IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PAULA BRABEC,

Plaintiff,

v.

DELMAR THOMSON LEARNING[1] and
THE THOMSON CORPORATION,

Defendants.

OPINION AND
ORDER

00-C-137-C

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In this civil action for monetary damages, plaintiff Paula Brabec contends that defendant Delmar Thomson Learning breached its publishing contract with her by failing to publish her manuscript and committed other actionable wrongs against her. Plaintiff contends that defendant The Thomson Corporation, defendant Delmar's parent company, tortiously interfered with plaintiff's contract with defendant Delmar by causing the termination of that contract. Jurisdiction is present under 28 U.S.C. § 1332. Defendants have moved for summary judgment, arguing that plaintiff breached the contract by failing to produce an

[1] The parties have stipulated that Delmar Publishers, named as a defendant in the amended complaint, is now known as Delmar Thomson Learning.

acceptable manuscript or to incorporate requested revisions to make the manuscript acceptable.

I find that although defendant Delmar's handling of its relationship with plaintiff was far from exemplary, plaintiff never tendered an acceptable manuscript. As a result, defendant Delmar did not breach its contract when it refused to publish plaintiff's manuscript. In addition, I conclude that plaintiff has failed to adduce legal or factual support for her other claims that would be sufficient to allow a jury to find in her favor on those claims at trial. Accordingly, defendants' motion for summary judgment will be granted.

As explained in this court's Procedures to be Followed on Motions for Summary Judgment, a copy of which was given to each party with the Preliminary Pretrial Conference Order on April 19, 2000, "[t]he court will not consider any factual propositions contained in the response to proposed findings of fact not supported properly and sufficiently by admissible evidence." Procedures, II.C.3.

From the facts proposed by the parties, I find that the following are both undisputed and material.

UNDISPUTED FACTS

I. PARTIES

Plaintiff Paula Brabec is a registered nurse and author who resides in Wausau, Wisconsin. Defendant Delmar Thomson Learning, formerly known as Delmar Publishers, is a publishing company with an office in Albany, New York. Defendant Delmar Thomson Learning is an unincorporated division of Thomson Learning Inc., formerly known as International Thomson Publishing Inc., a Delaware corporation, with its principal place of business in Connecticut. Thomson Learning Inc. is a wholly-owned subsidiary of defendant The Thomson Corporation, a Delaware corporation, with its principal place of business in Connecticut. Defendant Thomson owns defendant Delmar and therefore has a financial interest in it.

II. CONTRACT

On March 6, 1992, plaintiff entered into a publishing contract with defendant Delmar Publishers, Inc. Under the contract, plaintiff was to compose a 1,400-page manuscript that would be used for the publication of a textbook on the subject of community health nursing. Defendant Delmar agreed to publish the manuscript when it was ready for publication. The contract required plaintiff to submit a "final draft" of a complete and acceptable manuscript to defendant on October 1, 1993. Later, defendant Delmar extended that deadline. The contract specified that defendant was entitled "in its sole judgment [to] determine whether the

manuscript is acceptable and ready for publication." The contract stated also that, "The Author will alter the manuscript as requested by the Publisher to make it acceptable and ready for publication." Under the contract, defendant Delmar had the right to edit plaintiff's manuscript "in consultation with" plaintiff but did not have the right to "materially alter" the meaning of the manuscript. Defendant Delmar offered its contract to plaintiff largely on a "take it or leave it" basis. The contract is governed by New York law.

Plaintiff drafted a manuscript that consisted of at least thirty chapters of written material. Early reviews in 1993 of certain chapters indicated that the manuscript had potential but did not indicate that the reviewers would adopt the text. The reviews were positive and were viewed very positively by defendant Delmar.

In 1994, defendant Delmar prepared a funding request for the Brabec manuscript project. The second page of the funding request estimates, among other things, certain percentages relating to the Brabec text over the life of expected sales. The estimated royalty amount payable to plaintiff was $114,663.

Over time, defendant Delmar assigned numerous developmental editors to oversee the development of plaintiff's manuscript. Initially, Bill Burgower was the editor responsible for plaintiff's manuscript project. In or about 1995, defendant retained Jennings & Keefe, a production house, to help develop, edit and produce plaintiff's manuscript. Defendant

outsourced the manuscript to Jennings & Keefe because of defendant's increasingly busy production schedule. Jennings & Keefe put portions of plaintiff's manuscript "into proof." Putting manuscript pages "into proof" (also known as "first pages" and meaning that the pages were typeset) generally means a publisher considers a manuscript to be "acceptable." However, when an outside development house, such as Jennings & Keefe, works on a manuscript, the procedure is different from that used by defendant when it develops and produces the manuscript in house. When using outside development, defendant Delmar does not have control over when the pages are put into proof and the existence of proofs does not signal acceptance. Burgower threatened non-publication of plaintiff's manuscript if plaintiff did not comply with Jennings & Keefe's changes. Burgower also told plaintiff that her royalties under the contract would be lowered to 10% across the board because defendant was incurring additional cost by using Jennings & Keefe.

During 1995 and 1996, while the manuscript was being developed by Jennings & Keefe, defendant Delmar continued to oversee the manuscript and provided feedback to Jennings & Keefe to pass along to plaintiff. Plaintiff received feedback from Jennings & Keefe. The project received "little visible support or response from Delmar" through 1995 and most of 1996 and "the project appeared to wander without much direction" from defendant. Defendant's correspondence to plaintiff contradicted itself as to what defendant would require to make the

manuscript "acceptable" and "ready for production." Defendant provided the resources plaintiff said she needed in order to update her research.

A performance review of Burgower, dated March 1, 1996, and covering the period from January 1, 1995 to December 31, 1995, was critical of Burgower's role in managing plaintiff's project: "He [Burgower] has not taken an active enough role in the management of the Brabec project. . . . While Bill has been actively involved in working with Nick Keefe to develop the project, there has not been enough attention placed on managing the development budget. . . ." Burgower resigned in 1996.

The progress and development of plaintiff's manuscript was delayed for several reasons: inadequate management and delays by defendant from 1993 to 1996; delays, problems and mistakes made by Jennings & Keefe from 1995 to 1996; and plaintiff's failure to meet deadlines and provide timely requested revisions and her refusal to make revisions. Jennings & Keefe lost photographs and other art material supplied by plaintiff that were supposed to be incorporated into her manuscript. Eventually, defendant Delmar fired Jennings & Keefe.

Defendant Delmar recovered plaintiff's manuscript from Jennings & Keefe in early to mid-1997. The manuscript consisted of approximately fifteen chapters in "first pages" and the remaining chapters in draft form. The draft chapters included Delmar production codes that conveyed certain information to defendant's production department and were in a form in

which pages were sometimes put into production, although usually pages in production would have more information. When the manuscript was retrieved from Jennings & Keefe, plaintiff knew that the "publisher [did] not find the current product acceptable."

In 1997, William Brottmiller was defendant Delmar's team leader responsible for the Brabec manuscript project. On or about January 16, 1997, Brottmiller prepared a comprehensive status report on plaintiff's manuscript project that he sent to his supervisor, Nancy Roberson. Brottmiller summarized the history of the Brabec project as "lengthy, incomplete, confusing, contradictory, and just plain appalling." Brottmiller also wrote, "For two years, the project appeared to wander without much direction" from defendant and he noted that Burgower's unwillingness to make decisions appeared to be a major cause of delays. Brottmiller speculated that "[plaintiff] was helpless to deal with a 'hodgepodge of styles and levels.'" Defendant determined that plaintiff's manuscript was unacceptable because manuscript references were outdated. In part this was a result of the delays in the manuscript. However, some references were already outdated early in the process, as noted by the manuscript's reviewers.

III. FEEDBACK AND CRITICISM

A. From Defendant Delmar

At the defendant company, it is often the case that more than one developmental editor works on a book from inception to publication. Defendant Delmar provided plaintiff regularly with suggestions regarding necessary revisions to the manuscript and worked with her to aid in the development of the manuscript.

Over the course of approximately seven and a half years of development, defendant provided plaintiff with feedback regarding the drafts of the manuscript portions she submitted. This included a meeting with plaintiff on July 18, 1997; a letter to plaintiff dated July 22, 1997; a phone conference with plaintiff on October 22, 1997; a letter to plaintiff dated October 23, 1997 and letters to plaintiff or her attorneys dated September 18, 1998, September 24, 1998, October 5, 1998, October 12, 1998 (2 letters), December 15, 1998, May 17, 1999 and August 12, 1999. However, on many occasions defendant Delmar provided information to plaintiff that conflicted with information it had given her earlier.

B. From Professors

Defendant sent plaintiff's work in progress to various third-party professors of community nursing, all of whom agreed that the manuscript had potential but was not ready for publication. One early reviewer stated, "I would highly endorse this manuscript for use by undergraduate students" upon minor revisions affecting one chapter of the manuscript. A

1993 review of seven chapters noted, "I probably would not adopt the text because at the present time we do not have CHN at the graduate level."

In 1997, all of the reviewers "felt the way the text presented the application of the nursing process to community nursing diagnoses and aggregates was very helpful and well done throughout the text." These reviewers thought that the text would best fit into the bachelor of science in nursing program. In 1997, defendant Delmar noted that "there were some chapters that were considered too high a level for this area," while certain reviewers stated that "there are consistency problems with the format of some of the chapters" and that "there are some chapters that contain[] information that was redundant." Reviewers noted that plaintiff needed to add the Anderson and McFarlane's Community as Partner Model, the absence of which "was felt to be very problematic and would hinder the adoption of this text."

After the 1997 reviews, defendant noted "several global improvements to the manuscript [that would] be needed before it reaches our high standards for publication." Defendant said about the 1997 reviews, "We had the entire final draft manuscript thoroughly reviewed by five experts, and held our breath while we waited for their verdicts. I am now pleased (and relieved!) to report that the reviews were positive across the board." The reviews supported further development and publication of plaintiff's manuscript but did not indicate that the manuscript was ready for publication or that the reviewers would adopt the text as it

existed in the reviewing stage.

All outside reviews of plaintiff's manuscript that were conducted by defendant Delmar up to 1997 were favorable, positive and supportive of further development of the manuscript, although no review indicated that the manuscript was without problems or that the reviewer would adopt the text as it then existed.

C. Plaintiff's Knowledge of Criticism

At all times during the seven and a half years of development, plaintiff was aware of the criticisms by defendant and the reviewers. Plaintiff agreed that some of the comments were valid and that the manuscript required the suggested revisions but she disagreed with other comments. Plaintiff admits that she received copies of the reviews pointing out deficiencies in the manuscript and that she outlined the reviewers' criticisms for her co-author. In June 1997, plaintiff admitted that the writing style of the manuscript was inconsistent, lacked elements and "there [was] overlap, outdated reference lists, poor artwork, etc."

In early 1997, defendant reviewed plaintiff's manuscript in its entirety again. Defendant told plaintiff that the reviews were positive "across the board." Plaintiff acknowledged the problems that the reviewers had pointed out. On July 2, 1997, plaintiff told her then co-author Sandra MacKay, "The reviewers liked the book overall, but there were

several criticisms. The writing style is not consistent, there are missing elements . . . and there is overlap, outdated reference lists, poor artwork, etc."

In July 1997, plaintiff attended a meeting at defendant's offices in Albany, New York. The purpose of the meeting was to discuss the status of the manuscript project and the division of responsibilities between defendant and plaintiff necessary to enable the book to be published. Esperti, an employee of defendant, indicated to plaintiff in a follow-up letter that defendant anticipated a publication date of July 1998, if plaintiff addressed certain issues pertaining to the manuscript. Esperti's letter summarized what had been discussed and agreed to at the meeting. The letter required plaintiff to submit to defendant any revisions on January 9, 1998, and states, "Bound Book Date tentatively scheduled for July 24, 1998."

IV. STATUS OF MANUSCRIPT IN 1997-1999

Defendant Delmar counted plaintiff's manuscript as being "in production" because defendant was spending money to have the manuscript worked on by Jennings & Keefe. The fact that a manuscript is in production with an outside development house does not mean that the manuscript has been deemed acceptable by defendant. Furthermore, even manuscripts that have been deemed acceptable require "fine tuning" or "minor modifications" during production.

Defendant uses a "blue sheet procedure" to put an author's manuscript into production. The blue sheet is an internal document that effectuates the transition of an author's manuscript from defendant's editorial staff to its production department. Ordinarily, when a manuscript moves into production, the manuscript has been deemed to be acceptable to defendant Delmar. On or about May 30, 1996, Delmar editors completed a blue sheet form for plaintiff's manuscript. The first page of the blue sheet answers "yes" to the question, "Is text manuscript complete?" Defendant advertised plaintiff's community health nursing text for sale within its 1997 customer catalog and processed at least some purchase orders by customers who wanted to buy plaintiff's book. The inclusion of a book in a catalog does not indicate that the book has been accepted, only that it is anticipated that it will be published.

In late 1997, Marah Bellegarde became defendant's developmental editor responsible for plaintiff's project. Bellegarde had been a project and developmental editor for years before she began work on plaintiff's manuscript. Bellegarde reviewed chapters as they were provided to her and forwarded comments to plaintiff. Bellegarde does not recall ever reviewing all chapters of plaintiff's manuscript. In April 1998, Bellegarde sent two-thirds of plaintiff's manuscript in "final draft" to defendant's production department. In June 1998, Bellegarde sent the remaining one-third of the manuscript in "final draft" to defendant's production department. Bellegarde routed the draft manuscript to the production department for its

review as part of normal procedure and not because the book was being put "into production."

Plaintiff found Bellegarde to be an inexperienced editor who lacked substantive knowledge about nursing. On or about October 6, 1997, Bellegarde sent plaintiff a letter asking plaintiff to supply items that defendant had not requested in its letter to plaintiff of July 22, 1997. For example, defendant Delmar told plaintiff, "You will need to re-submit new art manuscripts with your final manuscript."

On or about December 11, 1997, Esperti sent a letter to plaintiff stating that defendant had "determined that [plaintiff's] January 9, 1998 [manuscript submission] date could not be met." The letter stated further that defendant's new "proposed publication date will . . . be September 1999." This was 14 months later than the publication date Esperti had given plaintiff tentatively in Esperti's July 22, 1997, letter to plaintiff. Esperti added that defendant could not make any definitive commitment to publish plaintiff's manuscript until it "readdressed its printer and production schedules." In the July 22, 1997 letter, Esperti had not indicated that publication of plaintiff's manuscript was contingent upon defendant's printer or production schedules. Bellegarde did not know why defendant imposed a new publication date of September 1999.

On or about December 29, 1997, Bellegarde sent plaintiff a letter with "a few

questions/observations" regarding her review of Chapters 2 and 3 of plaintiff's manuscript. Among other things, the letter stated, "please make sure you use the most current sources of information," without stating how current those references had to be. The only specific comments relating to Chapters 2 and 3 related to updating information within two figures of those two chapters. Plaintiff responded promptly to all of defendant's requests for comments and revisions by letter to defendant dated January 4, 1998.

V. PLAINTIFF'S REFUSAL TO MAKE FURTHER REVISIONS

From 1993 through at least 1998, plaintiff made numerous substantive revisions to her manuscript in response to changes requested by defendant and Jennings & Keefe. Plaintiff refused to make the changes requested by defendant in 1998 because she believed the changes were unnecessary and unreasonable. Plaintiff believed that defendant Delmar did not intend to publish her manuscript.

Plaintiff wrote a comprehensive letter to defendant, dated January 4, 1998, summarizing the history of the parties' dealings and setting forth plaintiff's position at that time regarding defendant's decision to request substantial edits and to delay publication of plaintiff's book to September 1999. In September and October 1999, Bellegarde sent letters to plaintiff requesting further substantial edits and changes to plaintiff's manuscript. In several instances,

as evidenced by Bellegarde's letters, defendant was asking for revisions to include things that were already included within the manuscript. In other instances, defendant was asking for revisions that contradicted editorial guidance that plaintiff had received previously from defendant or Jennings & Keefe.

By late 1998, plaintiff believed that defendant was requiring substantial changes and revisions to plaintiff's manuscript simply to string her along at a time when defendant had no intention of ever publishing her book, no matter what changes she made to her manuscript. However, plaintiff agreed in December 1998 that a chapter on economics was necessary and that she needed to revise the language in the manuscript anywhere it contained a discussion of community health standards. In or about April 1999, plaintiff retained legal counsel, who sent a letter to defendant dated April 23, 1999, setting forth plaintiff's position regarding the substantial edits and changes then requested by defendant.

In February 1999, defendant published a community health nursing book by an author named Hitchcock. At least in part, the Hitchcock book overlapped with subjects and topics within plaintiff's manuscript. On or about October 16, 1997, Brottmiller, Esperti and Bellegarde considered the implications of scheduling problems related to the production of the Hitchcock book and plaintiff's book. On or about this date, Brottmiller sent an e-mail memorandum to Esperti and Bellegarde, advising, "We no longer need to drag our feet on

Hitchcock to give Brabec a selling season of its own." Defendant had delayed the production of the Hitchcock book, the manuscript of which had come in early, to allow plaintiff to meet her schedule so that the book could be published in 1998 according to plan and to keep distance between the publication dates of the two works. Bellegarde was eligible to receive a bonus for the year 1999 and she received it because she had successfully met certain goals regarding books being placed into production and publication in 1999.

In his October 16, 1997 e-mail to Esperti and Bellegarde, Brottmiller wrote, "we will not be investing more in this title unless we can feel assured that it will sell. This not only means positive reviews, it means the schedules can be articulated so as to maximize sales between our two community health nursing books." Market acceptance and adoption were always important to the evaluation of the manuscript because course adoption is central to the commercial success of a textbook such as the one plaintiff and defendant were developing. Defendant never offers publishing contracts to authors undertaking not to develop a competing text and would not do so because a publisher needs to be free to publish a range of titles. Defendant never told plaintiff that it was planning to publish a text that would compete with plaintiff's.

As of mid-1999, none of the professors who reviewed plaintiff's manuscript would recommend it for course adoption, which is central to the commercial success of a textbook.

Although defendant's only budget for the project indicated that plaintiff's manuscript would produce an acceptable level of profits for the company, that budget was done well before the last round of reviews. Preliminary budgets are often optimistic in their analysis of a book's profitability.

Plaintiff spent thousands of hours developing her community health nursing manuscript for defendant. Plaintiff did so because defendant had indicated that her manuscript would be published if she addressed all of the reviewers' comments and other issues and that plaintiff would then receive compensation for her work.

VI. CONTRIBUTOR CONTRACTS

Plaintiff entered into contracts with other individuals to act as contributors to the book. In all cases, these contracts specified that defendant would hold the copyright to any material produced by the contributors for the book. On or about June 30, 1997, defendant sent a letter to the manuscript's contributing authors, with a copy to plaintiff, stating "The good news is that the [Brabec] text has reviewed so well, and that Paula will be giving the manuscript a final tune up before it officially goes into production this fall . . . We expect that the book will be published in the fall of 1998. . ." The letter indicated that revisions were being made that would not require the contributors' input and did not indicate that the manuscript was

acceptable and ready for publication. In or about July 1997, Brottmiller and Esperti sent letters to plaintiff's contributors about the status of the manuscript project. The letters stated, in part, "Due to unforeseen circumstances, we ran into some production problems that greatly delayed the publication of this book." Brottmiller and Esperti were alluding to the Jennings & Keefe situation. In October 1997, defendant agreed to pay for "permissions" that had expired because of the delays.

After terminating plaintiff's publishing contract, defendant released copyrights it held pursuant to plaintiff's contributor agreements in the materials produced by plaintiff's contributors. In or about November 1999, defendant notified plaintiff's contributors by letter that plaintiff's manuscript was unlikely to be published by defendant. Defendant's letters invited the contributors to publish their material elsewhere. Defendant had no permission from plaintiff to send these letters. In fact, plaintiff's lawyer advised defendants Delmar and Thomson on or about October 15, 1999, that they should not contact or attempt to release plaintiff's contributors. Esperti recalled only three instances when contributors phoned in 1999 wondering about the status of plaintiff's project. Some or all contributors withdrew their contributions to plaintiff's manuscript after they received these letters.

OPINION

Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). All evidence and inferences must be viewed in the light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). However, the non-moving party must set forth specific facts sufficient to raise a genuine issue for trial. See Celotex v. Catrett, 477 U.S. 317, 322, 324 (1986) ("the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). There is "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." Id. at 323 (emphasis in original). The Court of Appeals for the Seventh Circuit has held that summary judgment is appropriate if the court concludes that "if the record at trial were identical to the record compiled in the summary judgment proceedings, the movant would be entitled to a directed verdict because no reasonable jury would bring in a verdict for the opposing party." Russell v. Acme-Evans Co., 51 F.3d 64, 70 (7th Cir. 1995).

Plaintiff brings nine claims. Against defendant Delmar, plaintiff brings claims of breach of express contract, breach of implied contract, interference with existing contractual relations,

breach of fiduciary relationship, promissory estoppel, negligence, quantum meruit and unjust enrichment. Against defendant Thomson, plaintiff brings a claim of tortious interference with plaintiff's contract with defendant Delmar and with her contributors.

The parties agree that the publishing contract between plaintiff and defendant is a valid contract. The contract states that it "shall be construed and interpreted according to the laws of the State of New York." Esperti Affid., dkt. #27, Ex. A at ¶ 22. Although several of plaintiff's claims against defendant are not contractual, I have analyzed them under New York law because the contract indicates an intent on the part of defendant and plaintiff that their relationship be governed by New York law and because the parties themselves cite cases interpreting New York law. The claim against defendant Thomson is analyzed under Wisconsin law because defendant Thomson was not a party to the contract between plaintiff and defendant Delmar and because the parties cite Wisconsin law in discussing that claim.

I. CONTRACTUAL CLAIMS

The contract between plaintiff and defendant states, "The publisher shall, in its sole judgement, determine whether the manuscript is acceptable and ready for publication. The Author will alter the manuscript as requested by the Publisher to make it acceptable and ready for publication." Esperti Affid., dkt. #27, Ex. A at ¶ 5. The question is whether plaintiff

tendered an acceptable manuscript to defendant in 1997 and defendant breached its express obligation under the contract to make the manuscript ready for publication thereafter.

In Doubleday & Co. v. Curtis, 763 F.2d 495 (2d Cir. 1985) (applying New York law), the defendant asserted that although his manuscript was not of publishable quality, he would have been able to make it that way had plaintiff Doubleday provided him adequate editorial assistance. In resolving the case, the court discussed the standard for determining whether the contract had been breached: "[W]here the satisfactory performance of one party is to be judged by another party[,] New York courts have required the party terminating the contract to act in good faith." Id. at 500. The court 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.

All publishing contracts include an implied covenant of good faith and fair dealing. See Van Valkenburgh Nooger Neville, Inc. v. Hayden Publishing Co., 281 N.E. 2d 142, 144 (N.Y. 1972). The obligation of good faith includes "an implied obligation in a contract of this kind for the publisher to engage in appropriate editorial work with the author." Harcourt Brace Jovanovich, Inc. v. Goldwater, 532 F. Supp. 619, 624 (S.D.N.Y. 1982). The required editorial work "must consist of some reasonable degree of communication with the author[], an

interchange with the author[] about the specifics of what the publisher desires; about what specific faults are found; what items should be omitted or eliminated; what items should be added; what organizational defects exist, and so forth." Id. That defendant's editorial work may have been of poor quality does not mean that it breached the contract:

> The possibility that a publisher or an editor – either through inferior editing or inadvertence – may prejudice an author's efforts is a risk attendant to the selection of a publishing house by a writer, and is properly borne by that party. To imply a duty to perform adequate editorial services in the absence of express contractual language would, in our view, represent an unwarranted intrusion into the editorial process.

Doubleday & Co. 763 F.2d at 500.

Plaintiff contends that the determination whether defendant acted in good faith is a factual question of intent that should not be resolved on summary judgment. See Fitzsimmons v. Best, 528 F.2d 692, 694 (7th Cir. 1976) ("Questions of intent are particularly inappropriate for summary judgment."). It would be improper to grant summary judgment for defendant if the decision rested on credibility determinations. In this instance, however, no such determinations need be made. Summary judgment will be granted because plaintiff has failed to propose facts that would allow a reasonable jury to find that defendant acted in bad faith.

A. Breach of Express Contract

Plaintiff does not dispute that good faith is the standard to be used in evaluating

whether defendant breached its contract. The dispute is whether plaintiff tendered an acceptable manuscript and whether defendant acted in good faith in refusing to publish it. Plaintiff contends that defendant's bad faith is evidenced by Bellegarde's failure to undertake any editorial work on the greater part of the manuscript.

Plaintiff's argument that defendant breached its duty to make the contract "ready for publication" assumes the vital fact that plaintiff tendered an "acceptable" manuscript. The undisputed facts show that although plaintiff believed her manuscript should have been considered acceptable for publication, defendant never made such a determination. Plaintiff told her co-author as late as July 1997, "the publisher does not find the current product acceptable" and she agreed in December 1998 that a new chapter had to be added and revisions made. The contract is explicit that the determination of acceptability is to be made by the publisher. Defendant's conclusion that the manuscript was not yet acceptable is supported by the comments of outside reviewers.

Plaintiff implies that defendant defeated her efforts to make the manuscript acceptable by changing editors and requiring revisions that were inconsistent with earlier comments. Over the course of seven years, defendant worked with plaintiff to develop the manuscript, providing suggestions and revisions that it believed might make the manuscript acceptable. That defendant assigned different editors to the project over time, sent the project to an outside

production house and may have provided contradictory advice are not indications that defendant was acting in bad faith. See Doubleday & Co. 763 F.2d at 500. Similarly, Bellegarde's failure to review the entire manuscript is not evidence of bad faith. Bellegarde did edit several chapters and was working with plaintiff at a time when plaintiff began to refuse to make any revisions that she had not agreed to in July 1997.

Goldwater, 532 F. Supp. 619, is distinguishable. In that case, the publisher did *no* editorial work. The district judge found that "[t]he evidence does not indicate any desire or intention on the part of the [Harcourt Brace Jovanovich] people to edit. The evidence indicates a desire to have another writer and a lack of a bona fide commitment to abide by the contract." Id. at 625. In Goldwater, Harcourt Brace Jovanovich made no attempt to communicate with the authors to fix the problems it saw in the manuscript; in contrast, defendant Delmar provided substantial edits and suggestions to plaintiff over a seven-year period.

Plaintiff has submitted no evidence to support her assertion that defendant had decided not to publish her manuscript and was requiring her to make revisions only as a means of stringing her along. Defendant showed the manuscript to several reviewers over the years; at no point did any reviewer state that he or she would adopt the text in its current form. A publisher may consider the likelihood of a book's commercial success in deciding whether to accept a manuscript offered for publication. See Random House, Inc. v. Gold, 464 F. Supp.

1306, 1308 (S.D.N.Y. 1979). Because professors' adoption of a text is important to a text's commercial success, defendant could legitimately consider the manuscript's potential for commercial success in determining its acceptability for publication. Defendant Delmar deserves no medals for its handling of plaintiff's manuscript but it did not breach the contractual duty it owed plaintiff.

B. Implied Covenant of Good Faith and Fair Dealing

Although defendant's editorial efforts may have been inefficient and may have delayed potential publication of the manuscript, the undisputed facts do not suggest that any of defendant's editorial efforts were taken in bad faith or to thwart publication of plaintiff's manuscript. Plaintiff contends that defendant was dishonest because it promised her in July 1997 that her manuscript would be published in July 1998. (Plaintiff contends that a letter sent by Esperti "summarized what was discussed and agreed to" in the meeting; that letter indicates that the July 1998 date was a tentative date only.) Even if defendant did promise plaintiff a July 1998 publication date, its failure to fulfill that promise is not evidence of bad faith. Plaintiff never submitted an acceptable manuscript. Making such a promise might demonstrate poor judgment on defendant's part but it does not suggest that defendant did not intend to keep the promise at the time it was made. Moreover, the facts indicate that

defendant delayed publication of the Hitchcock text to allow plaintiff's text to be published first until it became clear that plaintiff would not be able to make revisions in time. Defendant had no responsibility to publish only one community health nursing book. The undisputed facts suggest that defendant attempted to coordinate the publishing schedules of the two books to maximize profits, which it had every right to do. Accordingly, defendant will be granted summary judgment on this claim.

II. INTERFERENCE WITH CONTRACTUAL RELATIONS

"The tort of inducement of breach of contract, now more broadly known as interference with contractual relations, consists of four elements: (1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff." Kronos, Inc. v. AVX Corp., 612 N.E.2d 289, 292 (N.Y. 1993). Plaintiff contends that defendant tortiously interfered with plaintiff's contributor contracts by writing to the contributors to tell them of its decision not to publish plaintiff's manuscript. Plaintiff has failed to adduce any evidence suggesting that defendant intended to induce plaintiff's contributors to withdraw their permission for plaintiff to use their work. Defendant's letters to the contributors told them that *defendant* would no longer consider them

bound to their contracts relating to plaintiff's manuscript. It did not prevent plaintiff from writing to the contributors and asking their permission to use their work to submit to another publisher. The fact that defendant's letter may have caused contributors to withdraw their permission does not imply that defendant intended its letter to have that effect. Defendant Delmar will be granted summary judgment on this claim.

III. BREACH OF FIDUCIARY RELATIONSHIP

"New York law . . . does not regard the relationship between a publisher and author, or between a licensor receiving royalty payments from a licensee, as establishing a fiduciary duty." Liebowitz v. Elsevier Science Ltd., 927 F. Supp. 688, 711 (S.D.N.Y. 1996). In Van Valkenburgh, the New York Court of Appeals (the state's highest court) affirmed an Appellate Division ruling after concluding that "it could be found, as a matter of law, on the record that there was no fiduciary relationship." See Van Valkenburgh, 281 N.E.2d at 145, 146. The Appellate Division had determined that there was no fiduciary relationship between the parties but instead one of ordinary contract and had reversed the lower court's finding that the publisher occupied a fiduciary relationship to the author and that there had been a failure by the publisher to act in good faith in that relationship. See id. at 144. The District Court for the Southern District of New York discussed this holding in Mellencamp v. RIVA Music Ltd.,

698 F. Supp. 1154, 1159-60 (S.D.N.Y. 1988). In Mellencamp, the federal district court read Van Valkenburgh as rejecting the idea that a publisher with exclusive rights in a work is a fiduciary in relation to the author. Rather, the "'trust elements' in a publisher-author relationship come into play where the publisher tolerates infringing conduct or participates in it." Id. Plaintiff has failed to adduce evidence showing that her relationship with defendant was anything other than an arm's-length contractual one. Therefore, defendant will be granted summary judgment on this claim.

IV. ESTOPPEL, QUANTUM MERUIT AND UNJUST ENRICHMENT

Defendant contends that these quasi-contractual remedies are not available to plaintiff because a valid contract addresses the issue and, even if they were available, plaintiff has failed to adduce sufficient evidence to entitle her to relief under the quasi-contractual theories. Plaintiff argues that the claims do not address the "same issue" as the contract and that, in any event, she may pursue potentially conflicting theories of recovery.

"The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." Clark-Fitzpatrick, Inc. v. Long Island Rail Road Co., 516 N.E.2d 190, 193 (N.Y. 1987). However, "where the contract does not cover the dispute in issue, plaintiff may proceed

upon a theory of quantum meruit and will not be required to elect his or her remedies." Joseph Sternberg, Inc. v. Walber 36th Street Associates, 594 N.Y.S.2d 144, 146 (N.Y. App. Div. 1993) (distinguishing Clark-Fitzpatrick and concluding that because contract was ambiguous, it could not be said that dispute was to be determined pursuant to terms of valid contract; therefore plaintiff was not barred from proceeding on quantum meruit theory). In Oscar Productions, Inc. v. Zacharius, 893 F. Supp. 250 (S.D.N.Y. 1995), relied on by plaintiff for the proposition that an author can recover under promissory estoppel against a publisher, the court found no contract between the parties. Thus, Oscar Productions is distinguishable from this case, in which plaintiff and defendant agree that a contract covered their relationship.

Plaintiff cites Seiden Associates, Inc. v. ANC Holdings, Inc., 754 F. Supp. 37, 38 (S.D.N.Y. 1991), for the proposition that "New York courts have specifically recognized that a plaintiff may pursue potentially conflicting theories of recovery that include claims for breach of contract, quasi contract, quantum meruit and unjust enrichment." Plt.'s Mem. of Law at 19. In Seiden Associates, the plaintiff survived a motion to dismiss the alternative theories of recovery because of liberal pleading rules and the fact that the express contract was with a non-party. See Seiden Associates, 754 F. Supp. at 40, 41 ("In the event that there is no enforceable contract between plaintiff and defendants, plaintiff may be able to recover under its alternative theories of quantum meruit and/or unjust enrichment"). That holding does not apply to the

present case, in which the parties agree that there is an enforceable contract between them. In Seiden Associates, the court addressed the present situation: "To the extent there is a valid and enforceable contract between plaintiff and defendants, plaintiff will not be able to seek recovery in quasi contract in addition to or in conflict with the express terms of that contract." Id. at 39.

Plaintiff argues that her contract claims do not concern the same issue as the quasi-contractual claims because the contract is silent regarding the compensation payable to plaintiff in the event she tenders an acceptable manuscript to defendant and defendant chooses not to publish it. Assuming that plaintiff could prove she had tendered an acceptable manuscript, which she has not done, defendant would be in breach of contract and contract law would determine plaintiff's damages. Defendant will be granted its motion for summary judgment on plaintiff's quasi-contractual claims.

V. NEGLIGENCE

Plaintiff contends that "Delmar's near seven-year relationship with Plaintiff transcended the parties' Contract and created an expectation on Plaintiff's part that Delmar would act toward Plaintiff with reasonable care, to ultimately ensure the publication of Plaintiff's book." Plt.'s Mem. of Law, dkt. # 31, at 20.

"A breach of contract is not considered a tort 'unless a legal duty independent of the contract itself has been violated.' Further, '[t]his legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract.'" Massena Towne Center Associates v. Sear-Brown Group, Inc., 680 N.Y.S.2d 349, 350 (N.Y. App. Div. 1998) (quoting Clark-Fitzpatrick, 516 N.E.2d at 193-94). See also New York University v. Continental Insurance Co., 662 N.E.2d. 763, 767-68 (N.Y. 1995).

> A legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship. Professionals, common carriers and bailees, for example, may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties. In these instances, it is policy, not the parties' contract, that gives rise to a duty of due care.

Sommer v. Federal Signal Corp., 593 N.E.2d 1365, 1369 (N.Y. 1992) (internal citations omitted). "[W]here plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory." Id. Plaintiff does not suggest that the position of publisher is so similar to that of a doctor or common carrier that public policy requires defendant to have exercised due care, irrespective of its contractual duties. Plaintiff bases her negligence claim on defendant's alleged failure to fulfill its contract. Her allegations do not support a claim of negligence.

VI. TORTIOUS INTERFERENCE WITH CONTRACT AGAINST THOMSON

As plaintiff's only claim against defendant Thomson, she contends that defendant Thomson wrongfully interfered with her contract with defendant Delmar and with her contributors. The claim fails for several reasons. First, plaintiff's failure to show that defendant Delmar wrongfully terminated its contract with plaintiff or with plaintiff's contributors makes it impossible for her to show that defendant Thomson wrongfully induced defendant Delmar to take the actions it did with respect to those contracts.

Plaintiff cites only one case in support of its claim against defendant Thomson, Allen and O'Hara, Inc. v. Barrett Wrecking, Inc., 89 F.2d 512, 516 (7th Cir. 1990) (applying Wisconsin law).

> The Wisconsin courts have adopted the Restatement (Second) of Torts on tortious interference with contracts. . . . [Section 769 of the Restatement] states that there is no tortious interference when one who has a financial interest in the business of a third party causes that person not to enter into a contract so long as wrongful means are not employed and the actor is protecting his interest in the relationship with the third party.

Id. (internal citations omitted). The court noted that the Supreme Court of Wisconsin has listed coercion by physical force and fraudulent misrepresentation as examples of improper means. See id. at 516-17 (citing Pure Milk Products Coop v. National Farmers Organization, 64 Wis. 2d 241, 219 N.W.2d 564 (1974)). The court of appeals concluded that the defendant's claim of tortious interference failed as a matter of law because there was no

evidence that the intervening plaintiff had used any means resembling physical force or misrepresentation. See id. Comments to the Restatement indicate that means that are ordinarily wrongful include physical violence, fraudulent misrepresentation, threats of illegal conduct, an illegal boycott or conduct in restraint of competition or productive of an illegal monopoly and conduct in abuse of a fiduciary relationship. See Restatement (Second) of Torts § 767 cmt. c, § 769 cmt. d (1977). Factors to be considered in determining whether other means are wrongful include the nature of the actor's interest and his relation to the person induced. See id.

It is undisputed that defendant Thomson has a financial interest in defendant Delmar and that it interfered with plaintiff's contract with defendant Delmar and with the contributor contracts. Plaintiff does not dispute that in interfering with the contracts, defendant Thomson was protecting its financial interest in defendant Delmar. Plaintiff contends that defendant Thomson's interference was wrongful because of the results, that is, because it caused her contributors to withdraw their contributions and therefore damaged plaintiff. In making this argument, she assumes what she must prove. The record contains no facts to show that defendant Thomson employed any of the wrongful means discussed above. Therefore, defendant Thomson will be granted summary judgment on this claim.

VII. SPECULATIVE DAMAGES

Because none of plaintiff's claims will survive this motion for summary judgment, it is unnecessary to address defendants' argument that plaintiff's damages are speculative as a matter of law.

ORDER

IT IS ORDERED that the motions for summary judgment of defendants Delmar Thomson Learning and The Thomson Corporation are GRANTED on all counts. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 20th day of December, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge