

Epstein v John Wiley & Sons, Inc.

2010 NY Slip Op 32671(U)

September 27, 2010

Sup Ct, NY County

Docket Number: 600767/07

Judge: Shirley Werner Kornreich

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

PRESENT: KORNEICHT
Justice

PART 54

Index Number : 600767/2007
EPSTEIN, ROBERT, PH.D.
vs.
JOHN WILEY & SONS
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED
1, 2, 3, 4, 5

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 summary decision order.

FILED
SEP 28 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/27/10 JUSTICE SHIRLEY WERNER KORNEICHT
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X

ROBERT EPSTEIN, Ph.D,
Plaintiff,

DECISION & ORDER

Index No. 600767/07

-against-

JOHN WILEY & SONS, INC., and
JOSSEY-BASS, an imprint of John Wiley & Sons, Inc.

Defendants.

FILED
SEP. 28 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X

KORNREICH, J:

Motion sequence numbers 004 and 005 are consolidated for disposition.

In this breach of contract action, defendants John Wiley & Sons, Inc. and Jossey-Bass, an imprint of John Wiley & Sons, Inc. (collectively the Wiley defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and for judgment in their favor on their first counterclaim alleging breach of contract. They also seek the return of the \$25,000 advance they paid to plaintiff, Robert Epstein, Ph.D. Motion Sequence 004.

In motion sequence 005, Epstein moves for partial summary judgment on his first cause of action alleging breach of contract.¹

I. Background

The facts of this case are not in dispute. In February 2006, the Wiley defendants and Epstein entered into an agreement for the publication of Epstein's manuscript titled "The Case Against Adolescence". Aggarwal Aff., Ex. 4. In a February 22, 2006 e-mail, Epstein's editor, Alan Rinzler, expressed his overall appreciation for the manuscript but asked Epstein to consider

¹ At the oral argument of these motions, Epstein withdrew his third cause of action alleging waste and his fourth and fifth causes of action seeking preliminary relief. Accordingly, the court will not address the arguments regarding these causes of action.

making extensive revisions to the work. The changes included, but were not limited to, deleting some chapters and combining others, reorganizing the content and simplifying the language.

Aggarwal Aff., Ex. 6.

In early April 2006, the Wiley defendants paid Epstein a \$25,000 advance against royalties and later that month, Epstein delivered a 529-page draft manuscript. Rinzler reviewed the manuscript and in early May 2006, returned it to Epstein with content deleted, line-edits, new headings and various other editorial suggestions. Aggarwal Aff., Ex. 7. The parties agreed that Epstein would submit the next draft of his manuscript by July 1, 2006.

At the end of June 2006, Epstein informed Rinzler that he had made many of the revisions that Rinzler requested, but had “departed from your suggestions and requirements in a number of respects – some quite significant.” In particular, Epstein informed Rinzler that he had not cut certain sections because he believed they were fundamental to the book. Epstein also expressed his dismay over the need to convert his manuscript, which had been produced using WordPerfect, into a Word document, complaining that the conversion “mangled” the text. Joint Statement of Facts, ¶ 21.

In emails dated June 28th and June 29th, Rinzler replied that cutting the manuscript was serious and important and that the Wiley defendants did not use WordPerfect in their production process. Rinzler reiterated that the final manuscript, acceptable to both parties, was due on August 15, 2006. Joint Statement of Facts, ¶¶ 24, 29. Epstein replied by voicing his concerns about a mangled conversion from WordPerfect to Word. Nonetheless, on July 1, he submitted a new, 505-page draft of the manuscript to Rinzler in both WordPerfect and PDF format.

Thereafter, Rinzler sent the manuscript to several experts in the field for review and suggestions. Epstein incorporated the changes, to some extent, into his August 15, 2006, revised

manuscript. The Wiley defendants gave the August 15, 2006 manuscript to a freelance copy editor, Marcy Marsh, and requested Marsh to make substantive changes enumerated by Rinzler. Dalley Aff in Opp., Ex F, at 46-49; Rinzler Aff., Ex. 12. Meantime, Epstein continued to make revisions to the manuscript and was advised by the Wiley defendants to hold on to the changes. He also was asked to update a number of facts and figures.

In a September 6, 2006, e-mail, the Wiley defendants advised Epstein that “[we] have a March 16, 2007 publication date.” Joint Statement of Facts, ¶ 59. A few days later, they told Epstein that the manuscript was in production. A September 8, 2006 e-mail to Epstein explained that the manuscript had been sent to the copy editor and provided a complete production schedule. Joint Statement of Facts, ¶ 60; Epstein Aff. in Opp., Ex. H.

