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

PRESENT: Hon Joan B. Madden Justice PART 11

Index Number : 600507/2008

HARPERCOLLINS PUBLISHERS, L.L.C.,

VS.

ARNELL, PETER

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 600507-08

MOTION DATE 10-9-09

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

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 this motion is decided in accordance with the annexed Memorandum Decision + Order.

FILED
APR 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: April 15, 2009

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
NEW YORK COUNTY, I.A.S. PART 11

HARPERCOLLINS PUBLISHER, L.L.C.,

Plaintiffs,

- *against* -

PETER ARNELL,

Defendant.

Index No.: 600507/08

DECISION/ORDER

MADDEN, JOAN A., J.:

In this action, plaintiff HarperCollins Publisher, L.L.C. (HarperCollins) alleges that defendant Peter Arnell breached a book publishing contract (Contract) by failing to submit a complete manuscript by the deadline set in the Contract, and it seeks the return of $100,000 paid to defendant as an advance on royalties from the book, plus interest and attorneys' fees. Defendant has asserted a counterclaim for breach of contract, alleging that plaintiff failed to provide editorial support and refused to publish the book, and seeks to recover lost royalties. Plaintiff now moves for summary judgment for the amount sought in the complaint, and to dismiss the counterclaim.

Background

The essential facts here are largely undisputed. HarperCollins is a publishing company located in New York, which publishes and markets a wide variety of books, both fiction and nonfiction. Peter Arnell (Arnell), the founder and CEO of the Arnell Group, is a successful and innovative marketer, product designer and brand-builder, well known for his "PowerBranding"

approach to creating brands for corporations. In April 2005, Arnell entered into a contract with HarperCollins to write a nonfiction book about personal "branding," described as "a book that shows readers how to rebrand themselves to become their own greatest asset in both their professional and personal life" (Contract, Ex. A to Mintz Aff. in Support, at 1). The Contract required Arnell to "deliver to the Publisher by February 16, 2006 one copy of the complete manuscript for the Work suitable for a book consisting of approximately 80,000 words in length ... and acceptable to the Publisher in content and form" (*id.*, ¶ 2 [a]). The submission deadline was extended to September 30, 2006, by written amendment dated March 30, 2006 (Amendment, Ex. B to Mintz Aff. in Support). Under the terms of the Contract, Arnell would be paid $550,000, in installments, as an advance against royalties, with the first advance of $100,000 paid at the time of the contract signing (Contract, ¶ 5 [c]).

Both sides acknowledge that there were delays in meeting the original February 2006 deadline, in part due to problems with Arnell's ghostwriters. Pursuant to the Contract, Arnell agreed to hire a ghostwriter/collaborator, at his expense, to assist him in writing the book (*id.*, ¶ 2 [e]). Although Arnell hired two separate writers, both were fired because their work was not satisfactory to him or his editor at HarperCollins, Maureen O'Brien (O'Brien). The first writer was dismissed in August

2005, and the second was let go in February 2006.

In mid-February 2006, defendant submitted a partial manuscript to O'Brien, who notified Arnell on February 17, 2006, that "the new chapters (1-6; approximately 20,000 words) ... are not editorially acceptable" (see Feb. 17, 2006 email, Ex. C to O'Brien Reply Aff.). The same day, defendant submitted additional material identified as a "final manuscript" (see Feb. 17, 2006 email from Sara Arnell, Ex. O'Brien Reply Aff.), which also was rejected by O'Brien, who advised defendant that "at only 35,000 words," it was "not worth [P]eter's reputation or ours or $500,000" (see Feb. 17, 2006 email from O'Brien, Ex. D to O'Brien Reply Aff.). Consequently, on or about March 6, 2006, a meeting was held to discuss the status of the book, which was attended by O'Brien, her supervisor, Joe Tessitore (Tessitore), Arnell, his wife, Sara Arnell, and their assistant, Tara Grote. At the meeting, O'Brien and Tessitore agreed to extend the deadline for the manuscript to September 30, 2006, and the parties agreed that Arnell and his wife would complete the manuscript themselves instead of hiring another ghostwriter.

Arnell's final manuscript was delivered to O'Brien on October 26, 2006, at a meeting attended by Sara Arnell, Tara Grote, and O'Brien. O'Brien admittedly was "overjoyed" to receive the final manuscript and expressed her excitement in an email to Arnell (O'Brien Reply Brief, ¶ 25), although she also

advised Sara Arnell that the manuscript was not yet "officially" accepted (*id.*). About a month later, O'Brien notified Arnell that the manuscript was not acceptable "due to the extreme shortness in length ... less than 25,000 words" (Nov. 17, 2006 email, Ex. P to O'Brien Reply Aff.). In January 2007, O'Brien notified Jan Miller, Arnell's literary agent, that because Arnell had not delivered a complete manuscript as called for by the contract, plaintiff was terminating the contract (*see* Jan. 3, 2007 letter; Jan. 4, 2007 email, Ex. S to O'Brien Reply Aff.). Subsequently, by letter dated February 2, 2007, plaintiff's Director of Contracts notified Arnell that his failure to deliver a complete manuscript constituted a breach of the Contract, and that plaintiff was requesting repayment of the $100,000 advance already paid to him. After unsuccessful efforts to collect the advance, plaintiff commenced this lawsuit.

Plaintiff alleges that Arnell breached the Contract in two ways: by failing to deliver a manuscript by September 30, 2006, and by failing to submit a complete manuscript (*see* Plaintiff's Memorandum of Law in Support, at 6). With respect to the timeliness of the submission, defendant provides evidence that the manuscript was ready on September 30, but was submitted a few weeks later with the approval of O'Brien, due to the previously scheduled meeting in October. O'Brien acknowledges that she agreed to the late delivery date, and accepted the manuscript on

October 26, 2006 (O'Brien Reply Aff., ¶ ¶ 23-24). In view of this, the court finds that the delivery of the manuscript was not untimely.

As to whether a complete manuscript was submitted, the parties do not disagree that the Contract required the submission of a complete manuscript before plaintiff could determine whether it was acceptable in content and form. The parties disagree, however, about what constituted a "complete manuscript" under the Contract. Plaintiff contends that the Contract required defendant to submit a complete manuscript that was approximately 80,000 words; that defendant did not submit a manuscript that was a completed work or that was approximately 80,000 words; and that defendant, at most, submitted a partial manuscript consisting of approximately 25,000 words. Plaintiff argues that, as this was a breach of a clear, objective requirement of the contract, there are no triable issues of fact, and it is entitled to summary judgment. Plaintiff further argues that, for the same reasons, it is entitled to an order dismissing defendant's counterclaim.

Defendant contends that the Contract required only that he submit a complete manuscript that was "suitable" for a book of approximately 80,000 words; that his 25,000 word manuscript was "suitable" because, with editorial assistance, it could have been expanded into a book of approximately 80,000 words; that the Contract entitled defendant to an opportunity to revise the

manuscript, which he was not given; and that plaintiff violated the contract by not providing editorial assistance to defendant and by rejecting the manuscript in bad faith.

The dispute thus centers around the meaning and effect of Paragraph 2 (a) of the Contract, which provides:

> The Author shall deliver to the Publisher by February 16, 2006 one copy of the complete manuscript for the Work suitable for a book consisting of approximately 80,000 words in length (plus photographs specified in Paragraph 2(b) below) and acceptable to the Publisher in content and form. If the complete manuscript delivered by the Author is not acceptable to the Publisher, the Publisher shall give the Author a request for changes and revisions. The Author shall have 60 days from the Author's receipt of such a request to deliver to the Publisher a revised manuscript for the Work that is acceptable to the Publisher.

The Contract further provided that "[i]f the Author does not deliver the complete manuscript ... the Publisher shall not be required to publish the Work and shall have the right exercisable at the Publisher's discretion at any time thereafter to recover from the Author any advances made to the Author under this Agreement ..." (Contract, ¶ 14 [a]).

Discussion

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court

as a matter of law in directing judgment." CPLR 3212(b); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." *Zuckerman*, 49 NY2d at 562.

It is well settled that "when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms." *W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 162 (1990); *see South Rd. Assocs., LLC v Intl. Bus. Machines Corp.*, 4 NY3d 272, 277 (2005); *Greenfield v Phillies Records, Inc.*, 98 NY2d 562, 569 (2002). A written contract should be read as a whole to give each clause its intended purpose (*see Williams Press, Inc. v State of NY*, 37 NY2d 434, 440 [1975]), and "to ensure that excessive emphasis is not placed upon particular words or phrases." *South Rd. Assocs., LLC*, 4 NY3d at 277; *see Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 (2003). Words and phrases must be given their "plain and ordinary" meaning (*see White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]; *Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 520 [1996]; *Lopez v Fernandito's Antique, Ltd.*, 305 AD2d 218, 219 [1st Dept 2003]), and "'[p]articular

words should be considered, not as if isolated from the context, but in the light of the obligations as a whole and the intention of the parties as manifested thereby'." *Matter of Stravinsky*, 4 AD3d 75, 81 (1st Dept 2003), quoting *Atwater & Co., Inc. v Panama R.R. Co.*, 246 NY 519, 524 (1927); *Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 144 (1st Dept 2008). Further, courts should avoid an interpretation which will leave a provision without force and effect. *See Spaulding v Benenati*, 57 NY2d 418, 425 (1982); *Laba v Carey*, 29 NY2d 302, 308 (1971).

It is also fundamental to contract interpretation that agreements are construed in accord with the parties' intent (*see Greenfield*, 98 NY2d at 569; *Slatt v Slatt*, 64 NY2d 966, 967 [1985]), "as derived from the language employed" in the contract. *Hartford Accident & Indem. Co. v Wesolowski*, 33 NY2d 169, 171-172 (1973); *see Slamow v Del Col*, 79 NY2d 1016, 1018 (1992). In searching for the parties' intent, "the aim is a practical interpretation of the expressions of the parties to the end that there be a 'realization of [their] reasonable expectations' (1 Corbin, Contracts, § 1)." *Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 400 (1977); *see Sutton v East Riv. Sav. Bank*, 55 NY2d 550, 555 (1982); *Duane Reade, Inc.*, 54 AD3d at 140. "[E]mbraced in the interpretive result should be 'any promises which a reasonable person in the position of the promisee would be justified in understanding were included.'"

Sutton, 55 NY2d at 555 [internal citation and quotation marks omitted].

"Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide." *Greenfield*, 98 NY2d at 569; *see Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548 (1995); *W.W.W. Assocs., Inc.* 77 NY2d at 162; *Van Wagner Adv. Corp. v S & M Enters.*, 67 NY2d 186, 191 (1986). "[A]mbiguity is determined by examining the 'entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed' ...." *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, __ AD3d __, 869 NYS2d 511, 516 (1st Dept 2008), quoting *Kass v Kass*, 91 NY2d 554, 566 (1998), quoting *Atwater & Co., Inc.*, 246 NY at 524. Generally, a contract is unambiguous if "on its face [it] is reasonably susceptible of only one meaning." *Greenfield*, 98 NY2d at 570; *see also Chimart Assocs. v Paul*, 66 NY2d 570, 572-573 (1986).

Applying these standards, the contract provision requiring delivery of "a complete manuscript ... suitable for a book of approximately 80,000 words" is reasonably susceptible to only one interpretation: The contract required a manuscript which approximated the anticipated length of the book, that is, approximately 80,000 words, or in terms of length, about 320

pages.[1] While "approximately," by definition, allows for some flexibility in the number of words and pages of the manuscript, it is not reasonable to interpret it to mean that 25,000 words approximates 80,000 words.

Defendant argues, in opposition, that his manuscript was complete under the Contract because it conformed to industry standards of a complete manuscript. In support of this argument, defendant submits an affidavit of his literary agent, Jan Miller, who attests that, based on her experience in the book industry, manuscripts are never rejected on the basis of word count, and word count is "not relevant when considering whether a manuscript is 'complete' or 'sufficient' to support a publishable book of a certain length" (Miller Aff., ¶ ¶ 11, 15). Rather, according to Miller, "[w]hat editors look for in a complete manuscript are the tone, quality of writing, completeness of story, depth of ideas ..." (*id.*). However, even assuming arguendo that there is such an industry standard, "[a] custom of industry cannot overcome the express language of a written agreement." *Stein & Day, Inc. v Morgan*, 1979 NY Misc LEXIS 2983, *5 (Sup Ct, NY County 1979); *see Matter of KiSka Constr. Corp.-USA v Triborough Bridge & Tunnel Auth.*, 3 AD3d 321, 322 (1st Dept 2004); *Salzman v Bowyer Prods., Inc.*, 42 AD2d 531 (1st Dept 1973). Nor, contrary to defendant's

[1] It is undisputed that the standard in the book publishing industry is that a full text page contains 250 words. *See* Miller Aff., ¶ 17.

contention, does "suitable for a book of approximately 80,000 words" introduce a subjective test or refer to any manuscript, of any length, that could be developed into a manuscript of 80,000 words.

To the extent that defendant claims that, at the March 6, 2006 meeting, plaintiff "relinquished any word count requirement for the manuscript" because the concept of the book changed to one "in which words would be secondary to visuals" (Defendant's Memo of Law in Opp., at 23), defendant offers no support for that assertion. While Arnell's assistant, Tara Grote, attests that she attended the March 6 meeting, and that the concept of the book changed at the meeting to "a big idea book" (Grote Aff. in Opp., ¶ 12), she makes no reference to any change in the requirements for the manuscript, including the word count. In any event, the parole evidence rule forbids proof of an oral agreement that might vary the terms of the written agreement, especially in view of the Contract's merger clause and provision precluding oral modifications (*see* Contract, ¶ 24). *See Marine Midland Bank-Southern v Thurlow*, 53 NY2d 381, 387 (1981); *Sabo v Delman*, 3 NY2d 155, 161 (1957).

Moreover, defendant was put on notice that there was a required number of words. In May 2006, O'Brien, concerned about getting the manuscript finished by the deadline, advised Sara Arnell not to worry about word count, and "[j]ust write the

book," but in the same message she urged her to aim for 75,000 words (*see* May 26, 2006 email, Ex. K to O'Brien Reply Aff.). Prior to that, O'Brien rejected a proposed manuscript that was approximately 35,000 words because it was too short (*see* O'Brien Reply Aff., ¶ 10). Even considering the suggestion of another editor, made in September 2005, that a book of about 200-250 pages (approximately 50,000 to 62,500 words) was discussed (*see* Sept. 8, 2005 email from Marion Maneker, Ex. B-4 to Grote Aff. in Opp.), Arnell's final submission was less than half of that. O'Brien described the manuscript she received as less than 25,000 words, and about 134 pages, 46 of which were taken up by photographs and graphics (O'Brien Reply Aff., ¶¶ 27-28).

Thus, without taking anything away from defendant's creative abilities or potential, the manuscript that plaintiff reasonably expected under the Contract was not produced. Even construing the language of the contract against plaintiff, as the drafter of the agreement (*see Lippincott Co. v Lasher*, 430 F Supp 993, 995 [SD NY 1977]), the court finds that the plain meaning of the Contract required a complete manuscript of approximately 80,000 words. As here, the "[m]ere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact." *Goldman v Metro. Life Ins. Co.*, 5 NY3d 561, 571

(2005), quoting *Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456, 460 (1957). Plaintiff therefore has established its entitlement to summary judgment on its breach of contract claim. *See Goodyear Publ. Co., Inc. v Mundell*, 75 AD2d 556 (1st Dept 1980); *Lippincott Co.*, 430 F Supp 993, *supra*; *see also Gregory v Simon & Schuster, Inc.*, 1994 US Dist LEXIS 9833, 1994 WL 38148 (SD NY 1994), *affd* 60 F3d 812 (2d Cir 1995).

Turning to defendant's counterclaim, his claim that plaintiff failed to provide him with editorial support, and rejected his manuscript in bad faith, rests largely on allegations that he was not given editorial support after he delivered the manuscript. Paragraph 2 (a) of the Contract provides that "[i]f the complete manuscript delivered by the Author is not acceptable to the Publisher, the Publisher shall give the Author a request for changes and revisions," after which the author has 60 days to revise the manuscript. In view of the court's finding, above, that defendant failed to submit a complete manuscript, the provision allowing time for revision is not applicable.

As to defendant's claim that O'Brien failed to provide editorial assistance prior to the submission of the manuscript, courts have recognized that there is an implied good faith obligation in standard publishing contracts "for the publisher to engage in appropriate editorial work with the author of a book."

Harcourt Brace Jovanovich, Inc. v Goldwater, 532 F Supp 619, 624 (SD NY 1982); *see Doubleday & Co., Inc. v Curtis*, 763 F2d 495 (2d Cir 1985); *Dell Publ. Co., Inc. v Whedon*, 577 F Supp 1459 (SD NY 1984). Thus, generally, a publisher may not terminate a book contract on the basis that a manuscript is unsatisfactory, if it has provided no editorial assistance to the author prior to submission of the manuscript. *See Curtis*, 763 F2d 495, *supra*; *Goldwater*, 532 F Supp 619, *supra*; *Whedon*, 577 F Supp 1459, *supra*.

Here, plaintiff submits evidence that O'Brien provided appropriate editorial assistance to Arnell, as well as to his ghostwriters, including detailed comments and suggested revisions, regular communication with defendant about the progress of his work, and numerous offers to discuss and review the manuscript (*see* O'Brien Reply Aff., ¶¶ 8, 17-21). *See Curtis*, 763 F2d at 501; *Goldwater*, 532 F Supp at 624. Defendant submits no evidence in opposition to plaintiff's showing except the affidavit of his assistant, whose conclusory assertion, not based on personal involvement in the editing process, that O'Brien gave little editorial assistance (*see* Grote Aff. in Opp., ¶ 16), is insufficient to raise a triable issue of fact as to the editorial assistance provided. Notably, no affidavit of Arnell, Sara Arnell, or either of the hired writers, with whom O'Brien worked, was submitted.

Nor has defendant presented any evidence of "dishonesty,

willful neglect or any other manifestations of bad faith" on the part of HarperCollins. *See Curtis*, 763 F2d at 501; *compare Random House, Inc. v Curry*, 747 F Supp 191 (SD NY 1990)(question of bad faith raised by allegations that editor required inclusion of unverifiable quote and particular treatment of editor's personal friend). The fact that O'Brien offered support and encouragement throughout the writing process, praised parts of draft manuscripts, or showed excitement upon receiving the final manuscript, does not show an attempt to deceive or mislead defendant. *See Nance v Random House, Inc.*, 212 F Supp 2d 268, 273 (SD NY 2002), *affd* 63 Fed Appx 596 (2d Cir 2003).

Although plaintiff has demonstrated its entitlement to summary judgment on its breach of contract claim, its request for attorneys' fees is denied, in the absence of any contractual provision or other authority to support its claim for such fees.

Accordingly, for the reasons stated above, it is

ORDERED that plaintiff is awarded summary judgment in the amount of $100,000, with interest from February 2, 2007; and it is further

ORDERED that the counterclaim is dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: April 15, 2009

J.S.C.