

**Shehata v Those Awesome Guys SRL**

2021 NY Slip Op 31075(U)

April 1, 2021

Supreme Court, New York County

Docket Number: 652444/2018

Judge: Shawn T. Kelly

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 57

-----X  
OMAR SHEHATA,

Plaintiff,

- v -

THOSE AWESOME GUYS SRL, NICOLAE BERBECE

Defendant.

INDEX NO. 652444/2018

MOTION DATE 12/08/2020

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

-----X  
HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

Defendants Those Awesome Guys SRL and Nicolae Berbece (collectively “Defendants”) move for summary judgment pursuant to CPLR § 3212 contending that as a matter of law they did not breach the contract as alleged in Plaintiff Omar Shehata’s First cause of action.<sup>1</sup>

**Background**

Berbece and Shehata met on “Newgrounds” - an entertainment website message board - when Berbece posted that he was looking for someone to collaborate with on the creation and development of a video game, and Shehata responded to Berbece’s post and agreed to work with him (NYSCEF Doc. No. 7, ¶5). Since then, Berbece and Shehata have worked on a number of video game projects together, including Concerned Joe (2011), Tiny Timmy (2012), Big Bill (2012) and VrunK Dultures (2013) (NYSCEF Doc. No. 7, ¶¶6-7). In each such project, according

<sup>1</sup> The Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth causes of action were dismissed pursuant to the court’s October 26, 2018 decision (NYSCEF Doc. No. 25). The sole remaining cause of action is breach of contract.  
652444/2018 SHEHATA, OMAR vs. THOSE AWESOME GUYS SRL Motion No. 003 Page 1 of 5

to Shehata, they split the revenues on a 50/50 basis and formed Those Awesome Guys (NYSCEF Doc. No. 7, ¶¶6-7). In June 2012, the team began working on a bigger desktop version of Concerned Joe, which later became known as “Move or Die” (herein “Move or Die”) (NYSCEF Doc. No. 7, ¶8). Pursuant to a January 7, 2015 Intellectual Property Assignment Agreement (herein “the Assignment Agreement”), between Those Awesome Guys and Shehata, Shehata assigned all of his right, title and interest in Move or Die for “good and valuable consideration” to Those Awesome Guys.

Plaintiff alleges that despite the fact that Berbece has on a number of occasions credited him as “co-developer” of Move or Die and that the success of the Berbece-Shehata partnership has received press attention, Shehata has not received any compensation from the approximately \$11 million Move or Die has made since it was commercially released in 2015.

### **Summary Judgment Standard**

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1<sup>st</sup> Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1<sup>st</sup> Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *DeRosa v City of New York*, 30 AD3d 323, 325 [1<sup>st</sup> Dept 2006]). The evidence presented in a summary judgment motion must be examined in the “light most favorable to the party opposing the motion” (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563 1<sup>st</sup> Dept 2010]) and bare allegations or

conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

#### Berbecé's Affidavit

In support of their motion, Defendants submit the unnotarized affidavit of Berbecé, Defendants' counsel's affirmation, the Assignment Agreement and the parties' deposition transcripts. In his affidavit, Berbecé states,

I reside in Romania, which, like everywhere else, has been affected by COVID-19, I am unable to have this Affidavit notarized because notarization here has been suspended for most services, including this action. However, I hope that the Court will accept this Affidavit as my solemn statement under oath with the full force and effect it would otherwise have had if it were notarized. (NYSCEF Doc. No. 42, ¶53).

Plaintiff contends that the court cannot consider Berbecé's unnotarized affidavit and therefore, Defendants' summary judgment must be dismissed as an affidavit of fact in support is procedurally required under CPLR §3212.

It is well established that on a motion for summary judgment, the submission of an attorney affirmation only (a person with no personal knowledge of the facts) may be considered by the court provided that the relief is based on documentary evidence relevant to the issue (*see Spink v Cohen*, 156 AD2d 201 [1st Dept 1989]). In the present case, the relief sought is based upon the Assignment Agreement and thus the court may consider the within application submitted only with an attorney affirmation.

#### Breach of Contract

Defendants contend that they have not breached the Assignment Agreement, which provides that Plaintiff assigned his rights in Move or Die for "good and valuable consideration."

Defendants argue that Plaintiff received good and valuable consideration by agreeing to forego a right that he otherwise would have had in order to sever his ties with Plaintiff and attend college. Further, Defendants claims that Plaintiff also received the perpetual right to use his work on the game to promote and market himself with potential employers. In opposition, Plaintiff alleges that the consideration he understood the Assignment Agreement to refer to was an exchange of money in return for his release of his intellectual property rights. Further, plaintiff argues that the contract is silent as to what the consideration exchanged was and therefore is ambiguous.

The elements of a breach of contract claim are “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). If a contract term is ambiguous, prior dealings between the parties are admissible to determine the intent in interpreting the contract (*Kenneth D. Laub & Co., Inc. v 101 ParkAve. Associates*, 162 AD2d 294, 556 NYS2d 881, 882 [1st Dept 1990]).

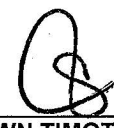
The Assignment Agreement is silent as to what consideration was exchanged for Plaintiff’s intellectual property rights. Contrary to Defendants’ arguments, they have not demonstrated that Plaintiff’s allegations fail to state a breach of contract claim. It is well established that “[w]hether a contract is ambiguous is a question of law” (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278, 793 NYS2d 835 [2005]; see *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). A contract is ambiguous when “on its face [it] is reasonably susceptible of more than one interpretation” (*Chimart Assoc. v Paul*, 66 NY2d 570, 573, 498 NYS2d 344 [1986]; *US Oncology, Inc. v Wilmington Tr. FSB*, 102 AD3d 401, 402, 958 NYS2d 47, 49 [2013]).

Accordingly, it is hereby,

ORDERED that Defendants' motion for summary judgment is denied.

4/1/2021

DATE



SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: