

<b>Shehata v Those Awesome Guys SRL</b>
2022 NY Slip Op 31296(U)
April 18, 2022
Supreme Court, New York County
Docket Number: Index No. 652444/2018
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

*Justice*

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OMAR SHEHATA,

Plaintiff,

- v -

THOSE AWESOME GUYS SRL, NICOLAE BERBECE

Defendant.

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INDEX NO. 652444/2018

MOTION DATE 4/18/2022

MOTION SEQ. NO. 005

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 137

were read on this motion to/for POST NOTE OF ISSUE DISCOVERY.

**BACKGROUND**

This action involves a claim for breach of contract to pay the consideration alleged due plaintiff under an intellectual property assignment agreement. Pursuant to the Intellectual Property Assignment Agreement dated January 7, 2015 between the plaintiff and Those Awesome Guys (TAG), plaintiff assigned all of his right, title and interest in the video game ‘Move or Die’ (MOD) to TAG for good and valuable consideration.

Plaintiff alleges in his complaint he signed that agreement for what he understood to be an exchange of fifty percent of the profits in exchange for transfer of his rights in MOD. MOD was commercially released in 2015, and it is estimated it has made over \$11 million in revenue to date. Despite the agreement, Plaintiff was not paid anything for his interest in the game.

As per CPLR §3101, the parties exchanged discovery demands and responses in 2018 and 2019. A deposition of Nicolae Berbece was held on May 8, 2019, and depositions of plaintiff

and a non-expert witness, Maarten De Meyer was conducted on February 17, 2020. The Note of Issue was filed on May 3, 2020.

On May 26, 2020, defendants filed a motion for summary judgment contending that they did not breach the contract and that plaintiff had already received the bargained for compensation in 2015. On April 1, 2021, the court (Kelly, J) denied the motion finding that “consideration” was ambiguous and that defendants failed as a matter of law to establish consideration was clear and unambiguous on the face of the document.

Justice Kelly’s decision was affirmed by the Appellate Division on October 21, 2021, pursuant to an order which held:

This action involves a claim for breach of contract for failure to pay the consideration due plaintiff under an intellectual property assignment agreement. Plaintiff and defendant Nicolae Berbecu were partners in the development of a number of video games, including the game at issue here, "Move or Die." It is estimated that the game earned over \$11,000,000 in sales to date. Plaintiff alleges that he assigned his intellectual property rights to defendants in return for 50% of the revenues earned from Move or Die in video game sales, and defendants breached the agreement by failing to pay him the amount owed. Defendants, on the other hand, contend that plaintiff already has received his consideration in the form of a "license," granted in connection with the assignment under the agreement, to use intellectual property in his portfolio for 1 of 2 purposes of marketing himself to future employers, as well as to cease working with defendants and attend college in the United States. We find that the court correctly found there is no clear language to support either party's contention as to what "good and valuable consideration" was received in exchange for plaintiff's intellectual property rights, and that term, as used in the parties' agreement, is ambiguous. The existence of a question of fact on the issue of consideration precludes summary judgment.

### **PENDING MOTION**

Plaintiff moves for post note of issue discovery. Plaintiff, through subpoena on a third party, discovered the existence of an additional contract related to the claim which defendant admittedly failed to produce in pre-note discovery. Plaintiff alleges the failure was intentional, and that defendants received significant income pursuant to said contract, defendants allege the

failure was inadvertent and of little consequence because all prior financial statements were produced.

For the reasons stated below the motion is granted.

### DISCUSSION

Plaintiff alleges he discovered due to service of a subpoena on Reverb Communications, a video game publisher and distributor, that defendants had a publishing and distribution deal with Reverb since January 8, 2016. Under the contract, Reverb is the publisher for Sony's PlayStation version of MOD. It also distributes MOD on computer console through various websites and platforms.

Plaintiff alleges defendants withheld royalty statements from Reverb showing sales from Sony PlayStation version of the game and other platforms Reverb has licensed the product to. Plaintiff alleges this information is central to his damages case as he is seeking compensation for breach of the contract, and that information withheld by defendants amounts to at least a million and a half dollars or more in sales generated by the video game.

Post- NOI discovery is only granted where "unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice...". *See, Valencia v City of New York*, 188 A.D.3d 549 (1st Dept. 2020), and *Hartnett v City of New York*, 139 A.D.3d 506 (1st Dept. 2016). Generally Trial Courts have the discretion to allow post Note discovery so long as it does not prejudice a party. *Cuprill v. Citywide Towing & Auto Repair Servs.*, 149 A.D.3d 442 (1st. Dept. 2017).

The court finds that plaintiff has established both unusual and unanticipated circumstances and a showing of substantial prejudice under the rule. New evidence has come to

light which is relevant to plaintiff's damage case. Defendant admittedly failed to provide the contract evidencing their partnership with Reverb. Further plaintiff alleges a contract between defendants and Reverb which transfers all rights to a new company owned by Berbece.

Based on the foregoing, plaintiff's motion is granted.

### CONCLUSION

WHEREFORE it is hereby:

ORDERED that defendants produce the following documents within 30 days of receipt of this order with notice of entry

- Royalty and or Revenue statements, and documents from Reverb Communication and Sony Interactive regarding sales of the PlayStation console game "Move or Die" from 2016 to date.
- Royalty and or Revenue statements, and documents from Reverb Communication regarding the sales of the desktop and mobile app, if any, versions for "Move or Die" from 2016 to date.
- Any documents between SV Soft Serve Games SRL and Those Awesome Guys and Mr. Berbece regarding the transfer of any right in the game "Move or Die".
- Revenue statements from SV Soft Serve Games SRL for sales of "Move or Die" on any platform from any party, including third party publishers and distributors:

and it is further

ORDERED that if defendant does not have possession of any of the requested documents, he shall provide an affidavit to that effect within said 30-day period; and it is further

ORDERED that plaintiff has leave to seek a further deposition of Nicolae Berbece but said request must be made to defendants in writing within 30 days of the receipt of the additional documents; and it is further

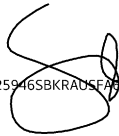
ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119);

and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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4/18/2022  
DATE

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SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE