

**Skyhorse Publ., Inc. v Blakley**

2023 NY Slip Op 34336(U)

November 3, 2023

Supreme Court, New York County

Docket Number: Index No. 657103/2020

Judge: Verna L. Saunders

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assert actual recoverable damages, and that in the event the agreement is found to be enforceable, plaintiff suffered no loss.

Plaintiff opposed the motion arguing that the publishing agreement is binding on defendant as the implied duty to write and publish the book at issue here constitutes consideration such that an enforceable agreement was created; that defendant's repudiation of the contract caused plaintiff to suffer compensable loss; and that defendant's counterclaims fail to state a cause of action and should be dismissed. Plaintiff seeks judgment in the amount of \$33,680.00, representing the guaranteed purchase of 4,000 copies of the Work pursuant to the publishing agreement.

In a motion for summary judgment, the movant bears the initial burden of presenting affirmative evidence of its *prima facie* entitlement to summary judgment, producing sufficient evidence to demonstrate the absence of any material issue of fact. (See *Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d 91, 101 [1st Dept 2020]; *Reif v Nagy*, 175 AD3d 107, 124-125 [1st Dept 2019]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].) "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." (*Anderson v Liberty Lobby, Inc.*, 477 US 242, 247-48 [1986].)

In order to form a valid agreement, there must be an offer, acceptance, consideration and a mutuality of intent to be bound. (See *Icahn v Lions Gate Entertainment Corp.*, 31 Misc 3d 1205[A], [Sup Ct, NY County 2011]; *Ovsyannikov v Monkey Broker, LLC*, 2011 NY Slip Op 33909(U).)

"[A]n illusory contract—that is, '[a]n agreement in which one party gives as consideration a promise that is so insubstantial as to impose no obligation'—is 'unenforceable'" (*Lend Lease [US] Constr. LMB Inc. v Zurich Am. Ins. Co.*, 28 NY3d 675, 684 [2018], quoting Black's Law Dictionary 370 [9th ed 2009]). "Consideration consists of either a benefit to the promisor or a detriment to the promisee. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him [or her]" (*Nassau County v New York State Urban Dev. Corp.*, 157 AD3d 805, 807 [2nd Dept 2018] [internal quotation marks omitted], citing *Lend Lease [US] Constr. LMB Inc. v Zurich Am. Ins. Co.*, 28 NY3d 675, 684 [2018]).

"Legally sufficient consideration does not necessarily entail a benefit flowing to the promisor" (*Weston v Smith*, 38 AD3d 1224, 1224-1225 [4th Dept 2007]); instead, "[a] 'promisee who has incurred a specific, bargained for legal detriment may enforce a promise against the promisor, notwithstanding the fact that the latter may have realized no concrete benefit as a result of the bargain'" (*id* at 1225, quoting *Holt v Feigenbaum*, 52 NY2d 291, 299; see *Weiner v McGraw—Hill, Inc.*, 57 NY2d 458, 464 [1982]). Indeed, "[t]he detriment suffered or the thing promised need not benefit the promisee or a third party, or be of substantial value to anyone"

(*Nassau County v New York State Urban Dev. Corp.*, 157 AD3d at 807-808; *Toobian v Golzad*, 193 AD3d 778, 783-784 [2nd Dept 2021]).

Here, defendant's promise to create the Work and publish same in exchange for plaintiff's promise to take on the promotion and marketing of the Work ostensibly to realize greater profit and benefit than defendant could conceivably obtain on his own behalf, through his own efforts is sufficient to establish that consideration exists here. Indeed, "[t]he detriment suffered or the thing promised need not benefit the promisee or a third party, or be of substantial value to anyone." (See *Nassau County v New York State Urban Dev. Corp.*, 157 AD3d at 807-808; *Toobian v Golzad*, 193 AD3d 778 at 783-784.) But here, where defendant decided to move forward independently shows that at some point, he believed his independent efforts could gain him a greater benefit than compliance with the agreement between the parties. Thus, defendant's claim that that the agreement was illusory lacks merit. And plaintiff's contention that the publishing agreement presupposes that there would be a creation to publish, here, the Work, is correct. It is clear that without the Work there would exist no predicate for performance of the balance of the agreement. Defendant's claim that the promises made herein by plaintiff to write/edit or publicize the book were insubstantial so as to essentially impose no obligation to perform is unavailing. Here, there was a mutuality of obligation and plaintiff did not possess a unilateral right to cancel his performance under the agreement. (*Dorman v Cohen*, 66 AD2d 411, 415 [1st Dept 1979]).

Thus, defendant's motion for summary judgment is denied. Plaintiff's cross-motion for summary judgment is granted inasmuch defendant failed to raise an issue of fact as no opposition to the motion was filed. However, the portion of the motion seeking damages due, if any, is referred to a special referee to hear and determine.

The remaining arguments are either without merit or need not be addressed given the findings above. Therefore, in accordance with the foregoing, it is hereby

**ORDERED** that defendant's motion for summary judgment is denied; and it is further

**ORDERED** that plaintiff's cross-motion for summary judgment is granted, without opposition; and it is further

**ORDERED** that defendant's counterclaims are dismissed; and it is further

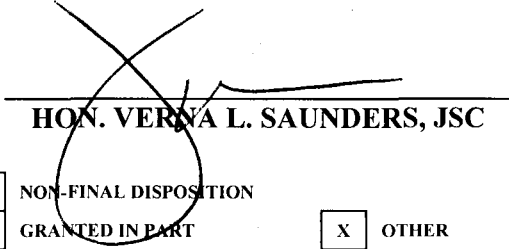
**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendant; and it is further

**ORDERED** that counsel for plaintiff shall, within twenty (20) days after this decision and order is uploaded to NYSCEF, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

**ORDERED** that service upon the Clerk of the Court and the Special Referee 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)).

This constitutes the decision and order of this court.

November 3, 2023

  
HON. VERNA L. SAUNDERS, JSC

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