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NO. 17358-02

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 23 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 7-11-03
Submission Date: 7-25-03
Motion Sequence No.: 001/MOT D

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NGR, LLC, doing business as NGR RADIOLOGY,
Plaintiff,

- against -

GENERAL ELECTRIC COMPANY,
Defendant.

---x

COUNSEL FOR PLAINTIFF
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Great Neck, New York 11021

COUNSEL FOR DEFENDANT
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228 East 45th Street - 17th Floor
New York, New York 10017

ORDER

The following papers were read on Plaintiff's motion for partial summary judgment:

Notice of Motion dated June 23, 2003;
Affirmation of Roy W. Breitenbach, Esq. dated June 23, 2003;
Affidavit of Marc Grumet sworn to on June 23, 2003;
Affidavit of Jason Dolger sworn to on July 18, 2003;
Defendant's Memorandum of Law
Affirmation of Roy W. Breitenbach, Esq. dated July 24, 2003.

Plaintiff NGR, LLC, ("NGR") moves for partial summary judgment on the issue of liability and for an order setting this matter down for an immediate trial to determine damages.

BACKGROUND

During 2001, NGR was constructing a medical imaging facility in Garden City Park. One of the pieces of equipment to be installed in these premises was an MRI machine. The target date for the opening of the facility was November, 2001.

NGR initially planned to install equipment manufactured by Siemens including a Siemens closed MRI machine.

After the plans for the construction had been prepared and construction had commenced, NGR decided to install an open MRI machine. However, Siemens was unable to provide an acceptable open MRI machine. Therefore, in the summer of 2001, NGR entered into negotiations with Defendant General Electric ("GE") and Hitachi for the installation of an open MRI machine.

As an incentive to install the GE MRI, which is allegedly more expensive than the Hitachi MRI, NGR alleges that a representative of GE offered to pay the cost involved in constructing the foundation needed for the GE MRI. Since the cost for constructing the foundation for an MRI machine is substantial, the offer by GE to pay such costs made the price of GE MRI competitive with the Hitachi machine.

GE forwarded a quotation to NGR dated August 16, 2001 which indicated the cost for the installation of the GE MRI machine which would include, "Determination of the Appropriate Structured Foundation Solution...and funding for the Incremental Costs Associated with the Structured Foundation Solution."

The quotation expired on September 30, 2001. The terms of payment were 10% down on order, 70% due on delivery of the major components and prior to installation and the balance due on completion of installation and/or availability for first use.

To further clarify the terms of the quotation, by letter dated September 4, 2001, GE advised NGR that GE would install an open MRI at the Garden City Park facility in accordance with the terms of an August 16, 2001 quotation "...within 6- 5 day work weeks (excluding holidays) of the mutually agreed upon delivery date providing that our access is not limited in any way through either construction delays, access to the site, or acts of god. Should we [GE] fail to meet our obligations, GEMS [GE Medical Systems] agrees to pay $10,000.00 per day for every day we [GEMS] are delayed beyond the target date."

Negotiations between NGR and GE continued after the September 4, 2001 letter and after the September 30, 2001 date set as the expiration date of the August 16, 2001 quotation. By letter dated October 8, 2001, GE advised NGR that the GE would pay for the costs incurred in the pre-construction environmental analysis, determination of the appropriate structured foundation and funding for the "incremental cost associated with the structured foundation solution", determination of the appropriate magnetic shielding and the incremental costs incurred in connection with the shielding and coordination of the environmental evaluation and structural construction with the customer's contractor. The October 8, 2001 letter stated that any other costs incurred in connection with the installation of the MRI machine would be the obligation of NGR.

The pre-construction environmental analysis was performed. In November, 2001, NGR received a proposal from a contractor indicating that the cost for the construction involved in the installation of the GE Open MRI machine would be approximately $450,000.00. In addition, NGR received an proposal from an architect indicating an additional expenses of $19,400.00 for architectural plans and revisions required for the installation of the GE MRI. NGR advised GE that it expected GE to pay the entire construction cost and the architect's fee.

GE refused to pay for the architect. In addition, GE asserts that a substantial portion of the construction cost involved modifications to the premises necessitated by NGR's decision to install a GE Open MRI machine instead of the Siemens closed MRI machine. GE asserts that it agreed to pay only those costs involved in the installation of the foundation required for its machine and that it never agreed to incur or pay any of the costs involved in the modifications required due to the change from a closed Siemens to the open GE MRI machine.

GE made a final offer to NGR whereby GE indicated that it would pay $250,000 towards the construction costs, which it asserts is more than the costs usually incurred to site a GE Open MRI machine in a similar facility. NGR rejected this offer.

NGR never entered into a contract with GE for the installation of the MRI machine in accordance with the terms of the August 16, 2001 quotation and never made any of the payments required by the quotation. As a result, NGR did not have an MRI machine available for use when the facility was opened in November, 2001. In

fact, an MRI was not installed in the Garden City Park facility until May, 2002.

NGR commenced this action seeking to recover damages against GE on the basis of promissory estoppel.

DISCUSSION

Summary judgment is a drastic remedy which will be granted only when it is clear that there are no triable issues of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); and Andre v. Pomeroy, 35 N.Y.2d 361 (1974). See also, Aksiezer v. Kramer, 265 A.D.2d 365 (2nd Dept., 1999). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). Once the party seeking summary judgment has made a *prima facie* showing of entitlement to judgment as a matter of law, the party opposing same must come forward with proof in evidentiary form establishing that triable issues of fact exist or demonstrate an acceptable excuse for its failure to do so. Zuckerman v. The City of New York, *supra*; Davenport v. County of Nassau, 279 A.D.2d 497 (2nd Dept. 2001); and Bras v. Atlas Construction Corp., 166 A.D.2d 401 (2nd Dept. 1991).

The party seeking summary judgment must clearly establish to the court that there are no triable issues of fact. Leo v. Gugliotta, 212 A.D.2d 761 (2nd Dept. 1995); and Daliendo v. Johnson, 147 A.d.2d 312 (2nd Dept. 1987). Summary judgment should be denied if there is any doubt as to the existence of a triable issue of fact. Freese v.

Schwartz, 203 A.D.2d 513 (2nd Dept. 1994); and Miceli v. Purex Corp., 84 A.D.2d 562 (2nd Dept. 1984).

When deciding a motion for summary judgment, the Court must view the evidence in a light most favorable to the non-moving party and must give that party all reasonable inferences which can be drawn from the evidence. Negri v. Stop & Shop, Inc., 65 N.Y.2d 625 (1985); and Louniakov v. M.R.O.D. Realty Corp., 282 A.D.2d 657 (2nd Dept. 2001).

"The elements of promissory estoppel are: a clear and unambiguous promise; a reasonable and foreseeable reliance by the party to whom the promise is made; and an injury sustained by the party asserting the estoppel by reason of his reliance." Ripple's of Clearview, Inc. v. Le Havre Assoc., 88 A.D.2d 120, 122 (2nd Dept. 1982). See also, Rogers v. Town of Islip, 230 A.D.2d 727 (2nd Dept. 1996). Plaintiff must prove all three essential elements of the cause of action. See, Kennedy v. Leibowitz, 303 A.D.2d 375 (2nd Dept., 2003); and Sanyo Electric, Inc. v. Pinros & Gar Corp., 174 A.D.2d 452 (1st Dept. 1991).

There are clearly questions of fact regarding the first two elements of a claim for promissory estoppel; to wit: (1) a clear and unambiguous promise and (2) reasonable and foreseeable reliance.

NGR alleges that GE promised to install the MRI machine by November, 2001. However, the September 4, 2001 letter upon which NGR relies indicates that the MRI machine could be installed within "6 - 5 day work weeks (excluding holidays) of the

mutually agreed upon delivery date." Since GE and NGR never agreed upon a delivery date, one may not consider this statement as a promise by GE to install the MRI by any specific date. See, Ripple's of Clearview, Inc. v. Le Havre Assoc., *supra.*

There is also a question of fact as to whether the September 4, 2001 letter was anything more than part of GE's offer to furnish an MRI machine to NGR. See, Sanyo Electric, Inc. v. Pinros & Gar Corp., *supra*

There are also questions of fact regarding whether NGR reasonably and foreseeably relied upon GE's representations. In this case, delivery and installation of the MRI by November, 2001 was conditioned upon NGR accepting the terms of the August 16, 2001 quotation. There are certainly issues of fact whether GE could be expected to incur any expenses for the construction involved for the siting of its MRI in the absence of a firm commitment from NGR for its installation. Furthermore, there are questions of fact regarding whether GE could reasonably be expected to deliver the equipment without having a firm agreement for its installation. Where the reliance is not reasonable, the claim for promissory estoppel fails. See, Trick v. County of Westchester, 216 A.D.2d 555 (2nd Dept. 1995); and Country-Wide Leasing Corp. v. Subaru of America, Inc., 133 A.D.2d 735 (2nd Dept. 1987).

The conduct of the parties after GE's September 4, 2001 letter certainly raises significant issues of fact. That is, negotiations between NGR and GE regarding the installation of the MRI equipment continued until November, 2001. The parties did not reach an unresolvable impasse until GE indicated that it would not pay the expenses for

the architect and the modifications required to convert the premises from a Siemens closed MRI to an GE open MRI. Thus, even had NGR and GE reached an agreement for the delivery and installation of the MRI, the installation of this equipment could not have been completed by November, 2001.

The function of the Court when deciding a summary judgment motion is issue finding, not issue determination. Matter of Suffolk Co. Dept. of Social Services v. James M., 83 N.Y.2d 178 (1994); and Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since there are significant issues of fact regarding the existence of a clear and unambiguous promise and reasonable and foreseeable reliance by the party to whom the promise is made, summary judgment must be denied.

Accordingly, it is,

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

ORDERED, that counsel for the parties are directed to appear before the Court for a Preliminary Conference on December 10, 2003 at 9:30 AM.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
October 31, 2003

Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE