

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 05-12247-GAO

PHILIP SELDON,
Plaintiff

v.

HARVARD UNIVERSITY PRESS,
Defendant

AMENDED¹
OPINION AND ORDER

October 4, 2007

O'TOOLE, D.J.

I. Background

The plaintiff, Philip Seldon, according to his pro se complaint, is a “renowned author of numerous best-selling books.” (Second Am. Compl. ¶ 1.) In April of 1998, he and Dr. Jay Pasachoff, a professor of astronomy at Williams College, entered into a contract with the President and Fellows of Harvard College,² which conducts the Harvard University Press, (“HUP”) to coauthor a popular introduction to astronomy. The contract, referring to Seldon and Pasachoff jointly as the “Author,” called for them to deliver a 125,000 word “complete Work” on or before July 31, 1998. (See Def. Ex. 1, ¶ 5(a).) It further provided that, “[i]f the Author has not delivered the final manuscript on the date specified above, or *if any manuscript that is*

¹This amends the previous Opinion and Order dated September 28, 2007 (dkt. no. 44) correcting two typographical errors on pages 5 and 6.

² Defendants have repeatedly pointed out in their filings that Harvard Univ. Press is not a separate legal entity, but rather is conducted by the President and Fellows of Harvard College, a Massachusetts charitable corporation. (Def.’s Harvard Univ. Press’s Mem. of Law in Supp. of its Mot. for Summ.J. 1 n.1.)

delivered is not, in the Publisher's judgment, satisfactory, the Publisher may terminate this Agreement at any time thereafter by notice in writing to the Author” Id. (emphasis added).

Seldon and Pasachoff set out to revise a book they had co-authored entitled “The Complete Idiot’s Guide to Astronomy,” which had been previously rejected for publication, into a more academic introductory text on the entire subject of astronomy, more suitable for publication by HUP. Seldon submitted a manuscript consisting of twenty-seven chapters to HUP on July 31, 1998 (the “1998 Manuscript”). He alleges that Michael Fisher, the editor at HUP who was principally involved, deemed the work submitted by the plaintiff to be “satisfactory.” (Second Am. Compl. ¶ 9.) Fisher sent the manuscript to two astronomers for review, who provided “negative comments on the style and presentation of the material.” (Opp. to Def.’s Mot. for Summ. J. ¶ 11.) Fisher shared the feedback from these reviews with Pasachoff, who in turn told Seldon that Fisher now required the work to be “completely rewritten to the style and tone of [HUP] standards.” (Id. ¶ 4.) Seldon then “completely rewrote the work to said standards” and submitted this revised manuscript to HUP in 1999 (the “1999 Manuscript”). Id.

Rather than immediately send the 1999 Manuscript out for review, Fisher awaited the Pasachoff’s revisions, allegedly orally extending the Agreement’s original deadline of July 31, 1998 as Pasachoff worked at a slower pace, much to Seldon’s dissatisfaction. (See Second Am. Compl. ¶ 23-24.) Pasachoff completed his review of substantial portions of the manuscript during his sabbatical year—the fall of 2001 through the fall of 2002. After Pasachoff sent Fisher some copies of work he had completed so that Fisher could gauge Pasachoff’s progress, Fisher and Pasachoff discussed changing the conception of the project from being a book about “astronomy” to a two-volume work, one volume about the solar system, and a second volume covering the rest of the field of astronomy. (See Def. Harvard Univ. Press’s Mem. of Law in

Supp. of its Mot. for Summ. J. at 7; Opp. to Def.'s Mot. for Summ. J. ¶ 5.) Seldon "vehemently objection to the proposal but stated he would be open to the book being published in two volumes spaced a year or two apart." (Opp. to Def.'s Mot. for Summ. J. ¶ 5.) At some point in the fall of 2002, Pasachoff sent Fisher a manuscript (the "2002 Manuscript") entitled "A Concise Guide to the Solar System," listing both Seldon and Pasachoff as authors, which was then sent for review. One reviewer, who evidently had also reviewed the 1998 Manuscript, said that the 2002 Manuscript was "a better manuscript than the one I read earlier. However, there are still some serious problems that should be solved before publication." (Def. Harvard Univ. Press's Mot. for Summ. J. Ex. G.) The other review of the 2002 Manuscript was considerably less favorable, describing it as "full of mistakes," "not repairable," and stating that he or she (the identities of the reviewers are kept confidential by HUP) was "still amazed that Pasachoff and Seldon could even have written this misbegotten manuscript." (Def. Harvard Univ. Press's Mot. for Summ. J. Ex. H.) Indeed, Seldon himself characterizes the 2002 Manuscript as "an inept work rife with misinformation and other errors . . ." (Am. Compl. ¶ 13) and "inept and misbegotten . . ." (Am. Compl. ¶ 17.) Fisher relayed the contents of the reviews to Pasachoff and Seldon. (Def. Harvard Univ. Press's Mot. for Summ. J. Ex. 3, ¶ 39.) On November 21, 2002, HUP sent correspondence to both Pasachoff and Seldon officially terminating the contract according to the terms of Clause 5(a). (Def. Harvard Univ. Press's Mot. for Summ. J. Ex. I.)

In November 2005 Seldon commenced this action asserting breach of contract claims against HUP and a fraud and/or fraudulent inducement claim against Fisher. (See Compl. ¶¶ 1-3.) On motion, I dismissed Seldon's breach of contract claim seeking specific performance (Count I) and his claim against Fisher (Count III). Seldon was allowed to proceed with two

breach of contract claims against HUP seeking monetary damages (Counts II and IV). Count II of Seldon's Amended Complaint alleges that HUP breached the contract because it received 2002 Manuscript entitled "A Concise Guide To The Solar System" and this was not a just cause for canceling the work titled "Astronomy" for various reasons. (Second Am. Compl. ¶¶ 28, 30.) In Count IV, Seldon alleges that the contract did not require a joint submission of the manuscript, and that he fully performed the contract unilaterally when he submitted the 1998 manuscript written only by him. (Id. ¶¶ 38-42). Therefore, Seldon alleges, HUP breached its contract by failing to publish, and pay for, the 1998 Manuscript. Id. The defendant has moved for summary judgment on both counts.

II. Discussion

Summary judgment is appropriate where there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). What must be shown by the moving party is that there are no genuine issues as to any material facts. Id. As to both Count II and Count IV, Seldon does not have sufficient evidence to establish a claim for breach of contract, and HUP is therefore entitled to summary judgment.

Count II and Count IV represent alternative theories as to why Seldon believes HUP breached the contract. Seldon's theory in Count II is that the contract could not be cancelled because a completed manuscript was never delivered to the defendant, because the reviews did not justify cancellation of the contract, and because the 2002 Manuscript was an entirely

different work from the work called for in the contract. Seldon argues that there are genuine issues as to the following material facts:

- 1) did the co-authors . . . ever deliver a completed manuscript to the defendant and
- 2) did the defendant have valid justification to cancel the contract based on one adverse review of the manuscript and 3) was the adverse review a review of the work ‘Astronomy’ or was it a review of a work titled ‘A Concise Guide To The Solar System’ which was not subject of the contract at issue.

(Opp. to Def.’s Mot. for Summ. J. ¶ 1).

Seldon’s query as to whether a completed manuscript was ever delivered is irrelevant. The agreement does not require a completed manuscript to be submitted for HUP to exercise the termination provision, clause 5(a). Clause 5(a) clearly provides that “if *any* manuscript that is delivered is not, in the Publisher’s judgment, satisfactory, the Publisher may terminate this agreement” (Def. Harvard Univ. Press’s Mot. for Summ. J. Ex. 1, ¶ 5(a) (emphasis added.)) Therefore, HUP was entitled to terminate the agreement at any point following the submission of any manuscript, complete or incomplete, if it found it to be unsatisfactory. Under the contract, whether any of the manuscripts submitted was “complete” is not material.

Seldon argues at length that the unfavorable reviews of the work did not justify canceling the contract because the book was factually accurate, but this is irrelevant because the contract clearly leaves whether a manuscript is “satisfactory” to HUP’s sole discretion and judgment, wise or unwise. Clause 5(a) explicitly provides that whether a manuscript is satisfactory is based entirely “in the Publisher’s judgment.” Courts that have considered the enforceability of such satisfaction clauses have found them enforceable. See Doubleday & Company, Inc. v. Curtis, 763 F.2d 495, 501 (2nd Cir. 1985); Random House, Inc. v. Gold, 464 F. Supp. 1306 (S.D.N.Y. 1979) *aff’d*, 607 F.2d 998 (2nd Cir. 1979). The Second Circuit has inferred a good faith

requirement into a contract containing a satisfaction clause, such that the contract may be terminated only as a result of honest dissatisfaction. See Doubleday, 763 F.2d at 500. The Second Circuit held that “a publisher may, in its discretion, terminate a standard publishing contract, provided that the termination is made in good faith, and that the failure of an author to submit a satisfactory manuscript was not caused by the publisher’s bad faith.” Id. at 501. Assuming that such a good faith requirement should be implied in this case, the issue is of no moment because Seldon does not allege or produce any evidence that Fisher acted in bad faith in any way. Indeed, the record contains only evidence that Fisher earnestly attempted to make progress on this project until the unfavorable reviews made it abundantly clear that it was a lost cause. Accordingly, questions posed by Seldon as to whether HUP was unwise to terminate the contract, whether the reviewers were qualified to review an astronomy book, whether one adverse review justifies cancelling the contract, how many of the reviews were adverse or whether the manuscripts submitted were factually accurate are all wholly irrelevant. According to the parties’ agreement, HUP was entitled to terminate the contract if it found any manuscript to be unsatisfactory in its sole, subjective judgment.

Seldon’s claim that the 2002 Manuscript, which preceded the termination, was a wholly separate manuscript from what Seldon and Pasachoff had contracted to write is also without merit. It is clear from the undisputed facts that the 2002 Manuscript was a revision of the same manuscript that Seldon and Pasachoff had been working on the entire time. Nothing in the contract provides that the title “Astronomy” had to remain unchanged. The contract merely says that it concerns “the publication of a work *now* entitled ‘Astronomy.’” (Def. Harvard Univ. Press’s Mot. for Summ. J. Ex. 1) (emphasis added.) Although Seldon claims he objected to the

new title, he admits that Fisher suggested this to Pasachoff, who in turn informed Seldon during the discussions about changing the scope of the project to cover the solar system in one volume and the remainder of the subject of astronomy in a second volume, which Seldon was “open to.” (Opp. to Def.’s Mot. for Summ. J. ¶ 5.) Seldon has not produced any evidence to support his contention that the submission of the 2002 Manuscript was a totally different and unrelated work. Accordingly, whether “the adverse review” was of a work titled “Astronomy” or of a work titled “A Concise Guide to the Solar System” is immaterial, because either way it was a review of the work that Seldon and Pasachoff contracted for with HUP.

Seldon’s alternative theory for his breach of contract allegations in Count IV, that the 1998 Manuscript he unilaterally submitted was satisfactory and therefore Seldon had fully performed his obligations to HUP, is also without merit. The contract clearly calls for a work that is the joint work of both Seldon and Pasachoff, who are jointly referred to as “the ‘Author.’” (Def.’s Ex. 1.) Seldon’s obligations under the contract could only be performed by the submission of a “satisfactory” work that Pasachoff had some involvement in, and not by the 1998 Manuscript which Seldon alone worked on and submitted. Aside from this, there is also no evidence in the record that the 1998 Manuscript was in any way deemed “satisfactory” by HUP. In fact, all of the evidence is to the contrary. After receiving poor reviews, Pasachoff and Seldon conceded as much by agreeing to continue revising the manuscript. As already discussed, whether Seldon himself believes his work to be “satisfactory” is irrelevant, as the contract provides that it is the Publisher’s judgment that determines whether a submission is satisfactory.

III. Conclusion

For the foregoing reasons, the defendant's motion for summary judgment (dkt. no. 38) is GRANTED. The defendant also requests an order precluding the plaintiff from filing any more claims and/or lawsuits against HUP and its representatives arising out of the Agreement, which is DENIED. If additional unmeritorious claims are brought, a remedy can be fashioned in due course. The plaintiff's motion to vacate protective order (dkt. no. 34) is also DENIED.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge