STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

THE IDE GROUP, PC,

Plaintiff,

v.

FREDERICK FERRIS THOMPSON HOSPITAL,

Defendant.

DECISION AND ORDER

Index #2007/05597

Plaintiff, the Ide Group, P.C., moves pursuant to CPLR 6301 for an order enjoining and restraining defendant during the pendency of this action from itself providing or permitting any other person to provide magnetic resonance imaging services on defendant's campus.

This matter involves plaintiff's provision of magnetic resonance imaging (MRI) services on defendant's hospital campus. Plaintiff is a privately-owned, for-profit group of physicians engaged in the practice of providing radiological services, including diagnostic MRI services. Defendant is a not-for-profit community hospital located in Canandaigua, New York. Since November 1, 1996, plaintiff and defendant have been parties to an Exclusivity Agreement. In the Exclusivity Agreement, plaintiff obtained "the sole and exclusive right to provide MRI services on the Hospital campus, including services to in-patients and out-patients of Hospital and individuals who are not patients of Hospital." Exclusivity Agreement, ¶1. The Exclusivity Agreement

further requires plaintiff to maintain certain "Quality Standards," which are described in relevant part as follows:

> Quality Standards. All matters relating to the operation of the MRI scanner and the provision of services to patients shall be in the exclusive control and at the direction of Ide; provided, however, that Ide's MRI services shall comply with Hospital's quality standards set forth below:
>
> (a) Ide's MRI scanning services will be available during scheduled hours as agreed between the parties....

Id. at ¶4. Plaintiff alleges that since the inception of the Exclusivity Agreement, it has maintained regular hours consisting of 7 a.m. to 5 p.m., Monday through Friday, in addition to maintenance of on-call personnel twenty-four hours per day, seven days a week. Defendant does not dispute this, but alleges that the Hospital's expansion since 1996 demands 24 hour, seven days a week MRI availability. Defendant contends that it approached plaintiff on more than one occasion to express its concern that the growing demands of the hospital required plaintiff to be available for longer hours. Defendant concludes that plaintiff has refused to expend its MRI coverage to keep up with the growth of defendant's emergency department and designation as a Stroke Center by the New York State Department of Health, and that "the MRI hours established back in 1996 are no longer adequate to accommodate Thompson's growing needs." Defendant's memo of law, at 4.

Paragraph 4 of the Exclusivity Agreement provides that plaintiff's failure to "consistently meet" the Quality Standards is an event of default under the Exclusivity Agreement. Id. The Exclusivity Agreement states the following with respect to events of default:

> Default. In the event that either party to this Agreement fails to abide by any of the terms or conditions of this Agreement, the other party shall have the option of notifying the defaulting party of the breach. If the party in default fails to correct the breach within thirty (30) days of such notice, the non-defaulting party shall, in addition to all other legal rights and remedies, have the right the cancel this Agreement upon sixty (60) days' written notice to the other party. Upon cancellation, Ide shall have up to ninety (90) days to remove its equipment from the Hospital campus.

The term of the Exclusivity Agreement is provided in paragraph 5:

> Term. This Agreement shall remain in full force and effect from the date hereof until December 31, 2004. Unless either party shall notify the other at least ninety (90) days prior to the end of the initial term, this Agreement shall automatically renew for an additional term of five (5) years, beginning at the end of the initial term.

The Exclusivity Agreement has an initial expiration date of December 31, 2004. However, it is undisputed that neither party exercised the 90 day cancellation provisions. As such, the Exclusivity Agreement was automatically renewed for another five year term and consequently remains in effect until December 31,

2009.

On April 27, 2006, defendant wrote to plaintiff stating that it was in the process of applying for approval to directly provide MRI technology, and proposed termination of the Exclusivity Agreement by mutual consent. While plaintiff has continued to provide MRI services at defendant's campus, the parties did engage in settlement discussions. On May 3, 2006, defendant applied for a certificate of need with the New York State Department of Health, and on August 16, 2006, the application was approved. By mid-January, 2007, the parties' settlement discussions proved to be less than fruitful. At that point, plaintiff corresponded with defendant, maintaining its position that it was the sole provider of MRI services on the campus until January, 2010.

On February 1, 2007, defendant responded to that letter, stating that it "must become a direct provider of MRI services due to the inadequacy of the MRI services provide[d] by the Ide Group, P.C. ("Ide") in its private medical office - an inadequacy so patent that it has been recognized by the New York State Department of Health in its approval of the Hospital's application for a second hospital-based MRI machine on the Hospital campus." Affidavit of R. Fermia, Exhibit D. The letter further sought to provide notice of an alleged default by plaintiff under the Exclusivity Agreement:

> As Ide should be well aware, while the Agreement gave Ide certain contractual rights, it also imposed contractual obligations. In particular, Paragraph 4 of the Agreement establishes quality standards with which Ide must comply. This letter will serve as the Hospital's formal notice of Ide's defaults under Section 4 of the Agreement.
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> In particular, Ide failed to provide MRI scanning services during agreed scheduling hours under Section 4(a). In fact, Ide's operations do not adequately support the Hospital's emergency department, which operates twenty-four hours per day, seven days per week, and the Hospital can agree to nothing less. Ide will remain in default until it commenced continuous operations on the Hospital's campus during those hours. Its failure to do so within thirty (30) days will lead to the termination of the Agreement. Further, Ide has failed to meet the quality and appropriateness standards of the Hospital referenced in Section 4 of the Agreement in other respects.

Plaintiff alleges that this was the first time defendant ever complained about, or proposed a change, to plaintiff's business hours. Plaintiff further asserts that DOH's approval resulted from what it considers to be a wholly misleading communication from FF Thompson to DOH in which it was claimed that a certificate of need should issue because "[a]s of May 14, 2006, the Radiology Group has terminated th[eir] relationship" with plaintiff. Plaintiff describes the communication as misconduct warranting a finding that the balance of equities decidedly tips in plaintiff's favor. By letter dated March 5, 2007, defendant terminated the Exclusivity Agreement effective November 1, 2007.

Plaintiff commenced this action in May, 2007, stating the following causes of action: (1) anticipatory breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) declaratory judgment, seeking a declaration that the Exclusivity Agreement remains in effect until December 31, 2009 at the previously agreed upon schedule; (4) an injunction seeking to enjoin and restrain defendant from operating an MRI magnet or providing MRI services on the hospital campus through December 31, 2009; (5) libel.

Preliminary Injunction

In order for a party to obtain a preliminary injunction, the party must establish that (1) there is a likelihood of ultimate success on the merits, (2) that there is a prospect of irreparable harm if the relief is not granted, and (3) that the balance of equities favor the moving party. See Doe v. Axelrod, 73 N.Y.2d 748 (1988). A preliminary injunction is a drastic remedy and should be issued cautiously. See Uniformed Firefighters Assn. of Greater New York v. City of New York, 79 N.Y.2d 236 (1992). A preliminary injunction is not available in a case for money only. See Credit Agricole Indosuez v. Rissiyskiy Kredit Bank, 94 N.Y.2d 541, 545 (2000)("our courts have consistently refused to grant general creditors a preliminary injunction to restrain a debtor's asset transfers that allegedly would defeat satisfaction of any anticipated

judgment"). This relief "should be awarded sparingly, and only where the party seeking it has met its burden of providing both the clear right to the ultimate relief sought and the urgent necessity of preventing irreparable harm." City of Buffalo v. Mangan, 49 A.D.2d 697, 697 (4th Dept. 1975). A motion for a preliminary injunction will be denied where "the right to the ultimate relief in the action is in doubt." Rupert v. Rupert, 190 A.D.2d 1028, 1028 (4th Dept. 1993).

Where, however, granting the preliminary injunction in effect grants the moving party the ultimate relief sought, courts are loathe to grant the ultimate relief under the guise of a preliminary injunction. See SportsChannel America Assoc. v. National Hockey League, 186 A.D.2d 417 (1st Dept. 1992). The ultimate relief sought will be granted via a preliminary injunction only where the circumstances are extraordinary. See SHS Bailey, LLC v. Res Land, LLC, 18 A.D.3d 727, 728 (2d Dept. 2005). See also, MacIntyre v. Metropolitan Life Ins. Co., 221 A.D.2d 602 (2d Dept. 1995).

Plaintiff's attempt to obtain the ultimate relief sought in this matter by use of a preliminary injunction shows why the motion must be denied. Plaintiff's fourth cause of action seeks an injunction enjoining and restraining defendant from operating an MRI magnet or providing MRI services on the hospital campus through December 31, 2009. On this motion, plaintiff seeks a

preliminary injunction enjoining and restraining defendant from providing MRI services on the defendant's campus through December 31, 2009. Pursuant to the authority set forth in SportsChannel, the circumstances presented herein do not warrant granting plaintiff the ultimate relief sought through a preliminary injunction.

Plaintiff contends that it is only desirous of keeping the status quo, and that the "ultimate relief" doctrine is only applicable when the preliminary injunction sought is mandatory, in nature, requiring defendants to accomplish some affirmative act. Neither contention has merit. First, maintaining the status quo in these circumstances would be tantamat to granting to plaintiff "specific performance" of the agreement, as interpreted by it, "in the guise of an injunction pendente lite." Sports Channel, 186 A.D.2d at 418. No matter how much merit plaintiff's reading of the contract may have, the effect of granting the motion would be to grant summary judgment and render further litigation futile. Yome v. Gorman, 242 N.Y. 395 (1926); Armitage v. Carey, 49 A.D.2d 496 (3d Dept. 1975); Xerox Corp. v. Neises, 31 A.D.2d 195, 197 (1st Dept. 1968). Second, the proposed injunction in the Eber Brothers case had the dual problem of being mandatory in nature and of granting the ultimate relief sought, rendering further prosecution of the case unnecessary. There was no suggestion in that case that the

"ultimate relief" doctrine applied only in a mandatory injunction context. It applies especially in that context, but not exclusively in that context. The leading case in this department, City of Buffalo v. Mangan, 49 A.D.2d 697 (4th Dept. 1975), involved a proposed injunction no more mandatory than the one proposed here, yet the "ultimate relief" rule was applied to uphold denial of the preliminary injunction.

Plaintiff's motion for a preliminary injunction is denied.

There is no need to reach the likelihood of success issue. I agree, however, that plaintiff raises a potentially meritorious issue on the question of defendant's anticipatory breach of the agreement by virtue of its unilateral demand of 24/7 coverage quite without regard to the alternative coverage series plaintiff has provided so far, and that a preference should be granted and the matter tried at the parties' earliest convenience. I can start Thursday, September 20th, give you the morning September 21st, and pick up the following Monday. Please advise.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: September __, 2007
Rochester, New York