SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03

Justice

DIANA LOCKE,

Plaintiff,

-against-

SHERRELL J. ASTON, M.D., individually, and SHERRELL J. ASTON, M.D., P.C.,

Defendants.

INDEX NO. 605851/2001

MOTION DATE

MOTION SEQ. NO. 008

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is

ORDERED that the motion is decided in accordance with the accompanying Order and Decision.

Dated: January 23, 2006

KARLA MOSKOWITZ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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DIANA LOCKE,

Plaintiff, Index No. 605851/01

-against-

SHERRELL J. ASTON, M.D., individually; and
SHERRELL J. ASTON, M.D., P.C., **Decision and Order**

Defendants.

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KARLA MOSKOWITZ, J.:

The court previously set forth the facts of this case in the court's decision and order dated July 26, 2002 and will repeat only those facts as are necessary to this decision. This dispute arises over a book about the plastic surgery process that never saw publication. Plaintiff Diana Locke ("Locke"), an author, and defendant Sherell J. Aston, M.D. ("Aston"), a cosmetic surgeon, allegedly entered into a collaboration agreement to write a self-help book on cosmetic surgery to be titled *The Cosmetic Surgery Bible*. Locke is suing defendants Aston and Sherrell J. Aston, M.D., P.C. ("Aston, P.C.") for breach of contract. By this motion (sequence number 008), defendants move for partial summary judgment dismissing that part of the breach of contract cause of action seeking lost profits.

DISCUSSION

On a motion for summary judgment, the court must view all evidence and draw all reasonable inferences in the light most favorable to the non moving party. (*Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 [1st Dept 1989]).

Defendants argue that summary judgment is appropriate because: (1) plaintiff fails to

demonstrate any evidence to support a certain calculation of lost profits and (2) Aston never agreed to accept liability for lost profits in connection with the collaboration agreement.

In opposition, plaintiff argues an issue of fact exists as to whether lost profits damages were foreseeable and there are reliable factors with which to measure lost profits.

Loss of future profits as damages for breach of contract are recoverable when they are foreseeable and are capable of measurement with reasonable certainty:

> The rule that damages must be within the contemplation of the parties is a rule of foreseeability. The party breaching the contract is liable for those risks foreseen or which should have been foreseen at the time the contract was made. The breaching party need not have foreseen the breach itself, however, or the particular way the loss came about. It is only necessary that loss from a breach is foreseeable and probable.

(*Ashland Mgt., Inc. v Janien*, 82 NY2d 395, 403 [1993]; *see also Cambridge Assoc. v Town of North Salem*, 282 AD2d 702, 702 [2d Dept 2001] [lost opportunity to sell was "so remote and unforeseeable as not to be in the contemplation of the parties at the time the contract was signed."]). In addition, that damages must be capable of measurement with reasonably certain does not require absolute certainty or mathematical precision. (*Ashland Mgt.*, 82 NY2d at 403).

Here, whether the parties contemplated lost profits at the time of contracting so that lost profits were foreseeable damages presents an issue of fact. The April 30, 2001 collaboration agreement refers to "royalties" and "monies to become payable." (*See* Affirm. of Donna Marie Werner, Exh. I). It also provides that the parties would apportion the monies payable to Locke and Aston on a 50/50 basis. Obviously, "royalties" and "monies to become payable" refer to profits and therefore raise an issue of fact as to whether the parties contemplated lost profits in the event of breach.

Further, plaintiff refers to discussions between the parties as to what profits they could expect from the sale of the book and that a potential appearance on the show *Oprah* could generate significant profits. Thus, there is evidence in this record that lost profits were foreseeable because they were in the contemplation of the parties at the time of contracting. Therefore, the court cannot grant summary judgment to defendants dismissing the claim for lost profits.

Defendant's argument that Aston did not specifically accept liability for lost profits misconstrues the law. The test is not whether the parties contracted to apportion lost profits in the event of breach (although parties are free to do so). Rather, the test is whether lost profits were in the contemplation of the parties at the time of contracting and, hence, foreseeable.

With regards to the second requirement, that damages be reasonably certain, defendants claim that any calculation of lost profits would be unduly speculative and plaintiff cannot recover lost profits. In opposition, plaintiff submits an expert affidavit from Todd Shuster, a partner in the literary agency firm of Zachary Shuster Harmsworth who provides a reasonable basis for calculation of the lost profits that Locke seeks. Shuster lists a number of accepted and reliable factors on which publishers, editors, agents and others in the book business routinely rely upon to determine how many copies a book will likely sell. He presents evidence of Locke's previous publication, *Nips and Tucks'* success and the number of copies it sold. (*See also* Deposition Transcript of Diana Locke, 64:12-65:4; 74:17-75:6). Further, Shuster presents a breakdown of the total sales of the 4th Edition of Grabb & Smith's *Plastic Surgery*, a textbook on cosmetic surgery that Aston edited previously. He uses the total sales of both parties' previous books as variables to calculate *The Cosmetic Surgery Bible*'s potential level of success.

To rebut Shuster's affidavit, defendants submit an expert affidavit from Jennifer Weis, an executive editor at St. Martin's Press. Weis claims that, because the parties' publisher never established variables such as publication date and publishing run and price, calculation of lost profits is uncertain. She further concludes that Shuster bases his analysis on inherently subjective criteria and cannot predict the book's success.

The parties' competing expert affidavits preclude summary judgment because both are reasonable and prevent the court from determining, as a matter of law, whether the lost profits are speculative.

Accordingly, it is

ORDERED that the motion of defendants Sherrell J. Aston, M.D. individually and Sherrell J. Aston, M.D., P.C. for summary judgment dismissing that part of the first cause of action seeking lost profits is denied; and it is further

ORDERED that parties are directed to appear for a pre-trial conference on February 9, 2006 at 2:30pm in room 248 at 60 Centre Street, New York, N.Y.

Dated: January 27, 2006

ENTER:

J.S.C.