Marsh completed the copy editing on October 15. On October 16, the Wiley defendants delivered the copyedited manuscript to Epstein, with a cover memo from Marsh explaining the changes she had made and requesting that Epstein update some of the data in the manuscript. In addition, the Wiley defendants requested that Epstein return his comments to the copyedited manuscript by November 3. It also directed Epstein to make changes he wished to make and indicated that his changes would proceed to the typesetter. Joint Statement of Facts, ¶ 69. Epstein, in response, informed several of the Wiley defendants’ employees that the copy edited manuscript contained numerous errors – too many to be corrected by hand on a printout. He requested that the Wiley defendants send him a digital version of the manuscript. On October 24, the Wiley defendants provided Epstein with a digital version of the copyedited manuscript, which, according to Epstein, contained errors involving misuse of quotations, grammar, formatting, language and meaning, which Epstein believed had been introduced by the copy

editor. Epstein advised the Wiley defendants that quotation marks appeared to have been removed from many quotes and that this would expose him to the risk of plagiarism. In the same communication, Epstein argued that it was not the job of the copy editor to suggest major cuts and revisions, noting that there was no time to make substantive changes without raising numerous continuity and cross referencing problems.

For the next several days, Epstein continued to resist making many of the changes that the Wiley defendants recommended. The Wiley defendants continued to defend their editorial process and the recommendations they had made regarding revising and deleting parts of the substantive material. On October 26, 2006, after internal consultations between several executives, the Wiley defendants decided that they would begin the process of non-acceptance of the manuscript. On October 30, the Wiley defendants informed Epstein that they would be unable to accept the manuscript, stating, in pertinent part:

The emails and voice mails of the past several days indicate that we're far apart regarding what is necessary to make the manuscript acceptable for publication. The issues between us are not about process, but content: the major substantive concerns we presented regarding the length, tone and style, and other aspects of the book's credibility that you have stated emphatically that you are unwilling to change. Your email to me of October 26 makes it clear that you do not share these substantive concerns. As we cannot proceed to publish without your readiness to address these concerns, there does not seem to be a productive path where we can go forward together.

Joint Statement of Facts, ¶ 91; Aggarwal Aff., Ex. 5. The Wiley defendants also requested repayment of the \$25,000 advance in accordance with the contract. Aggarwal Aff., Ex. 5.

In a November 2, 2006 e-mail to Rinzler, Marsh explained that while she was doing the

copy editing, she deleted numerous special characters in the manuscript that she did not recognize, later realizing that some of these were quotation marks. She stated that she did her best to go back and fix the problems but that “this could present problems down the line.”

Epstein Aff. in Opp., Ex. R.

II. *The Contract*

The contract required Epstein to deliver a manuscript in “final form” by August 15, 2006.

Aggarwal Aff., Ex 4, ¶ 2A. Paragraph 3 of the agreement provided:

Manuscript Acceptance. If the author delivers the Manuscript by the Due Date, but it is not satisfactory to the Publisher in its sole judgment, the Publisher shall, within 90 days of the later of delivery or Author’s request for comments, advise the author whether it believes the manuscript could be made satisfactory. If the publisher believes the manuscript could be revised to its satisfaction, it shall afford the author reasonable additional time, as determined and confirmed in writing by the publisher, to deliver a revised manuscript. If, following such additional time, the Author has not delivered a manuscript satisfactory to the Publisher. . . the Publisher may elect to terminate. If the Publisher elects to terminate it shall give notice in writing to the Author and the Author shall immediately repay to the Publisher all monies paid by the Publisher to the Author. . .

Aggarwal Aff., Ex. 4, ¶ 3.

Paragraph 4A of the agreement provides that once the publisher notifies the author that the manuscript is acceptable to the publisher, the publisher will not make substantive changes to the factual information without the author’s prior approval, “not including standard copyediting and style changes.” Aggarwal Aff., Ex. 4. Paragraph 5A states that the author’s advance against royalties is non-refundable except if the author fails to deliver a complete and satisfactory

manuscript.

III. Contentions

A. Motion Sequence 004

In support of their motion for summary judgment and for judgment on the counterclaim, the Wiley defendants argue that a publisher has broad discretion to terminate a publishing contract if the author submits an unacceptable manuscript, provided that the publisher's termination is made in good faith after providing editorial assistance to the author to attempt to make the manuscript acceptable. The Wiley defendants claim that they provided sufficient editorial assistance to Epstein by reviewing three complete drafts of the manuscript over an eight-month period and providing line by line comments by their staff and experts in the field, who reviewed the work. The Wiley defendants further contend that the second cause of action alleging intentional misrepresentation must be dismissed as duplicative.

In opposition to summary judgment, Epstein argues that there are questions of fact as to the sufficiency of the editorial assistance regarding the copyedited manuscript and as to good faith. In addition, Epstein argues that the second cause of action, alleging fraud, is based on misrepresentations both about the severity of errors in the copyedited manuscript and the Wiley defendants' commitment to publishing the work. It is Epstein's positions that these alleged misrepresentations go beyond the scope of the publishing agreement.

B. Motion Sequence 005

In support of his motion for partial summary judgment on his breach of contract claim, Epstein argues that through their course of conduct, the Wiley defendants accepted his manuscript, thereby binding them to publish his book. He further claims that the Wiley

defendants' decision to terminate the contract was made in bad faith.

In opposition, the Wiley defendants contend that plaintiff's motion should be denied without consideration of its merits because it was not served within the court ordered time period for making dispositive motions. Alternatively, the Wiley defendants argue that, if the court reaches the merits, the motion must be denied because the Wiley defendants did not act in bad faith and had not accepted the manuscript at the time they terminated the contract.

IV. Discussion

A. Motion Sequence 005

According to Rule 8 (b) of the Individual Practices of this court, summary judgment motions must be served within 60 days of filing the note of issue. The preliminary conference order in this case reiterated this direction. Epstein filed the note of issue on March 8, 2010. On April 1, 2010, at a conference before the court, plaintiff's counsel acknowledged the 60-day time period for serving dispositive motions and, at that time, was advised by the court that no extensions would be granted. Nonetheless, he served this motion on May 21, 2010, two weeks beyond the May 8, 2010 deadline.

In *Kihl v Pfeffer*, 94 NY2d 118, 123 (1999), the Court of Appeals affirmed the dismissal of a complaint for failure to respond to interrogatories within court-ordered time frames, stating that “[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.” In *Brill v City of New York*, 2 NY3d 648, 653 (2004), the Court of Appeals reversed the lower court's grant of summary judgment without reaching the merits because the motion was not filed within the statutory time frame and there was no showing of good cause for late filing. Then, in *Miceli v State Farm Mut.*

Auto. Ins. Co., 3 NY3d 725, 726-727 (2004), the Court cited both *Kihl* and *Brill* in reversing an award of summary judgment, again, without considering the merit of the untimely motion. It stated:

As we made clear in *Brill*, and underscore here, statutory time frames – like court-ordered time frames (*see Kihl v Pfeffer*, 94 NY2d 118 [1999]) – are not options, they are requirements, to be taken seriously by the parties. Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored.

Id.

Epstein's summary judgment motion, served two weeks after the court-ordered deadline, was untimely. Since no showing of good cause for the late service was made, the motion for summary judgment is denied without consideration of the merits. *See, Miceli, id.; Brill, supra.*

B. Motion Sequence 004

However, even were the court to reach the merits, it would deny both plaintiff's and defendant's motions. There is a material question of fact as to whether the Wiley defendants accepted Epstein's manuscript for publication under paragraph 3 of the contract, which is titled "Manuscript Acceptance." That paragraph provides that if the Wiley defendants find the manuscript to be unsatisfactory, they "shall, within 90 days of the later of delivery or [Epstein's] request for comments, advise [Epstein] whether the manuscript could be made satisfactory." The Wiley defendants, under such circumstances are to provide Epstein "reasonable additional time, as determined and confirmed in writing by the publisher." Contract, para. 3.

Here, the manuscript was delivered, and Rinzler, shortly after, on February 22, 2006, never explicitly stated he found it to be unsatisfactory and that Epstein would be provided time to

make it satisfactory. Rather, by email, after stating his appreciation for the manuscript, Rinzler suggested extensive changes, only some of which were made by Epstein on June 6. After that, although Rinzler again informed Epstein that extensive changes to the manuscript were required, he never explicitly wrote that the manuscript was unsatisfactory. Thereafter, he sent the further revised manuscript for review by experts and for copy writing. Epstein was advised of a publication date and a production schedule, and the manuscript was sent to the typesetter. Rinzler testified that ordinarily, the Wiley defendants do not submit a manuscript to a copy editor until after the manuscript has been accepted for publication. Rinzler Tr. at 46-49; Joint Statement of Facts, ¶ 54. Defendant Jossey-Bass' "Guidelines for Authors," Part 8, Section A, titled "Acceptance of Your Final Manuscript", states in pertinent part, "[o]nce your manuscript has been accepted for publication, you will be informed that the manuscript has been turned over to a production [copy] editor. Production may be delayed on manuscripts that are incomplete, or that are missing permissions documentation." Dalley Aff., Ex. I, at 28. On September 8, 2006, the Wiley defendants emailed Epstein stating, "I'm pleased to inform you that The Case Against Adolescence is now in production." Epstein Aff. in Opp., Ex. H. Indeed, as of October 26, 2006, Epstein's book was included in Jossey-Bass's online catalogue, where the cover image indicated a publication date of March 2007 and the book was given an ISBN number.

However, Paragraph 5 of the agreement provides for payment to Epstein of a second advance installment of \$12,500 upon the Wiley defendants's "acceptance of the complete and satisfactory final manuscript of the work." Dalley Aff., Ex. J, ¶ 5A. This second installment was never paid. Instead, on September 8, Epstein was advised that he would receive the second advance after his review and revision of the copyedited manuscript. In addition, on October 26,

2006, the Wiley defendants advised Epstein that the manuscript still required substantive revisions and that if the Wiley defendants and Epstein could come to terms on the substantive content issues and the password-protected copyediting process, “we can proceed *to accept* and publish a book that all of us can be proud of” [emphasis added]. Joint Statement of Facts, ¶ 84. Paragraph 4A of the contract provides that once the Wiley defendants have notified Epstein of the acceptance of the manuscript, no substantive changes will be made to it, other than copy writing and style changes. On October 30, 2006, long after the 90 days from delivery of the first manuscript, a non-acceptance notice was sent. In sum, the conflicting extrinsic evidence fails to resolve whether the manuscript was “accepted” by the Wiley defendants, and summary judgment must be denied.

Moreover, assuming *arguendo* that the Wiley defendants did not accept the manuscript for publication, there is a question of fact as to whether the Wiley defendants acted in good faith when they terminated the publishing contract. *See Doubleday & Co. v Curtis*, 763 F2d 495, 501 (2d Cir), *cert. dismissed* 474 US 912 (1985) (a publisher has wide discretion to terminate a standard publishing contract due to submission of an unsatisfactory manuscript, provided the termination is made in good faith). Although the Wiley defendants have made a *prima facie* showing that they are entitled to judgment by submitting evidence that they provided editorial assistance to Epstein in order to produce a manuscript that was acceptable to all parties (*id.* [a publisher’s thorough review of the manuscript and subsequent offers to help demonstrate good faith]), Epstein has produced documentary evidence that raises questions about the Wiley defendants’ good faith.

To begin, the Wiley defendants insisted that Epstein provide them with a Word, rather

than Wordperfect, document despite Epstein's repeated complaints that the resulting text when changed to Word, was mangled. They required Epstein to work with Marsh's copyedited manuscript, allegedly riddled with mistakes, rather than permitting him to work with an "unlocked" document that was not password protected. Dalley Aff., Ex. F, at 70-71; Ex. G, at 32; Ex. M; Ex. P. They gave no consideration to Epstein's complaints of missing quotation marks which would have exposed him to accusations of plagiarism. For all of the above reasons, summary judgment on the breach of contract cause of action is denied.

Furthermore, the branch of defendants' motion that seeks to dismiss Epstein's second cause of action alleging fraud is granted. It is well settled that a plaintiff cannot sustain a cause of action for fraud where the only fraud alleged consists of a breach of the contract between the parties. *Bridgestone/Firestone, Inc. v Recovery Credit Servs., Inc.*, 98 F3d 13, 20 (2d Cir 1996); *Helprin v Harcourt, Inc.*, 277 F Supp 2d 327, 336 (SDNY 2003); *McKernin v Fanny Farmer Candy Shops*, 176 AD2d 233, 234 (2d Dept 1991). "Where the fraudulent conduct alleged amounts only to the defendant's false representation that it was adhering to the terms of the contract, the claim for fraud must be dismissed as redundant of the breach of contract claim." *Glynwill Invs, N.V. v Prudential Sec., Inc.*, 1995 WL 362500, *7 (SDNY 1995).

Here, Epstein alleges that the Wiley defendants made intentional misstatements about their willingness to accept Epstein's changes to the manuscript. These allegations are nothing more than an allegation that the Wiley defendants failed to perform their part of the bargain by cooperating with Epstein to produce an acceptable manuscript. Thus, the second cause of action for fraud will not lie. Accordingly, it is

ORDERED that defendants John Wiley & Sons, Inc. and Jossey-Bass's motion for

summary judgment dismissing the complaint (Motion Sequence 004) is granted only to the extent that the second cause of action alleging fraud is dismissed and the motion is otherwise denied; and it is further

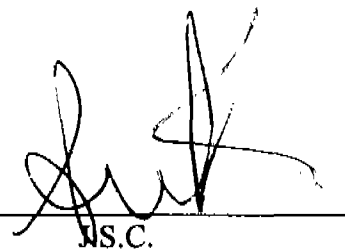
ORDERED that the action shall continue as to the first cause of action; and it is further

ORDERED that plaintiff Robert Epstein's motion for partial summary judgment (Motion Sequence 005) on the first cause of action is denied as untimely; and it is further

ORDERED that the parties are to appear in Part 54, 60 Centre Street, rm. 228, New York, NY, on October 7, 2010, at 10:30 a.m. for a pre-trial conference.

Dated: September 27, 2010

ENTER:



J.S.C.

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