IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROTOTHERM CORPORATION, Plaintiff,	:	CIVIL ACTION
	:	NO. 96-6544
v.	:	
PENN LINEN & UNIFORM SERVICE, et al., Defendants.	:	

BUCKWALTER, J. March 19, 1998

M E M O R A N D U M

I. INTRODUCTION

Currently before the Court is Defendant's motion for summary judgment, which I will grant, as Plaintiff has failed to demonstrate any genuine fact issue regarding the existence of consideration to support a contractual relationship between the parties.

II. BACKGROUND

Plaintiff Rototherm Corporation ("Rototherm") is a New Jersey corporation established to manufacture heat recovery units ("Units") for large commercial and industrial laundry dryers. The Units are designed to reduce fuel usage and thus costs, and Rototherm holds a patent and an exclusive license to manufacture them. It has also received a United States Department of Energy ("DOE") grant to make them commercially available.

As a result of the Court's previous Orders, Rototherm has breach of contract claims against the remaining corporate defendants, including Hospital Central Services Cooperative, Inc. ("HCSC"). The claim against HCSC arises from Rototherm's first attempt to install and test a DOE-funded pilot unit at an industrial laundry facility. On March 24, 1990, Rototherm president Ben Herschel sent a document to HCSC memorializing HCSC's agreement to allow Rototherm to install a pilot unit and collect performance data ("Agreement"). In a cover letter also dated March 24, 1990, Herschel wrote, in part, that:

> [T]he program will include furnishing, at no cost to you, one pilot REF-6000P ROTOTHERM heat recovery unit and associated instrumentation . . ..
>
> Enclosed is a simple agreement outlining our respective responsibilities under the DOE program. Please be advised that you have no obligation under this program other than expenses we have already discussed; further decisions will be yours to make contingent upon your evaluation of ROTOTHERM equipment and your satisfaction with its performance.

(Exh. A to HCSC's Motion for Summary Judgment).

The attached Agreement stated in part that:

> The following is a basic outline of equipment and services to be provided by Rototherm Corporation, as well as that which shall be provided by HCSC. . ..
>
> Following our 3/22/90 inspection of your facilities, it has been mutually agreed that your 400 lb. Norman tumbler designated "#7" would be

> the most suitable as the test tumbler, due to access, duct locations, etc. It is also agreed that the pilot program is to be conducted with minimal disruption to your normal production schedules: it is understood, however, that every effort will be made to obtain reliable, consistent test data.
>
> Following receipt of this signed agreement, Rototherm Corporation will provide, at no cost to you, the following: [Listing items and services necessary for unit installation and data collection].
>
> HCSC's responsibilities under the DOE program shall include the following:
>
> 1. Installation of provided fuel flow instrumentation on test tumbler
>
> 2. "Pre-heat recovery" data collection, with participation by Rototherm Corp. personnel (precise method to be mutually determined)
>
> . . .
>
> 6. Removal of pilot unit and instrumentation at end of pilot program.
>
> It is anticipated that pre- and post-ROTOTHERM testing duration shall be for 4- to 6-week periods each . . . . Any items not outlined here shall be as mutually agreed upon by HCSC and Rototherm Corporation.

Id.

Herschel apparently signed the agreement on March 24, 1990, and an HCSC representative apparently signed it in April 1990. Although Rototherm provided the fuel flow instrumentation in 1991, it did not complete construction of the test unit until September 1993, at which point HCSC refused to allow installation, and it subsequently refused further

participation in the pilot program. Rototherm claims that HCSC's actions constituted a breach of the March 24, 1990 Agreement.

HCSC disputes that its relationship with Rototherm was contractual, arguing that it received no consideration for allowing Rototherm to test its unit in the HCSC facility, and that, even if there were consideration, Rototherm took an unreasonable amount of time -- three and one half years -- to complete its obligations under the contract. Rototherm argues that HCSC received two forms of consideration for the contract -- the prospect of reduced fuel costs, and a discounted price for the purchase of additional units -- and it further argues that although it did not perform when either party "expected that it would, it had legitimate reasons for its delayed performance."[1]

III. DISCUSSION

I. Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the case under the governing substantive law. Anderson v. Liberty

1. Because I resolve this motion on the consideration issue, I do not reach the question of whether Rototherm performed within a reasonable time period.

Lobby, Inc., 477 U.S. 242, 248 (1986). A disputed factual matter presents a genuine issue "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. In considering a summary judgment motion, the court is required to accept as true all evidence presented by the non-moving party, and to draw all justifiable inferences from such evidence in that party's favor. Id. at 255. Once the moving party has fulfilled its initial burden of showing that no genuine issue of material fact exists, the nonmoving party must go beyond the mere repetition of the conclusory allegations contained in its pleadings. Pastore v. Bell of Pa., 24 F.3d 508, 511 (3d Cir. 1994).

II. Consideration

Under Pennsylvania law, the March 24, 1990 Agreement must have been supported by consideration on both sides to rise to the level of an enforceable contract. Peoples Mortg. Co., Inc. v. Federal Nat. Mortg. Ass'n, 856 F.Supp. 910, 922 (E.D.Pa. 1994).[2] "The requirement of consideration, of course, is nothing more than a requirement that there be a bargained for exchange." Com. Dept. Of Transp. v. First Pa. Bank, 466 A.2d 753, 754 (Pa. Cmwlth. 1983). HCSC argues a lack of consideration because it received no benefit in exchange for permitting

2. The Agreement does not state the parties' intent to be legally bound by its terms, regardless of consideration. Cf., Laudig v. Laudig, 624 A.2d 651, 654 (Pa. Super. 1993), citing 33 P.S. § 6.

Rototherm to test its unit; instead, it argues that it merely made a gratuitous and unenforceable promise.[3]

While courts generally will not evaluate the adequacy of consideration, I must nonetheless determine its existence, and I find that the prospect of a lower purchase price for units did not supply consideration for HCSC's participation in the pilot program. The March 24, 1990 Agreement makes no mention of any purchase of a Unit or Units by HCSC and indeed states the parties' intent that the test unit would be removed from the HCSC plant at the end of the pilot project. (Exh. A to HCSC's Motion for Summary Judgment; Herschel Deposition at 216). The record also makes clear that any price discount offered to HCSC was not contemporaneous with the making of the alleged contract in 1990, but instead arose in discussions between Herschel and HCSC three years later.[4] The prospect of a reduced purchase price therefore could not have constituted consideration for the alleged contract.

Rototherm also relies upon the savings in fuel costs which HCSC could expect from a successful pilot project. Its burden on summary judgment, however, was to identify specific

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3. Although HCSC also refers briefly to the distinct doctrine of failure of consideration, HCSC brief at 4, it is clear that it has grounded its summary judgment motion in an asserted lack of consideration. See In re Levine's Estate, 118 A.2d 741 (Pa. 1956).

4. Similarly, any discussions between Herschel and HCSC employee Crimmins about HCSC taking a minority equity position in Rototherm in 1993 cannot provide consideration for the 1990 agreement.

evidence supporting the existence of a genuine issue of material fact as to the existence of consideration supporting the agreement. While Rototherm broadly references Herschel's deposition testimony, the transcripts are silent on this point. Neither the Agreement nor Herschel's accompanying cover letter make any mention of reduced fuel costs, and Rototherm does not point to anything in the record indicating that HCSC agreed to permit it to install a pilot unit in exchange for reduced energy costs.

Of course, the Unit's purpose was heat reduction, and HCSC may be presumed to have hoped that its heating costs would decrease. The object of the pilot project itself, however, was not to benefit HCSC, but rather to demonstrate the Unit's viability to the commercial laundry industry, thus directly benefitting Rototherm. (See Herschel's May 30, 1990 report to the Department of Energy, noting that "HCSC presently operates four large laundries, and their visibility and reputation within the industry are extremely valuable to the program." (Exh. D. to HCSC's Motion for Summary Judgment)). Thus the existence of any promise of reduced fuel costs is belied by the experimental nature of this "pilot project."[5] It is undisputed that Rototherm had not previously installed the type of Unit in question, and

5. Further underscoring the speculative nature of the project, Herschel's July 30, 1990 report noted that "[HCSC} have committed to significant cost expenditures of their own to participate in the program, due to its potential value to them." (Exh. E)(emphasis added)).

there was thus no actual performance record for the parties to rely upon.

Because Rototherm has failed to move beyond mere assertions and identify specific evidentiary support in the record for the existence of consideration, it cannot demonstrate the existence of a contract between the two parties, an essential element of its claim for breach of contract, and I will accordingly enter summary judgment for HCSC. An Order follows.

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O R D E R

AND NOW, this 19th day of March 1998, upon consideration of Defendant Hospital Central Services Cooperative's Motion for Summary Judgment (Dkt. # 45), and Plaintiff's Response thereto (Dkt. # 49), it is hereby ORDERED that Defendant's Motion is **GRANTED** and Judgment is entered for Hospital Central Services Cooperative, in accordance with the accompanying Memorandum.

BY THE COURT:

RONALD L. BUCKWALTER, J.