

1 brief), Sampson, Ginsberg &
2 Griffin, P.C., Troy, New
3 York.

4
5 **APPEARING FOR APPELLEE:**

6 ROBERT A. BARRER, Hiscock &
7 Barclay, LLP, Syracuse, New
8 York.

9 Appeal from a judgment of the United States District
10 Court for the Northern District of New York (Sharpe, J.).

11
12 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
13 **AND DECREED** that the judgment of the district court be
14 **VACATED** and **REMANDED** for further proceedings consistent with
15 this order.

16
17 Plaintiff-Appellant Rensselaer Polytechnic Institute
18 ("RPI") appeals from: (i) a judgment and order of the
19 district court entered October 18, 2007, denying RPI's
20 motion for summary judgment, dismissing its complaint, and
21 permitting Defendant-Appellee Varian, Inc. ("Varian") to
22 retain \$367,000 (already in its possession) as damages, and
23 (ii) from the district court's order on reconsideration,
24 entered June 26, 2008, granting summary judgment in favor of
25 Varian and affirming the damages award. We assume the
26 parties' familiarity with the facts, the procedural history,
27 and the issues on appeal.

28
29 We review the district court's summary judgment
30 decision de novo. See Roe v. City of Waterbury, 542 F.3d
31 31, 35 (2d Cir. 2008). Summary judgment is appropriate if
32 "there is no genuine issue as to any material fact" and "the
33 movant is entitled to judgment as a matter of law." Fed. R.
34 Civ. P. 56(c).

35
36 **[1] Existence of the Contract.** RPI argues that the
37 district court erroneously concluded that a contract to
38 purchase a nuclear magnetic resonance spectrometer existed
39 between RPI and Varian. "To form a valid contract under New
40 York law, there must be an offer, acceptance, consideration,
41 mutual assent and intent to be bound." Register.com, Inc.
42 v. Verio, Inc., 356 F.3d 393, 427 (2d Cir. 2004) (quotations
43 omitted). We agree with the district court's conclusion
44 that the parties' respective behavior in October 2003--
45 including the exchange of signed forms and the deposit by
46 RPI of \$900,000--evinced agreement, and an intent to be
47 bound, which constituted a lawful contract.

1 **[2] Money Had and Received.** RPI brings a claim for
2 money had and received, but that claim is one in "quasi
3 contract [that] does not lie where, as here, there is a
4 valid contract between the parties respecting the matter at
5 issue." Indep. Order of Foresters v. Donald, Lufkin &
6 Jenrette, Inc., 157 F.3d 933, 940 (2d Cir. 1998).
7 Accordingly, we affirm the dismissal of the claim for money
8 had and received.

9
10 **[3] Breach of Contract.** RPI challenges the district
11 court's conclusion that RPI breached by unilaterally
12 terminating the contract. RPI cites generic language
13 contained in the "Commodity Description" section of the
14 contract; however, the contract also contains a specific
15 clause covering "Cancellation," which limits RPI's right to
16 cancel to a failure by Varian to timely deliver.

17
18 "A written contract will be read as a whole, and every
19 part will be interpreted with reference to the whole; and if
20 possible it will be so interpreted as to give effect to its
21 general purpose." Adams v. Suozzi, 433 F.3d 220, 228 (2d
22 Cir. 2005) (quotations omitted). We conclude--as did the
23 district court--that the clause specifically covering
24 cancellation governs this dispute; RPI's right to cancel was
25 therefore limited to a failure by Varian to timely deliver.
26 Varian did not fail to timely deliver, so RPI's termination
27 constituted a breach of the agreement.

28
29 **[4] Right To Reject and Rescind and Implied Warranty.**
30 RPI contends that there are genuine issues of material fact
31 as to: (1) whether it had the right to reject the goods and
32 rescind the contract under New York Uniform Commercial Code
33 ("N.Y. U.C.C.") § 2-711; and (2) whether Varian breached the
34 implied warranty of fitness for a particular purpose (N.Y.
35 U.C.C. § 2-315). We reject both arguments. Section 2-711
36 covers those cases "[w]here the seller fails to make
37 delivery or repudiates or the buyer rightfully rejects or
38 justifiably revokes acceptance." Id. § 2-711. None of
39 those circumstances was present here: Varian had not yet
40 delivered or repudiated, and RPI could not reject goods it
41 had not yet received and had no justifiable basis to revoke.
42 The district court also correctly concluded that RPI's
43 rescission claim fared no better when viewed through the
44 lens of N.Y. U.C.C. § 2-609. As to the implied warranty
45 claim, Paragraph 5 of the contract expressly disclaims "all
46 other express or implied warranties," and this Court has
47 made clear that "a party cannot justifiably rely on a

1 representation that is specifically disclaimed in an
2 agreement," Dallas Aerospace, Inc. v. CIS Air Corp., 352
3 F.3d 775, 785 (2d Cir. 2003). These challenges are
4 therefore rejected.

5
6 [5] Damages. Finally, RPI challenges the district
7 court's determination on damages. "In an action for breach
8 of contract, a plaintiff may seek two distinct categories of
9 damages: (1) general or market damages; and (2) special or
10 consequential damages." Schonfeld v. Hilliard, 218 F.3d
11 164, 175 (2d Cir. 2000) (quotations omitted). "A plaintiff
12 is seeking general damages when he tries to recover the
13 value of the very performance promised." Id. (quotations
14 omitted). "'Special' or 'consequential' damages, on the
15 other hand, seek to compensate a plaintiff for additional
16 losses (other than the value of the promised performance)
17 that are incurred as a result of the defendant's breach."
18 Id. at 176. As a general rule, "'special or consequential
19 damages are not recoverable unless the party was on notice
20 of those special damages at the time of contracting,'" Jessica Howard Ltd. v. Norfolk S. Ry. Co., 316 F.3d 165, 170
21 (2d Cir. 2003) (quoting Neptune Orient Lines, Ltd. v.
22 Burlington N. & Santa Fe Ry. Co., 213 F.3d 1118, 1120 (9th
23 Cir. 2000)), and in this case the contract specified that
24 "[i]n no event shall Varian or [RPI] be liable to the other
25 . . . for incidental, consequential, indirect, punitive, or
26 special loss or damages of any kind"

27
28
29 Here, the system RPI ordered from Varian included as a
30 component a 63-millimeter bore magnet which--along with
31 other magnets dedicated for other Varian customers--was in
32 production at the time of the breach. After RPI's breach,
33 Varian attempted to reshuffle and resell the various
34 magnets, and in the end was left with a 54-millimeter
35 magnet. The district court awarded damages based on the
36 value of that magnet. On appeal, RPI argues (among other
37 things), that it was improper for the district court to base
38 its damages award on a magnet that it never ordered,
39 especially when Varian was apparently able to resell the
40 magnet dedicated for RPI's system, and when special damages
41 were excluded by the explicit terms of the contract.

42
43 If the magnet remaining in Varian's production stream
44 were of the same size and kind required by the RPI system,
45 we would have no trouble concluding that the damages were
46 direct and affirming the award. However, the magnet
47 remaining in Varian's production stream was of a size not

1 ordered by RPI and not required by its system. Under those
2 circumstances, we conclude that a genuine issue of material
3 fact remains as to whether Varian's claimed damages were
4 direct or special, and whether they were permissible under
5 the contract. After the receipt of evidence, a fact-finder
6 may conclude that the damage award was proper, but the issue
7 cannot be decided as a matter of law. Accordingly, we
8 remand for a trial on damages only, including issues of
9 mitigation and industry custom and practice.

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11 We have reviewed Appellant's remaining arguments and
12 find them to be without merit. For the reasons stated
13 above, the judgment of the district court is VACATED and the
14 case REMANDED for further proceedings consistent with this
15 order.

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17
18 FOR THE COURT:
19 CATHERINE O'HAGAN WOLFE, CLERK
20

21
22 By: _____