their relationship for a portion of the anticipated time but never in accordance with the terms of the 2006 letter of agreement. When plaintiff did not pay in advance for the March 2007 show, defendant canceled plaintiff's show.

Clearly there was no meeting of the minds on the essential terms of the contract. Under the record facts, including the parol evidence borne out in discovery, there is no way to determine whether the "contract" was the unsigned 2006 letter of agreement standing alone, the unsigned 2006 letter of agreement aggregated with some other uncorroborated oral terms indicating a contract, or an altogether separate oral agreement implicated by the "tone" of conversation that took place between Serra and Pearse. The only thing that is clear from the record is that the parties had different understandings about whether there was an agreement between the parties, and if so, what constituted the agreement. Serra testified that the 2006 letter was not the agreement. Because the 2006 letter of agreement was not signed, Pearse allegedly believed that the parties had a week-to-week situation or pay as you go. Under the circumstances as presented, there is insufficient evidence on this record to create a question of fact regarding the existence of an offer, an acceptance, consideration, and mutual agreement to all of a contract's essential terms, *Kloian*, 273 Mich App 452-453, either as contained in one writing or a series of writings. As such, we conclude that the 2006 letter of agreement did not constitute a binding contract because (1) it was missing its essential terms, and, (2) no facts were presented to save it from the statute of frauds. Accordingly, the 2006 letter of agreement here was void.

Plaintiff also argues that the trial court erred in granting summary disposition on its equitable claim of promissory estoppel. A statute of frauds defense does not bar a claim of promissory estoppel. *Opdyke Investment Co,* 413 Mich at 369-370. The elements of equitable estoppel and promissory estoppel are synonymous. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442; 505 NW2d 275 (1993). Equitable or promissory estoppel applies where (1) a party, by representations, admissions, or silence, intentionally or negligently, induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts. *Lakeside Oakland Dev, LC v H & J Beef Co,* 249 Mich App 517, 527-528; 644 NW2d 765 (2002).

"The doctrine of promissory estoppel is cautiously applied. The sine qua non of promissory estoppel is a promise that is definite and clear." *Marrero,* 200 Mich App at 442 (internal citations omitted). "In determining whether a requisite promise existed, we are to objectively examine the words and actions surrounding the transaction in question as well as the nature of the relationship between the parties and the circumstances surrounding their actions." *Novak v Nationwide Mut Ins Co,* 235 Mich App 675, 687; 599 NW2d 546 (1999). This doctrine

should only be applied "where the facts are unquestionable and the wrong to be prevented undoubted." *Id*. "A promise is a manifestation of intention to act or refrain from acting in a specified manner, made in a way that would justify a promisee in understanding that a commitment had been made." *Schmidt v Bretzlaff*, 208 Mich App 376, 379; 528 NW2d 760 (1995). Statements of opinion, or mere predictions of future events, are not promises under the doctrine of promissory estoppel. *Ypsilanti Twp v Gen Motors Corp*, 201 Mich App 128, 134 n 2; 506 NW2d 556 (1993).

Here, count VIII of the complaint, asserting the promissory estoppel claim, alleged that WDIV "made promises that it would not unilaterally cancel Plaintiffs' program without notice and without reasonable cause." But Serra's deposition testimony did not unequivocally support this allegation. Serra mainly testified to vague generalities such as the "tone" of certain comments and an alleged "exclusivity" in the relationship of the contracting parties. Accordingly, even with Serra's deposition testimony, the trial court correctly reasoned that the "unsigned writing allegedly relied upon by plaintiff *does not demonstrate defendant promised to indefinitely continue plaintiff's program* or that it would not unilaterally, without notice or reasonable cause, cancel plaintiff's program." We cannot conclude that the facts supporting the alleged promise are unquestionable. *Novak*, 235 Mich App at 687. Therefore, plaintiff failed to create a genuine issue of fact.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Deborah A. Servitto
/s/ Brian K. Zahra
/s/ Pat M. Donofrio