

JEFF GROSSO, Plaintiff and Appellant,

v.

MIRAMAX FILM CORP. et al., Defendants and Respondents.

B193872

Court of Appeals of California, Second Appellate District, Division Five

September 10, 2007

Manning & Marder Kass, Ellrod, Ramirez, John A. Marder and Sylvia Havens for Plaintiff and Appellant.

Leopold, Petrich & Smith, Louis P. Petrich and Robert S. Gutierrez for Defendants and Respondents.

TURNER, P. J.

I. INTRODUCTION

Plaintiff, Jeff Grosso, appeals from a summary judgment in favor of defendants, Miramax Film Corp. (Miramax), Spanky Pictures, Inc., David Levien, Brian Koppelman, and Joel Stillerman. Plaintiff alleges: he submitted a script, *The Shell Game*, to Gotham Entertainment Group (Gotham); Gotham passed his script on to Miramax pursuant to a "first-look" agreement between the two companies; and Miramax used the script in producing a movie—*Rounders* (Miramax Films 1998)—but failed to compensate him for his ideas. Plaintiff seeks recovery pursuant to an alleged implied-in-fact contract. We find defendants met their burden of showing there was no implied-in-fact contract; further, plaintiff failed to raise a triable issue as to the existence of such an agreement. Accordingly, we affirm the judgment.

II. BACKGROUND

A. The Original Complaint And Proceedings In The Federal Courts

Plaintiff filed his original complaint on August 30, 1999. Defendants Miramax, Spanky Pictures, Inc., and Mr. Stillerman removed the action to the United States District Court for the Central District of California. Defendants filed a summary judgment motion in the federal court. They argued plaintiff was actually seeking protection under the federal Copyright Act.

(17 U.S.C. § 101 et seq.) Defendants sought an adjudication plaintiff could not prevail on a copyright infringement claim. Defendants asserted they did not have a reasonable possibility of learning about plaintiff's work, *The Shell Game*, prior to the release of the film entitled *Rounders*. Further, defendants asserted the *Rounders* production was not substantially nor strikingly similar to *The Shell Game* script. Plaintiff opposed the summary judgment motion. United States District Court Judge Audrey B. Collins granted the motion. Judge Collins found: there was no evidence defendants received plaintiff's screenplay; Patrick McDarragh, a Gotham principal, did not recall ever seeing a script with *The Shell Game*'s elements; Gotham had a contractual arrangement with Miramax; on behalf of Gotham, Mr. McDarragh was required to submit projects to Miramax if his company acquired an interest in a potential production; Gotham never acquired an interest in *The Shell Game*; Mr. McDarragh never submitted the script to Miramax; defendants did not have access to plaintiff's work—that is, a reasonable possibility or reasonable opportunity to view or copy it; and there was no evidence tending to show any defendant had access to *The Shell Game* before the *Rounders* script was written or produced. Judge Collins concluded, "Because there is no proof of access, [d]efendants are entitled to summary judgment on the copyright infringement claim." Plaintiff appealed to the United States Court of Appeals for the Ninth Circuit. A Ninth Circuit panel held plaintiff had alleged a state law claim for implied contract breach. (*Grosso v. Miramax Film Corp.* (9th Cir. 2004) 383 F.3d 965, 967.)

B. The First Amended Complaint

The operative pleading is plaintiff's June 24, 2004 first amended complaint, filed on remand to the superior court. Plaintiff's sole cause of action is for implied contract breach. Plaintiff alleges: he developed a written script; he submitted the script to Gotham, which is located in the same building in New York City as Miramax; the script was sent to Mr. McDarragh, a former Miramax executive; plaintiff submitted his script with a reasonable expectation, understood by defendants, that he would be paid if the script or any part of it was used; and defendants released a motion picture with "extensive similarities" to plaintiff's script, but they failed and refused to compensate him. More specifically with respect to the implied-in-fact contract, plaintiff alleged: "An implied contract was created between Plaintiff and Defendants . . . based upon, inter[alia], the solicitation by those Defendants, the submission of the script by Plaintiff and the use of that script by Defendants. The idea was submitted by Plaintiff to Defendants with the understanding and expectation, fully and clearly understood by Defendants, that Plaintiff would be reasonably compensated for its use by Defendants. The contract required reasonable compensation by Defendants to Plaintiff for the use of the script."

C. Defendants' Summary Judgment Motion

1. Evidentiary Objections

In conjunction with defendants' summary judgment motion, the trial court never ruled on the parties' evidentiary objections. Further, no evidentiary issues are raised in the opening or responding briefs on appeal. Therefore, we treat all of the evidence as properly before us. (See *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1186, fn. 1, disapproved on another point in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, fn. 19; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1.) In his reply brief, plaintiff argues for the first time on appeal that the trial court should have sustained his evidentiary objections. This argument comes too late and will not be considered. (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 214; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 763-766.)

2. The Moving Party

Defendants presented evidence: Mr. McDarrah was a principal and shareholder of Gotham; Mr. McDarrah's offices were at 99 Hudson, Second Floor, New York, New York; from April 1995 through April 1996, Gotham had a "first look deal" with Miramax; pursuant to that arrangement, "if Gotham obtained an interest in a project, Gotham was required to share the project with Miramax, and Gotham was not permitted to approach other financiers or studios with the project until Miramax had reviewed the project and 'passed' on it"; Gotham did not have a "first look deal" with Miramax after April 1996; Gotham never obtained an interest in *The Shell Game*; Gotham never submitted a screenplay by the name of *The Shell Game* to Miramax or to anyone else; Gotham never conducted business with plaintiff; while it was possible Gotham received an unsolicited manuscript called *The Shell Game*, Mr. McDarrah did not recall receiving or reading any such script; Mr. McDarrah did not recognize plaintiff's summary of *The Shell Game* as describing any project in which Gotham ever obtained an interest or ever "pitched" or submitted to Miramax; and Mr. McDarrah never had any communication with Mr. Koppelman, Mr. Levien, Mr. Stillerman, or Mr. Demme, or anyone known to be associated with Spanky Pictures, Inc.

Further, there was evidence: Mr. Levien and Mr. Koppelman co-wrote the *Rounders* screenplay; "*Rounders is the story of a reformed gambler (played by Matt Damon) who returns to gambling to help a friend (played by Edward Norton) pay off loan sharks*" (italics omitted); Mr. Levien's manager, Seth Jaret, submitted the *Rounders* screenplay to Spanky Pictures, Inc.—a production company owned by Mr. Stillerman and Mr. Demme; the *Rounders* screenplay was submitted to Miramax in late 1996 by Mr. Stillerman, a principal and officer of Spanky Pictures, Inc.; within a few days, Miramax decided to finance and distribute a movie based on the *Rounders* screenplay; Miramax purchased the right to produce the movie from the screenwriters, Mr. Koppelman and Mr. Levien; neither Mr. Stillerman, Mr. Levien, nor Mr. Koppelman ever received a copy of *The Shell Game* from plaintiff or from anyone else; they never met or communicated with plaintiff; they did not recognize *The Shell Game* summary; neither Mr. Levien nor Mr. Koppelman had ever met or had any communication with Mr. McDarrah; and Miramax's database of scripts and other materials sent to it for consideration contained no evidence *The Shell Game* was submitted.

Miramax's "First Look/Last Matching Right" agreement with Gotham provided in part: "This memo will serve as an agreement between [Miramax] and [Gotham] to provide Miramax with an exclusive 'First Look/Last Matching Right' acquisition/distribution deal whereby [Gotham] will be obligated to submit to Miramax on a 'First Look' and 'Last Matching Right' basis all projects [Gotham] own[s], control[s] or represent[s] or desire[s] to acquire and/or distribute in any and all media. [¶] . . . [¶] The term of this Agreement shall be one (1) year (the 'Term') beginning April 1, 1995. Miramax shall have an exclusive 90 day period to negotiate with [Gotham] to renew the Term commencing April 1, 1996." The term of the agreement was April 1, 1995, through March 31, 1996.

Plaintiff testified at a July 10, 2001 deposition as follows: he started writing *The Shell Game* in the summer of 1995; he mailed it to himself "as soon as [he] thought it was in a form that was [as] close to done as [he] was going to get at the time," in about February 1996; he read in a writer's market guide that Gotham accepted unsolicited material; he sent the entire *The Shell Game* script to Gotham; he never got that script back; he never got any response from Gotham that he recalled; he never spoke with anybody at Gotham; he had no direct knowledge any of the defendants ever received a copy of his screenplay prior to the release of *Rounders*; plaintiff was unaware of any information that suggested that Gotham submitted his screenplay to Miramax; plaintiff did not recall specifically sending his script to Mr. McDarrah; he remembered only that he sent it to Gotham; and plaintiff did not know why his pleading alleged he sent his script to Mr. McDarrah.

3. Plaintiff's opposition

In opposition, plaintiff presented evidence: in April 1996, he mailed *The Shell Game* script to himself and registered it with the Writers Guild; throughout the course of 1996, he submitted the script to producers, agents, and others for consideration; a "Writer's Market Guide" stated Gotham was accepting submissions and that it had a "deal" with Miramax; plaintiff mailed the script addressed to Mr. McDarrah at Gotham; and Gotham and Miramax had the same street address in New York City. Plaintiff declared: "I disclosed *The Shell Game* to Gotham for sale. Because of what I had read and based on my understanding of the entertainment and publication industry, I knew and believed that if Gotham accepted my script, it did so knowing that I disclosed it to Gotham on the understanding that if my script was used, I would be compensated a reasonable value for my work. I knew that Gotham did not expect to get my script and/or ideas for free and I also knew that anyone to whom Gotham showed my script did not expect to get my script and/or ideas for free. [¶] . . . I also knew and understood that in order to market my script and ideas, and potentially to sell my script and ideas, Gotham would have to show my script to others in the industry. As to anyone else shown my script and disclosed my ideas, however, I knew and believed that if anyone else used my script and/or ideas, they did so knowing that I expected to be compensated a reasonable value for my work." (Italics omitted.)

Plaintiff testified at his July 10, 2001 deposition: after submitting his script, plaintiff learned Gotham and Miramax "inhabited the same address in New York City"; Gotham had a

"first-look" deal with Miramax; plaintiff never got his script back from Gotham; he did not speak with anyone at Gotham about his script; he did not believe he had ever gotten a response from Gotham; no one had ever said that Mr. Levien, Mr. Koppelman, or Mr. Stillerman was given the screenplay; plaintiff did not personally submit the screenplay to any defendant; there was no direct evidence any defendant ever received a copy of plaintiff's screen play before Rounders was released; and there was no direct evidence Gotham had submitted plaintiff's script to Miramax.

Plaintiff presented evidence the "1997 Writer's Market: Where & How to Sell What You Write" contained the following entry: "GOTHAM ENTERTAINMENT GROUP, 99 Hudson St., Suite 200, New York, NY 10013. (212) 376-6063. Director of Development: Noah Baylin. Estab. 1995. Theatrical features. Buys 5-10 scripts/year. Works with 10-25 writers/year. Buys all rights. Accepts previously produced material on occasion. Reports in 2 weeks. Query with completed script. *Writer's Market* recommends sending a query first. Makes outright purchase. [¶] Needs: Film (35 mm). 'We produce only feature films. We need big action scripts. We have a deal with Miramax films on our productions. Call us.' [¶] Tips: Trends in the business include less and less sex and exploitation in features."

III. DISCUSSION

A. Standard Of Review

We apply the following standard of review as articulated by our Supreme Court. In *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pages 850-851, our Supreme Court described a party's burdens on a summary judgment or adjudication motion as follows: "[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. [Citation.] There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof [¶] [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]" (Fns. omitted; see *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.) We review the trial court's decision to enter summary judgment de novo. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348; *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65, 67-68; *Sharon P. v. Arman, Ltd.*, *supra*, 21 Cal.4th at p. 1188.) Our Supreme Court has further held, "In performing our de novo review, we must view the evidence in a light favorable to [the party opposing summary judgment] (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107), liberally construing her

[or his] evidentiary submission while strictly scrutinizing [the moving party's] own showing, and resolving any evidentiary doubts or ambiguities in [the opposing party's] favor. (*Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514, 1517; *Kaplan v. LaBarbera* (1997) 58 Cal.App.4th 175, 179.)" (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768-769; accord, *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) The trial court's stated reasons for granting summary judgment are not binding on us because we review its ruling, not its rationale. (*Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1196; *Dictor v. David & Simon, Inc.* (2003) 106 Cal.App.4th 238, 245.)

B. Implied-In-Fact Contract

There is no property right in an idea. (*Desny v. Wilder* (1956) 46 Cal.2d 715, 731; see *Rokos v. Peck* (1986) 182 Cal.App.3d 604, 613.) As the Supreme Court held in *Desny*, "Generally speaking, ideas are as free as the air" (*Desny v. Wilder, supra*, 46 Cal.2d at p. 731; see *Blaustein v. Burton* (1970) 9 Cal.App.3d 161, 176.) In *Desny*, the Supreme Court explained: "The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use." (*Desny v. Wilder, supra*, 46 Cal.2d at pp. 731-732, quoting *International News Service v. Associated Press* (1918) 248 U.S. 215, 250 [dis. opn. of Brandeis, J.]) Nevertheless, there are circumstances in which an idea cannot be acquired without cost. (*Id.* at p. 731.) Further, an idea cannot be of use to another until it has been disclosed. (*Ibid.*) Hence, the California Supreme Court has held that an idea can be the subject of a contract and its disclosure can be consideration for a promise to pay compensation. Our Supreme Court has held: "Even though an idea is not property subject to exclusive ownership, its disclosure may be of substantial benefit to the person to whom it is disclosed. That disclosure may therefore be consideration for a promise to pay" (*Desny v. Wilder, supra*, 46 Cal.2d at p. 733, quoting *Stanley v. Columbia Broadcasting System* (1950) 35 Cal.2d 653, 674 [dis. opn. of Traynor, J.]; see *Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778, 791-792 [plur. opn.].)

The contract can be express or implied. (*Desny v. Wilder, supra*, 46 Cal.2d at p. 734; see *Gunther-Wahl Productions, Inc. v. Mattel, Inc.* (2002) 104 Cal.App.4th 27, 37-39 [discussion of implied contractual obligations].) In *Desny*, the Supreme Court identified two circumstances where a person who discloses an idea can prevail in an action to recover compensation. First, compensation may be available to a person when before or after disclosing the idea, he or she obtained an express promise—in words—to pay. Second, a duty to pay compensation may arise where a person has clearly conditioned the disclosure upon an obligation to pay, and the offeree, with knowledge of that duty, voluntarily accepted the information and used the idea. (*Id.* at pp. 738-739; *Blaustein v. Burton* (1970) 9 Cal.3d 161, 182.) The Supreme Court explained, "The person who can and does convey a valuable idea to a producer who commercially solicits the service or who voluntarily accepts it knowing that it is tendered for a price should . . . be entitled to recover." (*Desny v. Wilder,*

supra, 46 Cal.2d at p. 734; see *Fink v. Goodson Todman Enterprises* (1970) 9 Cal.App.3d 996, 1008.)

Plaintiff seeks to recover on an implied-in-fact contract under *Desny*. In *Desny*, the plaintiff expressly stated the defendants could use his story only if they paid him for it and they agreed. (*Id.* at pp. 726-727, 744.) The defendants then used the plaintiff's ideas without compensating him. (*Id.* at p. 727.) The Supreme Court held: "[A]ssuming legality of consideration, the idea purveyor cannot prevail in an action to recover compensation for an abstract idea unless . . . the circumstances preceding and attending disclosure, together with the conduct of the offeree acting with knowledge of the circumstances, show a promise of the type usually referred to as 'implied' or 'implied-in-fact.'" (See *Weitzenkorn v. Lesser*[,*supra*,] 40 Cal.2d [at pp.] 794-795; *Elfenbein v. Luckenbach Terminals* (1933) [166 A. 91, 93].) That is, if the idea purveyor has clearly conditioned his offer to convey the idea upon an obligation to pay for it if it is used by the offeree and the offeree, knowing the condition before he knows the idea, voluntarily accepts its disclosure (necessarily on the specified basis) and finds it valuable and uses it, the law will either apply the objective test . . . and hold that the parties have made an [implied-in-fact] contract . . . to compensate. [¶] Such inferred or implied promise, if it is to be found at all, must be based on circumstances which were known to the producer at and preceding the time of disclosure of the idea to him and he must voluntarily accept the disclosure, knowing the conditions on which it is tendered. Section 1584 of the Civil Code ([T]he acceptance of the consideration offered with a proposal, is an acceptance of the proposal') can have no application unless the offeree has an opportunity to reject the consideration—the proffered conveyance of the idea—before it is conveyed. Unless the offeree has opportunity to reject he cannot be said to accept. [Citations.] The idea man who blurts out his idea without having first made his bargain has no one but himself to blame for the loss of his bargaining power The law will not imply a promise to pay for an idea from the mere facts that the idea has been conveyed, is valuable, and has been used for profit; this is true even though the conveyance has been made with the hope or expectation that some obligation will ensue." (*Desny v. Wilder*, *supra*, 46 Cal.2d at pp. 738-739, fn. omitted; see *Gunther-Wahl Productions, Inc. v. Mattel, Inc.*, *supra*, 104 Cal.App.4th at pp. 37-38.) Whether an implied-in-fact contract exists ordinarily is a question of fact. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 677; *Silva v. Providence Hosp. of Oakland* (1939) 14 Cal.2d 762, 774.)

Plaintiff asserts defendants failed to meet their summary judgment production burden to disprove the existence of an implied-in-fact contract. Specifically, plaintiff argues defendants failed to establish: plaintiff did not convey a valuable idea to them through Gotham; defendants did not solicit or voluntarily accept plaintiff's submission; and defendants did not know plaintiff's submission was tendered for a price. We disagree.

Defendants met their summary judgment burden with evidence: Gotham and the individual defendants had no contact with plaintiff; Mr. McDarragh had no recollection of receiving or reading *The Shell Game*; Gotham never acquired an interest in *The Shell Game* and never submitted it to Miramax or anyone else; none of the individual defendants ever received a

copy of The Shell Game from plaintiff or Gotham or anyone else; and Miramax's database contained no evidence The Shell Game was ever submitted to it.

Further, there is no evidence plaintiff conditioned his disclosure on any obligation to pay for his ideas if used. There is no evidence Gotham or any defendant accepted plaintiff's script with knowledge it was conditionally offered. No circumstances preceding or attending the disclosure show an implied promise by Gotham or Miramax to pay. Plaintiff simply mailed his script to Gotham. Plaintiff's expectation of payment does not establish an implied agreement to do so. (*Desny v. Wilder, supra*, 46 Cal.2d at pp. 738-739; see *Gunther-Wahl Productions, Inc. v. Mattel, Inc., supra*, 104 Cal.App.4th at p. 38.) Plaintiff asserts he had an implied-in-fact agreement with Gotham, which was acting as Miramax's agent; therefore, he had an implied-in-fact contract with Miramax. Because we find no triable issue as to an implied-in-fact contract between plaintiff and Gotham, we need not consider the agency issue.

In the trial court, plaintiff argued he was a third party beneficiary of the "first look" contract between Gotham and Miramax. On appeal, plaintiff raises a materially different argument—that he was a third party beneficiary of an *implied contract* between Gotham and Miramax. That issue was not raised in the trial court. Pursuant to well established authority, it cannot be raised for the first time on appeal. (*Zimmerman, Rosenfeld, Gersh, & Leeds LLP v. Larson* (2005) 131 Cal.App.4th 1466, 1488; *Piscitelli v. Friedenber* (2001) 87 Cal.App.4th 953, 983.)

Plaintiff cites his own declaration as evidence of an implied-in-fact contract: he disclosed The Shell Game to Gotham "for sale"; he knew Gotham did not expect to get his script for free; and he further knew anyone else Gotham showed his script to would not expect to get it for free. Plaintiff asserts his own expectation and his understanding of custom in the industry give a "factual basis" to his implied-in-fact contract claim. Plaintiff reasons that within the industry, it is a commonly understood practice that movie studios pay for ideas they use. We conclude plaintiff's own expectation and understanding is insufficient to raise a triable issue of material fact as to the existence of an implied-in-fact contract. There must be evidence of circumstances such that an agreement to pay can fairly be implied. (*Minniear v. Tors* (1968) 266 Cal.App.2d 495, 503; see *Thompson v. California Brewing Co.* (1961) 191 Cal.App.2d 506, 510.)

Plaintiff relies on *Minniear v. Tors, supra*, 266 Cal.App.2d at pages 497-498. In *Minniear*, the plaintiff developed a pilot for a television show and granted the defendant permission to see it. The defendant admitted pilots are made for the purpose of showing them to prospective purchasers with the intent to sell them commercially. (*Id.* at p. 504.) The plaintiff argued that permitting the defendant to view the pilot created an implied contract to pay for any ideas used. (*Id.* at p. 500.) Division Two of the Court of Appeal for this appellate district agreed and held: "There is substantial evidence to support an inference that [the plaintiff] submitted his idea to [the defendant] with the reasonable expectation he would be paid . . . if his idea was used. There is also sufficient evidence to support the further inference that

[the defendant] accepted the submission of the idea with full awareness of [the plaintiff's] expectation of payment in the event of use." (*Id.* at p. 504.)

Similarly, in *Gunther-Wahl Productions, Inc. v. Mattel, Inc.*, *supra*, 104 Cal.App.4th at pages 29-30, on which plaintiff also relies, the Court of Appeal described the facts as follows: "Michael Wahl testified he met Mattel's Debra Gallinni sometime in June 1993, possibly at an industry show in New York. They had a discussion, and she asked him to come in and show Mattel what they were doing. According to Michael Wahl, she was the gatekeeper or person to contact at Mattel and said to call and set up a meeting. He believed Ms. Gallinni invited him to the meeting to 'come in and present cartoon ideas that have ancillary toy application and merchandising ideas.' According to Michael Wahl, he had 'no doubt' she invited him to pitch or present." (Fn. omitted.) Later, several meetings were held and Mr. Wahl submitted three "properties" to the defendant. (*Id.* at p. 30.) The plaintiff, an independent animation company, later discovered the defendant had used its concepts without compensation. (*Id.* at p. 33.) At trial, both sides offered opinion testimony that it was the custom in the industry to stop a "pitch" or to suggest no interest when the recipient has something similar in development. (*Id.* at p. 31, fn. 5.) None of the defendant's employees ever told the plaintiff it had a similar product in production. (*Id.* at pp. 31, 32.)

Unlike the present case which does not involve an instructional error contention, the issue in *Gunther-Wahl Productions, Inc.* centered on a jury instruction as to the elements of an implied-in-fact contract. The plaintiff argued the request for a presentation by itself amounted to conduct implying a promise to pay for the idea if Mattel used it. (*Id.* at p. 37.) The Court of Appeal concluded: "Given the particular record in the case at bench, where Mattel clearly invited Gunther-Wahl to make a presentation at Mattel headquarters (whether or not at Michael Wahl's initial request), the instruction as given incorrectly forced the jury to find against plaintiffs unless they 'clearly conditioned' their disclosure on Mattel's agreement to pay . . . if it used the . . . concept or any portion of it.' The jury could easily interpret that language to require an express oral or written representation of compensation, which the law does not require for an implied contract." (*Id.* at pp. 42-43, orig. italics.)

There is no evidence comparable to the foregoing in the present case. Plaintiff simply mailed his script to Gotham after reading in a writer's market guide that Gotham accepted unsolicited material. There was no response from Gotham at all. There were no communications between plaintiff and Gotham. Nor was there any communication between plaintiff and defendants, including Miramax. There was no evidence of any communication between Gotham and defendants with respect to plaintiff's ideas. There was no opinion testimony presented as to the custom in the industry. There is no evidence defendants did or said anything prior to disclosure to indicate a willingness to pay for the disclosure.

This case is more like *Faris v. Enberg* (1979) 97 Cal.App.3d 309, 314-320. In *Faris*, the plaintiff had an idea for a television sports quiz show. The plaintiff disclosed the idea to the defendant, a television sports announcer. The plaintiff also gave the defendant a copy of a written format for the show. (*Id.* at pp. 314-316.) The Court of Appeal for this appellate district, Division One, affirmed a summary judgment in the defendant's favor. Our

colleagues held in part there was no triable issue of material fact as to the existence of an implied-in-fact contract. (*Id.* at pp. 316-320.) There was no evidence the defendant was told he should expect to be paid for disclosing the idea. The plaintiff voluntarily submitted the sports quiz show idea to the defendant. (*Ibid.*) The Court of Appeal concluded, "Based on the clear holding of *Desny* an obligation to pay could not be inferred from the mere fact of submission on a theory that everyone knows that the idea man expects to be paid." (*Id.* at p. 319.)

Klekas v. EMI Films, Inc. (1984) 150 Cal.App.3d 1102, 1106-1107, 1114-1115, is to the same effect. The plaintiff wrote a book and gave copies to several people: a friend with purported contacts in the film industry; a director; and his former girlfriend, who worked in the television industry. The plaintiff also mailed copies of his book to several publishers listed in the "Writers Market" directory. (*Id.* at pp. 1106-1107.) The Court of Appeal for this appellate district, Division Two, affirmed a summary judgment for the defendant. Among other things, the Court of Appeal held there was no triable issue as to the implied-in-fact contract cause of action. (*Id.* at p. 1114.) The court noted: "The law will not imply a promise to pay for an idea from the mere facts that the idea has been conveyed, is valuable, and has been used for profit; this is true even though the conveyance has been made with the hope or expectation that some obligation will ensue." (*Desny v. Wilder, supra*, 46 Cal.2d at p. 739.) (*Klekas v. EMI Films, Inc., supra*, 150 Cal.App.3d at p. 1115.)

Plaintiff asserts Gotham solicited submissions of scripts from the public. He points to the excerpt from the "1997 Writer's Market: Where & How to Sell What You Write" which states: "GOTHAM ENTERTAINMENT GROUP, 99 Hudson St., Suite 200, New York, NY 10013. (212) 376-6063. Director of Development: Noah Baylin. Estab. 1995. Theatrical features. Buys 5-10 scripts/year. Works with 10-25 writers/year. Buys all rights. Accepts previously produced material on occasion. Reports in 2 weeks. Query with completed script. *Writer's Market* recommends sending a query first. Makes outright purchase. [¶] Needs: Film (35 mm). `We produce only feature films. We need big action scripts. We have a deal with Miramax films on our productions. Call us.' [¶] Tips: Trends in the business include less and less sex and exploitation in features." Plaintiff asserts, "Here, it is undisputed plaintiff submitted his script at the invitation of Gotham which in turn had been solicited by Miramax to gather ideas for Miramax." In addition, plaintiff reasons, his script was not returned. We conclude there is no evidence from which it reasonably could be inferred the language in the writer's market guide was a solicitation by Gotham accompanied by a promise to compensate. There is no evidence as to the source of the information in the writer's market guide. There is no evidence Gotham solicited or intended to solicit material from the general public through the writer's market guide and to forward it to Miramax with a promise to pay for any ideas used. The evidence is insufficient to create a triable issue as to the existence of an implied-in-fact contract between plaintiff and Gotham or Miramax. Thus, there is no merit to plaintiff's contention that defendants failed to sustain their initial evidence production burden or that a triable issue of fact exists concerning his implied contract claim.

IV. DISPOSITION

The judgment is affirmed. Defendants, Miramax Film Corp., Spanky Pictures, Inc., David Levien, Brian Koppelman, and Joel Stillerman, are to recover their costs on appeal from plaintiff, Jeff Grosso.

We concur:

ARMSTRONG, J.

KRIEGLER, J.