

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Charles Edward Ramos

53

PRESENT: Hon. \_\_\_\_\_

PART \_\_\_\_\_

Justice

Scholastic Inc.

INDEX NO.

600512/99

- v -

MOTION DATE

Parachute Press

MOTION SEQ. NO.

003

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

FILED

Cross-Motion: Yes  No

OCT 17 2002

Upon the foregoing papers, it is ordered that this motion

COUNTY CLERK'S OFFICE  
NEW YORK

IS DISPOSED OF  
IN ACCORDANCE WITH THE ACCOMPANYING  
MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE

J.S.C.

DATED: \_\_\_\_\_

Dated: 4/4/02

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X  
PARACHUTE PRESS, INC.,

Plaintiff,

Index No.  
600507/99

-against-

SCHOLASTIC INC., SCHOLASTIC PRODUCTIONS,  
INC. AND SCHOLASTIC ENTERTAINMENT, INC.,

Defendants.

-----X  
-----X  
SCHOLASTIC INC. and SCHOLASTIC  
ENTERTAINMENT, INC.,

Plaintiffs,

Index No.  
600512/99

-against-

PARACHUTE PRESS, INC., PARACHUTE  
PUBLISHING, LLC, PARACHUTE CONSUMER  
PRODUCTS, LLC, PARACHUTE ENTERTAINMENT,  
LLC and ROBERT L. STINE,

Defendants.

-----X  
**Charles Edward Ramos, J.S.C.:**

These related breach of contract actions are consolidated for purposes of disposition of motions bearing sequence numbers 002 and 003.

In action 600507/99, motion sequence 002, Parachute Press, Inc. ("Parachute") and Robert Stine move, pursuant to CPLR 3212, for an order granting summary judgment on Parachute's first cause of action and its third through eighth causes of action against Scholastic Inc. ("Scholastic"), Scholastic Productions, Inc. and

Scholastic Entertainment, Inc. ("SEI") and, pursuant to CPLR 3211 (a)(7) and 3212, for an order granting Parachute and Stine's motions to dismiss and for summary judgment dismissing Scholastic's claims in Scholastic's action. Alternatively, Parachute moves to consolidate these actions. In action 600512/99, motion sequence 003, Scholastic moves, pursuant to CPLR 3212, for an order granting partial summary judgment. Scholastic also moves, pursuant to CPLR 2221, for an order granting renewal and reargument of this court's March 27, 2000 decision which denied Scholastic's motion to amend its complaint.

### **1. Background**

These actions arise from Scholastic's publication of a very popular series of children's books entitled "Goosebumps", which were written by Robert Stine. Goosebumps was conceived as a series of fun and scary fiction novels written for children ages 8 to 12 years old. Parachute is the trademark and copyright owner of the Goosebumps series.

From 1990 to 1996, the parties executed a series of contracts for the publication of both the Goosebumps books and two series of spin-off books entitled "Give Yourself Goosebumps" and "Tales to Give Yourself Goosebumps". The parties also contracted for the exploitation of the non-publication rights associated with Goosebumps, including commercial rights and dramatic rights. Among other things, the non-publication rights included the development of a television series and promotional tie-ins with food and beverage companies.

The first agreement was dated April 3, 1991. Pursuant to that agreement, Parachute licensed to Scholastic the right to publish six Goosebumps books. Among other things, the contract contained a provision stating that Parachute would be the sole owner of each work and Robert Stine would be the sole writer of each work. This agreement also provided Scholastic with the ability to exploit certain non-publications rights.

On May 13, 1992, the parties executed a second contract for the publication of three additional Goosebumps books. This contract also contained a provision stating that Robert Stine would be the sole writer of each work.

The third agreement, dated November 18, 1992, provided for the publication of books 10 through 15. The fourth agreement, dated March 18, 1993, was for the publication of books 16 through 23. The fifth agreement, dated October 26, 1993, provided for the publication of books 24 through 35. The sixth contract was dated September 1, 1994, and provided for the publication of books 36 through 59. In each case, the contract stated that Robert Stine would be the sole writer of each work.

The parties also executed four contracts for the publication of books in the Give Yourself Goosebumps series and the Tales to Give Yourself Goosebumps series, between 1994 and 1996. None of these contracts contained a provision stating that Stine would be the sole writer of the books in either series.

In a March 2, 1995 agreement ("Memorandum Agreement"), Parachute licensed the non-publication rights to Goosebumps to SEI, a subsidiary of Scholastic. These rights included theatrical and

television motion picture rights, as well as home video, recording, non-theatrical and commercial tie-in rights. Parachute retained the right to approve the material terms of any agreement that SEI executed for the exploitation of these rights. According to Scholastic, by 1996, SEI had executed more than 40 licensing agreements with various companies world-wide.

In early 1996, the September 1, 1994 publication agreement was due for an extension, and the parties began to negotiate a new contract for the publication of additional Goosebumps books. Scholastic contends that Parachute used this opportunity to try to recapture the non-publication rights, which had become very valuable, and to renegotiate Parachute's compensation for the previously published Goosebumps books. Specifically, Scholastic asserts that Parachute used its approval rights to block or interfere with various non-publication licensing deals that SEI was working on. Scholastic asserts that it was able to complete certain deals, but could not develop any new ones.

Parachute does not dispute that it wanted to regain control of the non-publication rights. Parachute states that by early 1996, it was dissatisfied with SEI's exploitation of the non-publication rights under the Memorandum Agreement.

On November 27, 1996, after extensive negotiations, the parties executed three new agreements: a new publication agreement for additional books ("1996 Publication Agreement"), an agreement amending the earlier publication agreements ("Publication Amendment"), and an agreement ("Memorandum Amendment") amending the Memorandum Agreement. The 1996 Publication Agreement provided for

Scholastic to publish a total of 106 books, including 42 Goosebumps books, 63 spin-off books and a book about Robert Stine. This agreement contained a warranty that Robert Stine would be the sole writer of the Goosebumps books.

The Publication Amendment increased Parachute's royalty rate for the 59 Goosebumps books that had already been published. The Memorandum Amendment transferred many of the non-publication rights back to Parachute. In return, Scholastic obtained, among other things, approval rights over the material terms of certain agreements entered into by Parachute with respect to the non-publication rights as well as approval rights over the form of the merchandising licenses utilized by Parachute with respect to those rights. The Memorandum Amendment also contained a provision requiring that certain disputes arising from the exploitation of the non-publication rights be submitted to executives of Scholastic and Parachute for resolution.

The three new agreements also contained a provision under which the parties agreed that if Parachute breached any material term of any of the new agreements, then the parties would revert back to the earlier terms for revenue division that were set forth in the previous Memorandum Agreement and Publication Agreement. The term "material breach" included, among other things, Robert Stine's failure to personally write any of the Goosebumps books.

By letter dated August 28, 1997, Scholastic notified Parachute that it believed Parachute had breached various material terms of the three new agreements. Among other things, Scholastic claimed that Parachute had entered into merchandising agreements despite

Scholastic's disapproval of the licensing form that was used by Parachute in making those deals. On September 30, 1997, Scholastic notified Parachute that it had elected to exercise its right to revert to the terms of the previous agreements based on the breaches set forth in the August 28<sup>th</sup> letter and in an earlier letter, dated June 12, 1997.

In November of 1997, Parachute commenced an action against Scholastic in federal court for breach of the 1996 agreements and for copyright and trademark infringement in connection with the publication of a separate property, called Goosebumps Tripleheaders. That action was dismissed on jurisdictional grounds in January of 1999. On February 1, 1999, Parachute commenced the instant action in this court asserting, among other things, that Scholastic had breached the 1996 agreements on September 30, 1997, by refusing to pay Parachute approximately \$36 million, including amounts due in connection with an additional property known as Gargoyles. Shortly thereafter, Scholastic commenced its own action in this court, alleging, among other things, that Parachute had breached the 1996 Publication Agreement by employing outside authors to write certain of the Goosebumps books.

The parties now each move for summary judgment. Of course, a party moving for summary judgment 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. Winegrad v. NYU Medical Center, 64 NY2d 851 [1985]. The party opposing the motion is then required to demonstrate the existence

of a factual issue requiring a trial of the action. Zuckerman v. City of New York, 49 NY2d 557, 560 [1980].

## **2. Sole Writer Clause**

One of the main issues in both actions centers on the clause in each publication agreement stating that Robert Stine would be the sole writer or sole author of the Goosebumps books. Scholastic contends that Parachute breached the sole writer clause because Stine was not the sole author/writer of some of the Goosebumps books. Scholastic asserts that freelance writers actually wrote many of the books based on Stine's ideas.

It is undisputed that Goosebumps was enormously successful and profitable for several years. According to Parachute, Robert Stine was the number one selling author in the United States from 1994 through 1996. However, it is also undisputed that by sometime in 1997, sales of the Goosebumps books and related items declined dramatically. Scholastic contends that this decline occurred because Stine did not write all of the books himself. Scholastic contends that the freelance writers were not established authors in their own right and could not recreate Stine's "unique storytelling voice".

Scholastic does not dispute that Robert Stine wrote the first 16 Goosebumps books without assistance from other writers. However, according to Scholastic, in late 1992 or early 1993, Parachute began to hire freelance writers to write the manuscripts of the books. In general, the outside writers received a 10-page outline from Stine and converted them into 100-120 page books. Scholastic states that the outside writers made the majority of creative and

stylistic choices for developing the story lines, the characters and the dialogue. Stine would review the manuscripts and suggest certain changes, which were often minimal. Scholastic characterizes his role as that of an editor, rather than a writer. As a result, the books did not benefit from Stine's unique talents.

Scholastic also contends that Parachute deliberately concealed that Stine was not writing the books himself. Scholastic asserts that, among other things, Parachute's contracts with the freelance writers required the writers not to reveal that they were writing or working on the books. Scholastic states that this was part of a campaign by Parachute to conceal from Scholastic the fact that Stine was not writing the books.

Parachute concedes that, commencing with book 17, it employed third-parties to assist Stine in writing some of the Goosebumps books. Parachute hired assistants whenever needed to prepare draft manuscripts "fleshing out" Stine's 10-12 page outlines. This procedure was allegedly necessitated by several factors including a monthly delivery schedule, Stine's need to devote his energy to creating new story lines, and to his frequent promotional appearances.

Despite this, Parachute contends states that every Goosebumps book was Stine's original creation because, at a minimum, he conceived the titles and story concepts and wrote chapter by chapter story outlines detailing each book's setting, plot, characters and key dialogue. Stine also contributed to the tone, style and humor of each book. Finally, Parachute states that Stine

exercised final creative control, often discarding or rewriting the draft manuscripts.

Parachute contends that the use of freelance writers was not a breach of the sole writer clause for several reasons. First, Parachute alleges that the sole writer provision used here is uniformly understood in the publishing industry to mean that the issuing party warrants that no person other than the specified author is an author of the work. This is designed to protect the publisher against third-party claims. In support of this argument, Parachute asserts that Scholastic insisted on including a "sole author" clause in the publication agreements for the spin-off books, even though Stine was not required to write those books.

Parachute also contends that there was no breach because the publication agreements permitted Stine to incorporate third-party materials, provided that the appropriate permissions were obtained. Thus, Stine was permitted to incorporate the work of the writing assistants. Scholastic contends that this provision was intended for the use of limited outside materials, such as portions of songs or other materials.

Parachute also contends that it is common practice in the publishing industry for an author to engage third-parties to contribute research, writing or editing to the work. Finally, Parachute contends that Stine must be considered the sole author because none of the work contributed by the third-parties could be separately copyrighted.

The court finds that neither side has demonstrated that it is entitled to judgment as a matter of law. Questions exist which

preclude a granting of summary judgment to either side on the issue of whether Parachute breached the sole writer clause in the various publication agreements.

First, the parties sharply dispute the meaning of the sole writer clause in terms of how much of the books each party believed that Stine was actually required to write. The parties also dispute the meaning of such a clause within the publishing industry in general. Both sides rely on industry experts to support their arguments. For instance, Scholastic asserts that, according to John Taylor Williams, co-author of The Publishing Law Handbook, it is incorrect as a matter of industry practice for Parachute to contend that a sole writer warranty is designed solely to protect a publisher against third-parties seeking writing credit because the warranty also confirms to the publisher that it is receiving an original work by the named author, not an imitation.

Parachute relies in part on a leading copyright treatise, Nimmer on Copyright, Vol. 5 ¶ 26.03 [2000], for the proposition that it is common practice for authors to engage outsiders to contribute research, writing and editing work to a book. Parachute also relies on several other treatises which recommend the use of sole author warranties in order to safeguard against authorship claims by outside parties. One of the treatises relied on by Parachute is The Publishing Law Handbook, whose co-author is cited by Scholastic, as noted above.

In general, conflicting expert opinions should not be resolved on a summary judgment motion. Corbett v. County of Onondaga, \_\_\_ AD2d \_\_\_, 738 NYS2d 621 [4th Dept. 2002]. Here, the court finds

that neither side has demonstrated on these motions that industry practice entitles it to summary judgment on this issue.

Moreover, it is unclear at this point how much of the various books were in fact written by Stine. Neither side contends that Stine was required to write every word of a given book in order to be considered the sole author or writer and it is undisputed that Stine did not write every word of every book. In some cases, however, outside parties may have written the majority of the actual words in a given book, even if the story was created by Stine. Therefore, at this point, neither side has demonstrated as a matter of law whether Stine was or was not in fact the sole author as set forth in the parties' agreements.

Parachute argues that, in any event, Scholastic's claim is premature because none of the writing assistants has asserted any authorship interest in any of the Goosebumps books. However, it is undisputed that Parachute hired outside writers to assist Stine in writing portions of some of the books. Scholastic's claim that Stine was not the sole author of the books is not premature.

Parachute also argues that Scholastic cannot prove, with any certainty, that it suffered any damages even if Parachute breached the sole writer clause. However, Scholastic adequately alleges that its damages include, among other things, lost profits, advances and royalties paid to Parachute under the various publication agreements and a decline in the value of Scholastic's stock.<sup>1</sup>

---

<sup>1</sup> Scholastic does not seek summary judgment on its damages claims in the motions at issue here.

Whether Scholastic can ultimately prove such damages cannot be determined on these motions.

Parachute also argues that Scholastic's claims for breach of the sole writer clause must be dismissed as to any claims arising after September 30, 1997 because Scholastic breached and repudiated the publication agreements on that day by declaring Parachute in breach and electing to revert back to the earlier contract terms. However, Scholastic's September 30, 1997 notice to Parachute did not indicate that it was repudiating the agreements, but merely that it intended to revert to the earlier terms.

### **3. Non-Publication Rights**

Pursuant to the original Memorandum Agreement, Parachute licensed the non-publication rights to the Goosebumps books to SEI. However, Parachute retained the right to approve or disapprove the material terms of any agreement that SEI executed for the exploitation of these rights, as long as any disapprovals were reasonable and in good faith. In its Complaint, Scholastic alleges that in early 1996, Parachute commenced a campaign to essentially repudiate and disrupt performance of the Memorandum Agreement in order to regain control of this portion of the Goosebumps franchise, which had become very lucrative. Among other things, Scholastic alleges that on March 15, 1996, Parachute advised Scholastic that it was unilaterally imposing a moratorium on SEI's exploitation of its rights under the Memorandum Agreement. To effectuate this, Parachute allegedly stated that it would withhold approval of all pending and future deals until SEI complied with

certain demands, including the renegotiation of the publishing terms.

In April of 1996, Parachute's attorney allegedly advised Scholastic that it had to consult with Parachute before scheduling meetings with certain entities and demanded that Scholastic not attend meetings concerning Goosebumps without a Parachute representative present. Parachute also allegedly informed SEI that it would not permit SEI to negotiate or conclude any transactions regarding Goosebumps without Parachute's input at each step of the process. Parachute also allegedly refused to approve certain deals, while also refusing to specify terms that it would find acceptable for those deals. Finally, Scholastic contends that Parachute threatened to file an action in federal court for rescission of the Memorandum Agreement in order to force Scholastic to renegotiate the terms of the agreement.

Scholastic alleges that Parachute's actions led to at least sixteen licensing deals that were either delayed or lost resulting in damages of more than four million dollars. This included deals involving many types of products and many companies, including Fox Home Entertainment, Walt Disney and Pepsi. Scholastic contends that Parachute's actions constituted a breach of the Memorandum Agreement as well as a breach of the duty of good faith and fair dealing.

Parachute argues that these claims must be dismissed for several reasons. First, Parachute argues that, as a matter of law, it could not have breached the Memorandum Agreement through the exercise of its approval rights because Scholastic had the ability

to enter into agreements even if Parachute disapproved, leaving Parachute to sue for damages. In support of this, Parachute relies on paragraph 22 of the agreement, which stated that Parachute was not entitled to seek injunctive relief and its only remedy for breach of the agreement would be an action for damages. However, Parachute has not demonstrated that this section relieved it of the obligation to use good faith in approving or disapproving deals or that Scholastic was relieved of its obligation to honor reasonable disapprovals simply because Parachute could sue for damages.

The court also notes that Scholastic has submitted evidence, including letters from Parachute's counsel to Scholastic, demonstrating that at the relevant time, Parachute believed that Scholastic could not in fact go forward on certain deals without Parachute's approval, despite Parachute's ability to sue for damages. In any event, Scholastic has alleged not only that Parachute withheld its approval in certain cases but that Parachute went further and injected itself into various transactions and interfered with the negotiation process.

Parachute also argues that Scholastic's claims for breach of the Memorandum Agreement are waived because it failed to provide adequate notice of any breaches, thus depriving Parachute of an opportunity to cure. Parachute contends that Scholastic did not notify it of the alleged breaches until November of 1999, which was well after the breaches occurred and after the parties had already executed the Memorandum Amendment. However, Scholastic has submitted evidence, including letters sent to Parachute, demonstrating that it informed Parachute as early as 1996 that it

believed that Parachute's various actions constituted a breach of the Memorandum Agreement. Therefore, Parachute is not entitled to summary judgment on this basis. For the same reasons, Parachute's argument that Scholastic is equitably estopped from asserting these claims, because it failed to provide notice of them or otherwise assert them, is unpersuasive.

Parachute also argues that Scholastic's claims for breach of the Memorandum Agreement should be dismissed under the doctrine of novation because the execution of the Memorandum Amendment superseded the terms of Memorandum Agreement. Generally, a novation is an agreement whereby an existing obligation is immediately extinguished by the acceptance of a new promise. Sudul v. Computer Outsourcing Services, Inc., 917 F.Supp. 1033 [SDNY 1996], citations omitted.

Here, it is undisputed that the Memorandum Amendment fundamentally changed the nature of the parties' relationship in connection with the non-publication rights, with control of those rights largely passing back to Parachute. In fact, the Memorandum Amendment specifically states that paragraph 12.2 of the Memorandum Agreement, which is at issue here, was deemed deleted and replaced with the new provisions of the amendment. However, at most, this demonstrates that the parties intended to change the terms of their relationship on a prospective basis. Parachute has not pointed to anything in the Memorandum Amendment which indicates that Scholastic released or otherwise waived any claims to breaches of the Memorandum Agreement which had already occurred. Indeed, the Memorandum Amendment specifically contains a release whereby

Parachute waived any such claims. However, it does not contain a similar provision pertaining to Scholastic, thus indicating an intention that such claims were not waived or released by Scholastic.

Therefore, Parachute's motion to dismiss and for summary judgment on these claims is denied. Scholastic's motion for summary judgment on these claims is also denied because fact questions exist as to whether Parachute's actions constituted a breach of the Memorandum Agreement or of the duty of good faith and fair dealing.

Parachute also seeks summary judgment dismissing Scholastic's claims for breach of the Memorandum Amendment. In its complaint, Scholastic alleges that Parachute breached this agreement in several ways, most notably by disregarding Scholastic's repeated disapproval of the merchandising form used by Parachute in various licensing deals. Scholastic has identified at least 21 deals which Parachute executed while using forms that were disapproved by Scholastic. Scholastic also alleges, among other things, that Parachute failed to comply with certain reporting and meeting requirements, used disapproved press/kits and press releases and entered into certain deals despite Scholastic's disapproval of the material terms of those deals. One such deal involved an amendment to an audio book contract with Walt Disney which Scholastic expressly disapproved.

Parachute does not dispute that it entered into various deals despite Scholastic's disapproval of either the form used or certain terms of the deals. However, Parachute argues that its actions were not a breach of the agreement because Scholastic did not have

approval rights over the item in issue or its approval was wrongfully withheld. In some instances, Parachute argues that even if a breach occurred, it was not material and the claims must therefore be dismissed anyway. Parachute also argues that Scholastic did not provide adequate notice of the alleged breaches and thus did not provide Parachute with an opportunity to cure.

It is undisputed that Scholastic repeatedly notified Parachute that it disapproved of the merchandising form being utilized and that it disapproved of certain deals that Parachute executed. Scholastic also notified Parachute that it believed Parachute was in breach of the Memorandum Amendment before September 30, 1997, when Scholastic actually declared that Parachute had breached the agreement and that Scholastic was resorting to the terms of the earlier agreements, pursuant to the reversion provision. Thus, Parachute has not demonstrated that Scholastic failed to give adequate notice of the alleged breaches or an opportunity to cure.

The court also finds that questions exist as to whether Parachute's actions, including the use of disapproved forms and ignoring certain other disapprovals, constituted material breaches of the Memorandum Amendment or of the underlying duty of good faith and fair dealing. Similarly, it is unclear whether Scholastic wrongfully disapproved of Parachute's actions and whether Scholastic wrongfully reverted to the use of the terms set forth in the earlier agreements. Questions also exist as to whether either or both sides breached the agreement by failing to attempt to resolve their disputes by mutual agreement as set forth in paragraph C.

Parachute argues that, in any event, the reversion or "snapback" provision contained in the Memorandum Amendment is punitive in nature and unenforceable. As set forth above, this clause provided that if Parachute breached any material term of any of the new agreements, then the parties would revert back to the earlier terms for revenue division. However, this was a provision that was bargained for and agreed to by both sides. Parachute may ultimately prove that Scholastic wrongfully utilized this provision. However, it has not demonstrated that the provision is unenforceable as a matter of law. Therefore, the motions for summary judgment are denied with respect to the claims arising under the Memorandum Amendment.

Parachute also argues that it is entitled to summary judgment on its seventh and eighth causes of action, which assert that Scholastic breached the Gargoyles Agreement by failing to pay approximately \$459,921.91 in royalties and other fees. The Gargoyles Agreement, which is unrelated to the Goosebumps series, was executed by Parachute and Scholastic in 1995 and provided Scholastic with publication rights to two literary works to be created by Parachute based on a Disney cartoon series. Parachute asserts that it invoiced Scholastic several times for the amount owed but has never received payment.

Scholastic does not dispute that it owes Parachute the \$459,921.91 that Parachute seeks. Instead, it argues that the court should stay enforcement of any judgment for this money pending the resolution of Scholastic's claims in connection with the Goosebumps books. Scholastic contends that it is unlikely that Parachute will

be able to satisfy even a "modest" portion of the damages that Scholastic seeks. Thus, Scholastic argues that it will be prejudiced by having to satisfy the Gargoyles claims before the Goosebumps claims are resolved. Scholastic's argument is sufficient to warrant a stay. Therefore, this portion of Parachute's motion for summary judgment is granted, enforcement stayed.

#### **4. Renewal and Reargument**

Scholastic also moves for renewal and reargument of this court's March 27, 2000 decision which denied Scholastic's motion to file a supplemental summons and amended complaint. In that decision, the court found that Scholastic had not adequately alleged facts supporting its claim for tortious interference with contract. Specifically, the court found that there was no allegation that Stine's sole purpose for not being the sole author of each book was to harm Scholastic.

The court also found that Scholastic's proposed fraud claims were duplicative of its claims for breach of contract. The court noted that the proposed amended complaint alleged that when Parachute executed the various contracts, it did not intend to fulfill the provision which allegedly prohibited the use of other writers. The court found that this was merely a restating of the claims for breach of contract. The court also noted that Scholastic's allegations could not support a fraud claim because the alleged misrepresentations referred to future performance rather than to present facts.

Finally, the court found that Scholastic could not assert certain claims for breach of the Memorandum Amendment because it

contained a clause requiring that disputes arising from it be resolved through arbitration. Scholastic now moves for renewal and reargument of various portions of the decision.

"A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law." McGill v. Goldman, 261 AD2d 593, [2d Dept. 1999], citing, Pahl Equip. Corp. v. Kassis, 182 AD2d 22 [1<sup>st</sup> Dept. 1992]; Foley v. Roche, 68 AD2d 558 [1<sup>st</sup> Dept. 1979]; CPLR 2221. A motion for leave to renew must be based on "new facts not offered on the prior motion that would change the prior determination" or it must demonstrate that there has been a change in the law that would change the prior determination. Meighan v. Rodriguez, 287 AD2d 442 [2d Dept. 2001], CPLR 2221(e). The movant must also provide a reasonable justification for failing to present such facts on the prior motion. CPLR 2221(e).

First, Scholastic argues that the court erred in not permitting it to amend the complaint to assert claims for breach of contract arising from the publication agreements dated March 18, 1993, October 26, 1993 and September 1, 1994. Scholastic states that it first learned during discovery that Stine was not the sole author of some of the Goosebumps books that were delivered pursuant to these three contracts. Scholastic asserts that its claims under those contracts are the same as the one asserted in connection with the 1996 Publication Agreement because each contract contained a warranty that Stine would be the sole author or writer of the Goosebumps books.

Parachute contends that this portion of the motion to amend was correctly denied because, as Parachute argues above, Stine was in fact the sole author of the various Goosebumps books and there was therefore no breach of contract. However, as set forth above, questions of fact exist as to whether Stine was the sole author of some of the books, including books published under the earlier contracts. Moreover, Scholastic has adequately asserted that it learned of the alleged breaches of the earlier agreements only after the original motion was decided. Therefore, this portion of the motion for renewal and reargument is granted.

Scholastic also contends that the court erred in denying leave to assert fraud claims against Parachute, as well as claims for aiding and abetting fraud. Specifically, Scholastic contends that Parachute fraudulently represented that Stine was the sole author of the Goosebumps books and would continue to be the sole author of the books. However, Scholastic has not demonstrated that the court erred in finding that this claim is duplicative of the claims against Parachute for breach of contract, which are also based on Scholastic's assertion that Stine was not the sole author of certain Goosebumps books. At most, the facts demonstrate that the parties disagree as to whether Stine was the sole author. However, Scholastic has not adequately alleged an independent claims for fraud against either Parachute or against two of its principals, Jane Stine and Joan Waricha as individuals. Therefore, that portion of the motion for renewal and reargument is denied.

Scholastic also seeks clarification as to the court's ruling that claims for breach of the Memorandum Amendment could only be

resolved through arbitration. Scholastic argues that the court may have incorrectly expanded the scope of the arbitration provision in the Memorandum Amendment. However, the court's original decision on this issue applied only to the claims at issue in that decision, i.e. those set forth in Scholastic's motion to amend the complaint. It did not apply to other claims for breach of the Memorandum Amendment which might properly be brought.

Settle order on notice.

Dated: April 4, 2002

A handwritten signature in black ink, consisting of a stylized, cursive-like script that is difficult to decipher but appears to be a name.

---

J.S.C.