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

ROBERT ZALINSKI,	:	
	:	CIVIL ACTION NO. 3:00CV-0591
Plaintiff,	:	
	:	
vs.	:	
	:	(JUDGE CONABOY)
OSRAM SYLVANIA, INC. et al.,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

This matter comes before the Court on Defendants' motion for summary judgment filed on January 2, 2001. (Doc. 13). Plaintiff filed the above-captioned matter asserting in his complaint filed March 31, 2000 that he was unjustly denied pension and severance benefits and was induced to resign by his long-time employer, Osram Sylvania and its agents. (Doc. 1). Plaintiff alleges these claims under Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, et seq. ("ERISA") as well as under Pennsylvania common law regarding breach of contract, detrimental reliance, promissory and equitable estoppel, and fraud.

A motion for summary judgment can be a very powerful motion. It is a legal method of totally resolving a case without a trial based on a review of pleadings and submissions of the parties. Granting summary judgment is appropriate in cases where there are no significant facts in dispute. Because of the finality of

granting a summary judgment motion, we must carefully examine the case and supporting documents along with the submissions from the Plaintiff who hopes to keep his case alive.

We follow considerable guidance in determining whether summary judgment should be granted. Summary judgment is proper '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 judgment as a matter of law." See Knabe v. Boury, 114 F.3d 407, 410 n.4 (3d Cir. 1997)(citing Fed.R.Civ.P. 56(c)). "[T]his standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-8, 106 S.Ct. 2505 (1986) (emphasis in original).

These rules make it clear then, that in order for a moving party to prevail on a motion for summary judgment, the party must show two things: (a) that there is no genuine issue as to any material fact, and (b) that the party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). This instructs us that a fact is "material" if proof of its existence or nonexistence would effect the outcome of the lawsuit under the law applicable to the case. Anderson, 477 U.S. at 248; Levendos v. Stern Entertainment

Inc., 860 F.2d 1227, 1233 (3d Cir. 1988). We are further instructed that an issue of material fact is "genuine" if the evidence is such that a reasonable jury might return a verdict for the non-moving party. Anderson, 477 U.S. at 257; Hankins v. Temple University, 829 F.2d 437, 440 (3d Cir. 1987); Equimark Commercial Finance Co. v. C.I.T. Financial Services Corp., 812 F.2d 141, 144 (3d Cir. 1987).

Under this regimen that we follow, the Court is required to view the evidence in the light most favorable to the non-moving party. Consistent with this principle, the non-movant's evidence must be accepted as true and all reasonable inferences must be drawn in the non-movant's favor. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990). However, the non-moving party may not rest on the bare allegations contained in his or her pleadings. Once the moving party has satisfied its burden of identifying evidence which demonstrates an absence of a genuine issue of material fact, see Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988), the nonmoving party is required by Federal Rule of Civil Procedure 56(e)[1] to go beyond the pleadings by way of

[1] In relevant part, Rule 56(e) states:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

affidavits, depositions, answers to interrogatories or the like in order to demonstrate specific material facts which give rise to a genuine issue. Celotex Corporation v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548 (1986). When Rule 56(e) shifts the burden of proof to the non-moving party, that party must produce evidence to show the existence of every element essential to its case which it bears the burden of proving at trial. Equimark, supra at 144.

FACTUAL HISTORY

This case is about a former employee seeking severance and pension benefits from his former employer. As of July 29, 1997, Plaintiff, Robert Zalinski was employed by a subsidiary of Defendant Osram Sylvania, Inc. as an Engineer Manager at its Towanda, Pennsylvania facility. (Doc. 26, citing Zalinski deposition). As of that date, Plaintiff was entitled to certain benefits upon retirement under the Osram Sylvania, Inc. Pension Plan for Salaried Employees, an employment benefit plan within the meaning of ERISA. (Id.). Generally, under the Pension Plan, if the sum of the Plaintiff's age plus years of accredited service equaled seventy-six (hereinafter "Rule of 76"), he would, upon retirement, be eligible to withdraw as a lump sum the GTE portion of his pension, and receive pension monies as a lifetime annuity beginning at age sixty-five under the Osram portion of the Plan. (Id.). The Petitioner would have satisfied the Rule of 76 on or about February 28, 1999, had he continued to be employed. (Id.).

Defendant Peter Broderick was a Human Resources Manager at the plant where the Plaintiff was employed. (Doc. 26). On July 29, 1997, Broderick informed the Plaintiff that he was to be removed from his Engineering Manager position and placed in another position in a different manufacturing group at a lower job grade with the same pay rate effective July 30, 1997. (Id.). The new position was a process engineer in a minor product line, outside the Plaintiff's area of expertise, that the Plaintiff believed had the potential of being eliminated some time in the future, leaving him feeling like he had very little job security. (Id.). The Plaintiff asked whether there were any other employment options; however, Broderick said that the position being offered to the Plaintiff was the only one available at the time. (Id.). Broderick also informed the Plaintiff that his future employment status with the company would always be as an individual contributor and never in a managerial position again, and that the Plaintiff had a "greatly reduced potential in the company [from] that day forward." (Doc. 26, citing Zalinski deposition at 19 and 25). Broderick then offered to discuss other options with Plaintiff in the morning. (Id.).

The next morning, July 30, 1997, Broderick told the Plaintiff that Defendant Gary Reiter, another Human Resources Manager, had prepared a handwritten document which Broderick then showed to the Plaintiff. (Zalinski deposition at 21-22, Ex. G).

Essentially, the document outlined four bullet points, two of which state, in part, "Reach the Rule of 76-(2-28-99)" and "able to stretch out severance to cover longer time." (Zalinski deposition at 40, Ex. G). The document then contains a "summary" stating "Getting to Rule of 76 critical" and "w/o Age 55 Early Ret. Affected Significantly." (Zalinski deposition at Ex. G). The document then indicates that the Plaintiff had "36 wks. Sep. pay as of 9-19-97." (Id.). Broderick discussed each of these points with the Plaintiff, and confirmed that the Plaintiff had approximately thirty-six weeks of separation pay available him. (Zalinski deposition at 23). The document has three options which Broderick discussed with Zalinski. (Zalinski deposition at 24). Generally, the first option was that the Plaintiff would leave immediately and get his pension at age sixty-five, and the second option was that the Plaintiff would stay one more year and receive a slightly increased pension at age sixty-five. (Doc. 26). The third option, which is the option involved in the case before us, was that the Plaintiff would leave, but that his thirty-six weeks of separation pay would be stretched over eighteen months to qualify him for the Rule of 76, which would in turn, allow him to withdraw the GTE portion of his pension as a lump sum, indicated on the handwritten document as approximately $206,000.00, at age fifty-five. (Zalinski deposition at 24).

After the options had been discussed, the Plaintiff asked Broderick for time to think about it and Broderick agreed, and said that this was a significant decision and the he knew that he could not make that kind of decision quickly. (Zalinski deposition at 28). The Plaintiff then moved his belongings from his old office to his new office. (Id.).

Over the next couple of weeks, the Plaintiff did some research and calculations, and determined that the third option was "pretty attractive and that it was the only way [he] could recoup the security that [he] lost ... if [he] would leave Osram Sylvania." (Zalinski deposition at 29).

Approximately three weeks after the July 30, 1997 meeting, the Plaintiff asked Broderick how long he had to make a decision and was told that the offer was not on the table indefinitely. (Zalinski deposition at 30). Broderick then said that he would need to have it resolved "in a matter of weeks." (Id.). The Plaintiff agreed, and told Broderick that he would get back to him when he made a decision. (Id.).

On September 29, 1997, the Plaintiff personally delivered the following letter to Broderick:

> To: Pete Broderick
> From: Bob Zalinski
> September 29, 1997
>
> This letter is to inform Osram Sylvania Products, Inc. of my intention to accept their offer concerning my my [sic] resignation.

> I would like to resign my position effective two weeks from today.
>
> It is my understanding that my severance pay will be allocated over the next 18 months giving me enough service time to qualify for the Rule of 76 and allow me to draw my GTE pension as a lump sum after meeting all requirements for proper notice, etc.

(Zalinski deposition at 32-33 and at Ex. H). Broderick then stated that he was not sure that the offer was still available and that he would have to check. (Zalinski deposition at 33). Broderick then asked the Plaintiff what he was going to do, and the Plaintiff replied that he received a job offer from a competitor. (Id.). Broderick then instructed the Plaintiff to go home and wait for a phone call. The Plaintiff went home. (Id. at 34).

A couple of hours later, Broderick called and told the Plaintiff "that the decision was made that the option was no longer available but that [Broderick] could arrange for [Zalinski] to have an exit interview later that day." (Zalinski deposition at 34-35). At the exit interview, Broderick informed the Plaintiff that he would be receiving only two weeks separation pay. (Id. at 35).

Later that day or the next, the Plaintiff called Broderick and stated that he believed he had accepted the offer of the third option, and did not believe that they had the right to withdraw the offer. (Zalinski deposition at 36). Broderick stated that he would ask again and get back to the Plaintiff. (Id. at 36). After a few hours, Broderick called back and said that the offer was not

available because Broderick felt it had been too long since the offer was made and, more importantly, because the Plaintiff was going to work for a competitor. (Id. at 37).

On December 24, 1997, the Plaintiff's counsel wrote to Defendant Reiter requesting, among others, "copies of any and all benefit plans and policies under which Mr. Zalinski was covered as an employee of Osram Sylvania." (Ex. L, Zalinski deposition). It was not until the correspondence of June 21, 1999 from Defendants' counsel, however, that the Plaintiff or his counsel were provided with a copy of the Osram Sylvania Severance Pay Plan for Salaried Employees ("Severance Plan"). (Ex. O, Zalinski deposition). Prior to then, the Plaintiff was not aware that there was a Severance Plan and does not recall reading anything about Severance Plan. (Zalinski deposition at 44). In the letter of June 21, 1999, Defendants' counsel stated: "To appeal the denial of severance pay, you must submit a request for review to the Plan Administrator ... within 60 days of the your receipt of this letter." (Ex. O, Zalinski deposition). On August 3, 1999, Plaintiff submitted a request for review. (Ex. P, Zalinski deposition). Via correspondence of September 1, 1999, Defendant Severance Pay Plan Committee ("Committee") denied the Plaintiff's claim. (Ex. Q, Zalinski deposition). Plaintiff filed his complaint March, 31, 2000. (Doc. 1).

DISCUSSION

Plaintiff's complaint avers five counts against the Defendants. (Doc. 1). They are as follows: (I) ERISA Interference with protected rights; (II) ERISA Recovery of benefits and enforcement of rights; (III) Breach of contract; (IV) Promissory Estoppel; (V) Equitable Estoppel/Detrimental Reliance; and (VI) Fraud/Misrepresentation.

Defendants argue in their brief supporting the motion for summary judgment (Doc. 17) that the Plaintiff's common law claims (III-VI) are preempted by ERISA. We agree. Because it is appropriate[2] and because Plaintiff "concurs with dismissal of his common law claims, contained within Counts III-VI of the Complaint, based upon certain representations by Defendants" (Doc. 26, p. 7) we will grant summary judgment as to claims III-VI, only. In light of Plaintiff's concurrence we narrow our discussion to Counts I and II.

COUNT I- Violation of ERISA § 510/29 U.S.C. § 1140

In Count I, Plaintiff charges that "Defendants Osram, Broderick and Reiter induced Plaintiff to end his employment in reasonable and justifiable reliance that Plaintiff would receive

[2]Section 541(a) of ERISA, 29 U.S.C. § 1144(a) provides in part that ERISA "shall supersede any and all state laws insofar as they may not or hereafter be related to any employee benefit plan." The Supreme Court consistently has interpreted the term "relate to" as embracing a broad spectrum of state laws. Pilot Life Ins. Co. v. Dedeaux, 484 U.S. 41 (1987); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990); FMC Corp. v. Holliday, 498 U.S. 52 (1990). The Court has held that a law relates to an employee benefit plan if it has "a connection with or reference to such a plan." Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96-97 (1983).

continuation of his salary until he satisfied the Rule of 76, and the pension benefits to which he was entitled by satisfying the Rule of 76." (Doc. 1, p. 8). Plaintiff further claims that Defendants Osram, Broderick and Reiter "knew or reasonably should have known that Plaintiff would end his employment in reasonable and justifiable reliance that Plaintiff would receive continuation of his salary until he satisfied the Rule of 76, and the pension benefits to which he was entitled by satisfying the Rule of 76." (Id.). Also, Plaintiff claims that Defendants Osram, Broderick and Reiter

> unlawfully discharged, expelled or discriminated against the Plaintiff for exercising or attempting to exercise rights to which he was entitled under the provisions of an employee benefit plan, and unlawfully interfered with the Plaintiff's attainment of the rights to which he was entitled under an employee benefit plan, in violation of 29 U.S.C. § 1140[3], by inducing the end of Plaintiff's employment with Defendant Osram, accepting Plaintiff's resignation, but then refusing to continue his salary until he satisfied the Rule of 76, and precluding Plaintiff from receiving the benefits to which he was entitled by satisfying the Rule of 76.

(Id. at 8-9). In light of this claim, Plaintiff requests damages for lost wages and benefits, lost future wages and benefits, lost

[3]Section 510 ERISA/§ 1140 Interference with protected rights
It shall be unlawful for any person to discharge, fine, suspend, expel discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, ... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan ....

salary until he satisfied the Rule of 76, loss of the benefits to which he was entitled by satisfying the Rule of 76, injunctive relief, declaratory relief, compensatory damages for emotional distress, punitive damages, attorney's fees and costs, and interest. (Doc. 1).

Defendants move for summary judgment on this claim arguing that the record shows that the Plaintiff was not discharged, fined, suspended, expelled, disciplined or discriminated against by the Defendants. (Doc. 17). The Defendants further proclaim that the admissions in the Plaintiff's testimony "tend to establish not that defendant's forced him out, but that they attempted to cushion the demotion by protecting his income. (Id. at 11). Defendants also argue that the Plaintiff was not discharged, but that he resigned. They rely on Joyce v. R.J.R. Nabisco, 126 F.3d 166 (3d Cir. 1997) citing that "constructive discharge claims under § 510 of ERISA are governed by an 'objective standard,' which asks whether the employer 'created conditions so intolerable that a reasonable person would resign.'" (Id. at 177). Furthermore, Defendants argue that Plaintiff's claim must be rejected because "[h]e has no evidence which would permit a finder of fact to conclude any of the defendants had a purpose to interfere with the plaintiff's attainment of a Rule of 76 retirement." (Doc. 17, p. 12). We disagree.

The Third Circuit addressed the issue of discharge under ERISA § 510 in Joyce v. R.J.R. Nabisco, 126 F.3d 166 (3d Cir. 1997). The Defendants are correct when they cite to this case in their argument, however, a material legal question still remains: was Mr. Zalinski discharged, or did he voluntarily resign? Further, depending on that answer, what effect, if any, should that have on his access to severance and pension benefits? The Defendants, of course, maintain that the Plaintiff did resign voluntarily. On the other hand, the Plaintiff argues that he was presented with three options by the Defendants, all of which required him to resign. Under § 1140 of ERISA a plaintiff must show intent on the part of the defendant to interfere with his or her benefit rights. DeWitt v. Penn-Del Directory Corp., 106 F.2d 514 (3d Cir. 1997). That interference need not be the sole reason for a termination, and the plaintiff's evidentiary burden may be satisfied by circumstantial evidence because, "in most cases ... 'smoking gun' evidence of specific intent to discriminate does not exist." DeWitt at 522-523.

We find that in this case the Plaintiff has adduced sufficient evidence for a finder of fact to reasonably infer the requisite intent under § 1140 of ERISA based on the way the Plaintiff was treated after he was demoted. We also find that based on Plaintiff's submissions that a finder of fact could reasonably infer that the Defendants knowingly interfered with the

Plaintiff's benefit rights. It is, therefore, inappropriate to grant summary judgment on this count.

COUNT II- ERISA § 502(a)(1)(B)/29 U.S.C. § 1132(a)(1)(B)

In Count II, Plaintiff charges that "Defendants Osram's, Severance Plan's and Committee's failure and refusal to continue Plaintiff's salary until he satisfied the Rule of 76, and attain pension benefits to which he was entitled by satisfying the Rule of 76, was arbitrary, capricious, unreasonable, and/or an abuse of discretion." (Doc. 1, p. 10). In addition, Plaintiff claims pursuant to 29 U.S.C. § 1132(a)(1)(B)[4] that Defendants Osram and Committee breached their fiduciary duties by failing and refusing to continue Plaintiff's salary until Plaintiff satisfied the Rule of 76, and by precluding Plaintiff from attaining the pension benefits to which he was entitled by satisfying the Rule of 76. (Id.).

Defendants counter that Plaintiff cannot recover benefits because he did not exhaust the plan claims procedures and because

[4]ERISA Section 502(a)(1)(B)/§ 1132 Civil Enforcement
(a) Persons empowered to bring a civil action
A civil action may be brought–
(1) by a participant or beneficiary–
. . .
(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan...

the Plaintiff cannot show that the reasons for denial of benefits were arbitrary and capricious. (Doc. 17). The Defendants maintain that the Administrative Committee of the Plan denied benefits on the grounds that the Plaintiff did not make a timely claim and that he was not entitled to severance because he had voluntarily resigned. (Id.).

The Defendants would have us believe that the Plaintiff is not entitled to relief because he did not comply with the exhaustion remedies under the Plan, namely, he did not timely file a claim for benefits or appeal the denial of a claim in accordance with the limits set by the Plan. (Doc. 17). They rely on Weldon v. Kraft, Inc. 896 F.2d 793 (3d Cir. 1990) citing that Federal Courts will not entertain an ERISA claim for benefits under § 502(a) unless the Plaintiff has exhausted the remedies available under the Plan. (Weldon at 800). While this is the standard by which we are guided, conflicts remain as to whether or not the Plaintiff was afforded proper notice.

Regulations promulgated under ERISA require that a notice of claims denial be in writing, and set forth:

> (1) Specific reason or reasons for the denial;
> (2) Specific reference to pertinent plan provisions on which the denial is based;
> (3) A description of any additional material or information necessary for the Claimant to perfect the claim and an explanation of why such material or information is necessary; and
> (4) Appropriate information as to the steps to be taken if the participant or beneficiary wishes to submit his or her claim for review.

29 C.F.R. § 2560.503-1(f).

According to Plaintiff, Federal courts have declined to dismiss ERISA claims on exhaustion grounds where the Defendant did not comply with the notice requirements. See, Sage v. Automation, Inc. Pension Plan and Trust, 845 F.2d 885 (10th Cir. 1988)(rejection letter did not describe information needed to perfect the claim, nor elaborate on any sort of review process); DiMarco v. Michigan Conference of Teamsters Welfare Fund, 861 F.Supp. 599 (E.D. Mich. 1994)(denial letter did not contain a description of the claims review procedure and notification of the right to appeal); McLean Hosp. Corp. v. Lasher, 819 F.Supp. 110 (D. Mass. 1993)(denial deficient where it contained only conclusory reasons for denial, failed to indicate information needed to appeal, provided only sparse information as to procedures for review, and lacked notice of appeal information. Moreover, inadequate notice, in and of itself, may constitute arbitrary and capricious denial of benefits).

In this case, according to Plaintiff, he received no written notification when Broderick told him that he would not be receiving the extended severance benefit or qualify for the Rule of 76. Broderick also did not inform the Plaintiff of any rights of appeal. It was not until Defendants' counsel's letter of June 21, 1999 that the Plaintiff or his counsel were provided with a copy of the Severance Plan, and the Plaintiff did not know until that date

that a Severance Plan existed. Furthermore, it was this June 21, 1999 letter (Ex. O, Zalinski deposition) from the Defendants that directed him to file an appeal within sixty days, which he did, within the time limitation set forth in the letter. Therefore, again we find it would be inappropriate to grant summary judgment on this count in light of this factual dispute.

Finally, Defendants claim that Plaintiff cannot establish a claim for breach of fiduciary duties, because they claim that Defendant Osram Sylvania, Inc. did not exercise any fiduciary duty. (Doc. 17).

ERISA provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). "The fiduciary may not, in the performance of these duties, 'materially mislead those to whom the duties of loyalty and prudence are owed.'" Adams v. Freedom Forge, 204 F.3d 475, 491 (3d Cir. 2000)(citation omitted). In Adams, employees whose job responsibilities included explaining plan benefits were found to have "act[ed] as a fiduciary when explaining plan benefits and business decisions about plan benefits to its employees." Id. at 492. The Adams court stated:

> An employee may recover for a breach of a fiduciary duty if he or she proves that an employer, acting as a fiduciary, made a material misrepresentation that would confuse a reasonable beneficiary about his or her benefits, and a beneficiary acted thereupon to his or her detriment.... Having made such representations, a company cannot insulate itself from liability by

> including unequivocal statements retaining the right to terminate plans at any time in the [plan documents].... Moreover, **a fiduciary may not remain silent when he or she knows that a reasonable beneficiary could rely on the silence to his or her detriment.**

Id. (citations omitted)(emphasis added).

Defendants have conceded that Broderick had authority to make the offers to the Plaintiff and that each of Osram's facilities had autonomy regarding the offering of severance benefits. Because of this, we can find that Broderick acted in a fiduciary capacity based on his interactions with the Plaintiff.

It appears that at no time prior to Plaintiff submitting his resignation did Broderick indicate that too much time had elapsed or that the option offered to the Plaintiff was no longer available. Plaintiff only learned that the offer was revoked when he attempted to accept it. It is plain from the pleadings that the Plaintiff relied upon Broderick's representations to his own detriment, which leaves enough material facts in dispute for us to determine that granting summary judgement on Count II is inappropriate.

CONCLUSION

Based upon the aforementioned discussion, we shall grant Defendants motion for summary judgment (Doc. 13) with respect to

Counts III-VI, only. Counts I and II of the Complaint (Doc. 1) survive the motion for summary judgment.

Finally, because Counts III-VI which were grounded in common law will be dismissed, the Plaintiff is no longer entitled to a trial by jury because only the ERISA claims survive. See Slapkus v. QVC, Inc., 1997 WL 220244 (E.D. Pa. 1997); Cox v. Keystone Carbon Co., 861 F.2d 390 (3d Cir. 1988).

_____
Richard P. Conaboy
United States District Judge

DATE:

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

ROBERT ZALINSKI, :
: CIVIL ACTION NO. 3:00CV-0591
Plaintiff, :
:

vs.	:	
	:	(JUDGE CONABOY)
OSRAM SYLVANIA, INC. et al.,	:	
	:	
Defendants.	:	

ORDER

NOW, this _____ Day of March, 2001, it is hereby ORDERED that:

1. Defendant's motion for Summary Judgment (Doc. 13) is GRANTED in part and DENIED in part;

2. Defendant's motion for Summary Judgment (Doc. 13) is GRANTED as to Counts III, IV, V, and VI;

3. Defendant's motion for Summary Judgment (Doc. 13) is DENIED as to Counts I and II;

4. The Parties are to proceed with discovery in this case in preparation for trial per our separate Discovery Order entered this day, March 13, 2001 and separate Scheduling Order entered on March 9, 2001.

5. The Clerk of Court is directed mark the docket.

_____
Richard P. Conaboy
United States District Judge