

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BECTON DICKINSON AND COMPANY,)
)
 Plaintiff,)
)
 v.) Civil Action No. 02-1694 GMS
)
 TYCO HEALTHCARE GROUP LP,)
)
 Defendant.)

MEMORANDUM

I. INTRODUCTION

The plaintiff, Becton, Dickinson and Company (“BD”) filed the above-captioned action against Tyco Healthcare Group, LP. (“Tyco”) on December 23, 2002. In its complaint, BD alleges that the defendant is infringing U.S. Patent No. 5,348,544 (the “544 patent”).

Presently before the court is Tyco’s Motion for Summary Judgment (D.I. 119), BD’s Motion for Summary Judgment of Literal Infringement (D.I. 127), and BD’s Motion for Summary Judgment Dismissing Tyco’s Anticipation Defense (D.I. 125).¹ For the reasons that follow, the court will deny Tyco’s Motion for Summary Judgment on both literal infringement and anticipation; the court will deny BD’s motion for summary judgment of literal infringement; and the court will grant BD’s motion for summary judgment dismissing Tyco’s anticipation defense.²

¹ Tyco provides its non-infringement and anticipation arguments in one summary judgment motion, filed on May 3, 2004. BD’s motions for summary judgment of literal infringement and seeking dismissal of Tyco’s anticipation defense were filed on May 4, 2004. Because the issues are duplicative, the court will address Tyco’s and BD’s motions in the same memorandum.

²In light of the court’s decision to deny Tyco’s summary judgment motion for non-infringement and BD’s summary judgment motion for literal infringement, the court will not address BD’s Motion to Strike in Part Defendant Tyco Healthcare Group LP’s Motion for Summary Judgment because it is moot.

II. STANDARD OF REVIEW

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 judgment as a matter of law.” FED. R. CIV. P. 56(c); *see also Boyle v. County of Allegheny Pa.*, 139 F.3d 386, 392 (3d Cir. 1998). Thus, summary judgment is appropriate only if the moving party shows there are no genuine issues of material fact that would permit a reasonable jury to find for the non-moving party. *Boyle*, 139 F.3d at 392. A fact is material if it might affect the outcome of the suit. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986)). An issue is genuine if a reasonable jury could possibly find in favor of the non-moving party with regard to that issue. *Id.* In deciding the motion, the court must construe all facts and inferences in the light most favorable to the non-moving party. *Id.*; *see also Assaf v. Fields*, 178 F.3d 170, 173-74 (3d Cir. 1999).

When a party challenges a patent’s validity, the court begins with the statutory presumption of validity. 35 U.S.C. § 282 (“A patent shall be presumed valid.”). Accordingly, “[t]he burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.” *Id.* Invalidity must be shown by clear and convincing evidence. *Robotic Vision Sys., Inc. v. View Eng’g, Inc.*, 189 F.3d 1370, 1377 (Fed. Cir. 1999). This evidentiary standard is relevant in the context of a motion for summary judgment because “the judge must view the evidence presented through the prism of the substantive evidentiary burden.” *Anderson*, 477 U.S. at 254.

As the Court elaborated,

[W]here the . . . ‘clear and convincing’ evidence requirement applies, the trial judge’s summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual

dispute concerns [a material issue]. . . the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the [movant] has shown [that material issue] by clear and convincing evidence or that the [movant] has not.

Id. at 255-56. Thus, Tyco must show that there is no genuine issue as to any material fact that is necessary for a finding, by clear and convincing evidence, of invalidity. If Tyco makes such a showing, BD may withstand summary judgment by adducing “specific facts” sufficient to create a genuine issue of material fact as to an essential element of Tyco’s defense of invalidity. FED. R. CIV. P. 56(e); *see also Int’l Ass’n of Heat & Frost Insulators & Asbestos Workers Local Union 42 v. Absolute Envtl. Serv., Inc., et al.*, 814 F. Supp. 392, 401-02 (D. Del. 1993) (explaining summary judgment standard and burdens).

With these standards in mind, the court will describe the facts that led to the motion presently before the court.

III. BACKGROUND

A. The ‘544 Patent

The invention of the ‘544 patent is a “safety needle shield” to prevent accidental needle sticks to health care workers. A safety needle shield is a device that covers the needle cannula (*i.e.* needle tube) after the needle is used. Some time before the ‘544 patent issued, it was recognized that healthcare workers had a continuous risk of exposure to infectious disease because of needle sticks. Although other needle shields had been developed, they were unappealing or impractical in that they required health care workers to use both hands to shield the needle, were cumbersome or interfered with the use of hypodermic syringes, visually obscured the tip of the needle cannula during use, and/or altered the performance of the shield. Thus, there was a need for single-handed actuated safety shields. In April 1993, BD developed the invention claimed in the ‘544 patent. On

September 20, 1994, the United States Patent and Trademark Office (the “PTO”) issued United States Patent No. 5,348,544 (the “544 patent”). The ‘544 patent discloses single-handed actuated safety shields for medical needles.

The claims of the patent-in-suit describe a safety needle shield containing a hinged arm with proximal (*e.g.*, situated close to the technician’s body) and distal (*e.g.*, situated away from the technician’s body) segments connected to one another for movement between a first position and a second position.³ Claims 1 and 24 include the limitation the proximal and distal segments of the arm have “respective lengths for permitting said guard to move from said first position to said second position on said needle cannula, and for preventing said guard from moving distally beyond said second position.” (Col. 7, ll. 28-32; col. 10, ll. 11-16).⁴ Claims 1 and 24 also include the limitation “spring means connected to said hinged arm for urging said guard along said needle cannula toward said second position.” “Spring means” was construed to mean “the hinged arm is connected to a spring that moves the guard along the cannula toward the second position.”⁵

³ The first position describes the position where the guard is at the proximal end of the needle, adjacent to the needle hub, exposing the needle for injection. The second position describes the position where the guard is extended to the distal end of the needle covering the needle tip.

⁴ BD proposed a construction of the limitation “proximal and distal segments of said hinged arm having respective lengths for permitting said guard to move from said first position to said second position on said needle cannula, and for preventing said guard from moving distally beyond said second position” to mean “[t]he proximal and distal segments of the hinged arm are of respective lengths so as to permit the guard to move along the cannula from the first position to the second position but not beyond the second position (*i.e.* to prevent the proximal end of the guard from moving beyond the needle tip so that when the shield assembly is in the second position, the needle tip is shielded within the guard).” Tyco accepted the plaintiff’s construction. *See* the parties’ joint claim chart of July 11, 2003 (D.I. 45).

⁵ *See* the court’s order of November 14, 2003 as to claim construction (D.I. 77). The court did not accept the defendant’s proposed claim construction of “spring means” as being limited to the separate “spring element 68” or the “coil spring 90” in the specification.

On December 23, 2002, BD filed the present action. In its complaint, BD alleges that Tyco “has made, used, offered for sale and/or sold, and continue[s] to make, use, sell and/or offer for sale, products which infringe one or more claims of the ‘544 patent.” (D.I. 1 at 2, ¶ 11). BD alleges that Tyco’s Monoject Magellan™ safety products, including the Monoject Magellan™ safety syringe needle (the “Monoject safety needle products”) and the Monoject Magellan™ safety blood collector products (the “Monoject SBC products”) (collectively “the accused products”) infringe the ‘544 patent under 35 U.S.C. § 271(a). BD further alleges that Tyco’s infringement is willful, has caused direct and proximate financial damage to BD and will continue unless enjoined by this court. (D.I. 1, at 3, ¶¶ 12-13 & 15).

B. The Accused Infringing Products

Tyco is a Delaware Limited Partnership that produces and sells the Monoject Magellan™ safety products, including the Monoject safety needle products and the Monoject SBC products. The Monoject safety needle products consist of a needle hub, a hinged arm, and a guard, with living hinges located between the proximal and distal arm segments of the hinged arm, between the hinged arm and the guard, and between the hinged arm and needle hub. The Monoject safety needle products do not have a separate spring that moves the guard toward the second position. The Monoject SBC products also consist of a hinged arm with proximal and distal segments. The Monoject SBC products have living hinges that are located between the proximal and distal arm segments of the hinged arm and between the hinged arm and blood collection barrel. The Monoject SBC products do not have a separate spring that moves the guard toward the second position. Tyco asserts that its Monoject Magellan™ safety products do not infringe the ‘544 patent. Tyco further asserts that the ‘544 patent is invalid because it is anticipated by the prior art. 35 U.S.C. § 102.

On May 3, 2004, Tyco filed a motion for summary judgment of non-infringement and invalidity under 35 U.S.C. § 102. On May 4, 2004, BD filed a motion for summary judgment of literal infringement and a motion for summary judgment dismissing Tyco's anticipation defense.

IV. Discussion

A. Tyco's Motion for Summary Judgment of Non-Infringement and BD's Motion for Summary Judgment of Literal Infringement

A patent is infringed when a person “without authority makes, uses or sells any patented invention, within the United States . . . during the term of the patent.” 35 U.S.C. § 271(a). A patent infringement analysis entails two steps: “(1) claim construction to determine the scope of the claims, followed by (2) determination of whether the properly construed claim encompasses the accused device.” *Bai v. L & L Wings, Inc.*, 160 F.3d 1350, 1353 (Fed. Cir. 1998) (citations omitted). The first step, claim construction, is a matter of law for the court to decide. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996). The second step, the determination of infringement, is a question of fact. *Bai*, 160 F.3d at 1353. “Literal infringement of a claim occurs when every limitation recited in a claim appears in the accused device, i.e., when ‘the properly construed claim reads on the accused device exactly.’” *KCJ Corp. v. Kinetic Concepts, Inc.*, 323 F.3d 1351, 1358 (Fed. Cir. 2000) (citation omitted). Thus, summary judgment on the grounds of literal infringement is proper when no reasonable jury could conclude that every limitation recited in the properly construed claim is present in the accused device. *See Karlin Tech., Inc. v. Surgical Dynamics, Inc.*, 177 F.3d 968, 974 (Fed. Cir. 1999).

Tyco contends that BD cannot establish infringement of the '544 patent for several reasons.⁶

The court will address each of those reasons in turn.

1. Spring Means

Tyco moves for summary judgment of non-infringement on the grounds that the accused products lack a “spring means,” as required by claims 1 and 24 of the patent-in-suit. This argument fails, however, because it presumes a construction of “spring means” whereby a separate spring must move the guard along the cannula toward the second position. In fact, the court has construed the relevant language of claims 1 and 24 to mean “the hinged arm is connected to a spring that moves the guard along the cannula toward the second position.” In doing so, the court rejected Tyco’s proposed construction of spring means as being limited to the separate “spring element 68” or the separate “coil spring 90” in the specification.⁷ [In addition, the abstract of the '544 patent states that a spring may be provided to assist movement of the guard toward the distal shielded position. It does not state that a spring must be provided.] Summary judgment on this basis is not appropriate.

⁶ Tyco’s summary judgment briefing goes beyond the non-infringement issues it presented as amenable to summary judgment in its letter brief of March 25, 2004 (D.I. 104) and its response to BD’s letter brief of March 31, 2004 (D.I. 108). Tyco’s letter brief did not include the non-infringement defense that the SBC products lack a separate guard with a proximal end and articulation to the hinged arm, or the non-infringement defense of the doctrine of equivalents. In addition, Tyco’s letter in response to BD’s letter brief does not include the aforementioned defenses and states that the only significant difference between the parties’ requests is that Tyco’s motion will apply to both sets of the accused products, while BD’s motion will apply only to the Monoject safety needle products. The court, therefore, has not agreed that these issues are amenable to summary judgment and will address only Tyco’s “spring” non-infringement defense.

⁷ Tyco’s opening brief in support of its motion for summary judgment attempts to revisit claim construction and redefine the term “spring means.” This effort is unavailing, given the courts claim construction order of November 14, 2003 (D.I. 77).

2. Living Hinges as Springs

The movant contends that summary judgment is appropriate because the living hinges in the accused products do not have “stored energy” sufficient to move the guard along the needle cannula, and thus are not “springs.” In support of its argument, Tyco contends that when the accused products are properly used, as described in its instructions-for-use, only the force that the technician applies causes the forward motion of the needle from the first position to the second position. In addition, Tyco presents test evidence which it contends unambiguously shows that there is no stored energy in the hinges that would move the guard toward the tip of the needle. Further, Tyco asserts that when the hinged arm is pushed so that the proximal segment is just over the latch and the latch removed, the living hinges move backwards toward the folded state (*i.e.* first position) and not forward toward the second position. Tyco also contends that even though the folding of the polymer hinges during manufacture will initially impart a stored energy state, the stored energy state will dissipate over time. Tyco contends that BD performed its tests in such a way as to alter the properties of the hinges. Tyco asserts that, other than the force that the technician applies, the only way to get forward movement of its guard is to move the arm partway toward the distal end of the needle, stop and remove the latch, and then return the arm back to the needle hub. Tyco asserts that this mode of operation, which it contends BD used in conducting its tests, is inconsistent with the normal operation of its products as described in its instructions-for-use, which state that the normal operation of its product is to manually push the arm to the end of the needle in one stroke. Tyco, therefore, argues that BD’s tests alter the hinges thereby imparting a “springiness” to them. Finally, Tyco contends that even if its Monoject safety needle products had enough stored energy during manufacture to move the guard, its product would still not infringe because the latch prevents any

movement of the guard during manufacture.

BD counters that the Monoject safety needle products infringe as a matter of law because the living hinges that connect the hinged arm to the guard, each other, and the needle hub are “springs” for moving the guard along the cannula toward the second position. BD contends that the ‘544 patent provides examples of springs as used in claims 1 and 24 that include a hinged spring (e.g., a living hinge). The hinged arm is connected to the living hinges in the Monoject safety needle products and is restrained from moving when packaged and before use only because of a latch that keeps the arm retracted. Thus, BD asserts that the latch is required to ensure that the hinged arm stays folded in the first position despite the stored energy of the living hinges. Furthermore, after the latch is released, the living hinge springs cause the guard to move toward the second position. To support its argument, BD presents test evidence which it contends proves that when the latch is released the hinged arm of the Monoject safety needle products begins to extend and moves toward the needle tip. Lastly, BD contends that at the time the Monoject safety needle products are manufactured, when the guard is folded, there is sufficient stored energy that if released, the guard moves along the needle cannula toward the second position.

Tyco has presented evidence that the living hinges used in its safety products do not have stored energy sufficient to “move[] the guard along the cannula toward the second position.” Opening Brief (D.I. 120, 130) at 25-29; Answer Brief (D.I. 136) at 7-10. BD has presented evidence that the living hinges used in Tyco’s products act as “springs.” Opening Brief (D.I. 128) at 6-8; Answer Brief (D.I. 132) at 10-12. Thus, the real dispute between the parties is whether Tyco’s living hinges are “springs” constituting “spring means” as construed by the court. The court concludes, however, that whether Tyco’s living hinges fit within the courts construction of the term

“spring means” is a determination that may ultimately depend upon, among other things, expert testimony or additional information adduced at trial. Because there is evidence that suffices to raise a genuine issue of material fact as to whether Tyco’s living hinges function as a spring “that moves the guard along the cannula toward the second position,” a grant of summary judgment of non-infringement or a grant of summary judgment of literal infringement would be inappropriate.

B. Tyco’s Motion for Summary Judgment of Anticipation by Prior Art and BD’s Motion for Summary Judgment Dismissing Tyco’s Anticipation Defense

A patent is not valid if the associated invention was “described in a printed publication . . . more than one year prior to the date of the application for patent.” 35 U.S.C. § 102(b). “Anticipation is a question of fact.” *Scripps Clinic & Research Found. v. Genentech, Inc.* 927 F.2d 1565, 1576 (Fed. Cir. 1991). A claim is anticipated when each and every claim element . . . [is] shown, either expressly or inherently, in a single prior art reference. *In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997). To invalidate a patent, the reference also must enable someone skilled in the art to make the claimed invention. *PPG Indus. v. Guardian Indus. Corp.*, 75 F.3d 1558, 1566 (Fed. Cir. 1996). Assertions of invalidity based only on prior art references before the patent examiner during prosecution carry an added burden because the examiner, who is presumed to have properly done his job, specifically reviewed the reference. *Am. Hoist & Derrick Co. v. Sowa & Sons*, 725 F.2d 1350, 1359 (Fed. Cir. 1984), *cert denied*, 469 U.S. 821 (1984).

Tyco alleges that the ‘544 patent is invalid and moves for summary judgment on the ground that the invention is anticipated by prior art. Tyco contends that if “BD is correct that the ‘spring means’ limitation can be satisfied by ‘stored energy’ in the hinges and the ‘connected to’ and ‘extending between’ claim language can be ignored, then that interpretation must be used for

determining invalidity.” (D.I. 120, at 32). Tyco further contends that if BD’s “interpretation” is used for determining invalidity, then the ‘544 patent is invalid because the asserted independent and asserted dependent claims are anticipated by three prior art references: Levitt, U.S. Patent No. 4,911,706 (the “‘706 patent”), Hagen, U.S. Patent No. 4,735,618 (the “‘618 patent”), and Dombrowski, U.S. Patent No. 4,790,828 (the “‘828 patent”).⁸ BD, in both its response and its own motion for summary judgment to dismiss the defendant’s anticipation defense, contends that each of the prior art references cited by Tyco were considered by the patent examiner during prosecution, who determined that none of the three references raised any issues regarding the patentability of the ‘544 patent. BD also contends that each of the defendant’s proffered references lack one or more limitations found in the claims of the patent-in-suit. The court will address each reference in turn.

1. The ‘706 Patent

The ‘706 patent discloses a needle protection device with a folding spring loaded arm that has a base and outer end, and is folded upon itself. The protection device is mounted onto the base of the needle so that it leaves the needle exposed for initial use. After the needle is used, a tab is released and the spring loaded support arm pushes a protective cap out past the end of the needle tip to cover the end of the needle and prevent a needle stick to the technician. (‘706 patent Abstract). The ‘706 patent also discloses an alternative embodiment, which prevents the arm from pushing the protective cap out past the needle tip. This embodiment discloses the use of a tether cord to stop the extension of the support arm and prevent the arm from sliding all the way off the needle. (Col. 5, ll. 21-26). The ‘706 patent claims do not include a spring means limitation. Tyco asserts that

⁸ The three references that Tyco contends anticipate the claims of the ‘544 patent were considered by the patent examiner. The patent examiner issued the patent as a First-Action allowance over the three prior art references.

applying what it refers to as BD's view of the spring, *i.e.* that which is not limited to a separate spring element or coil spring, the '706 patent contains all of the elements of claims 1-4, 6, 15, 24, and 27 of the '544 patent. (D.I. 120, 130, 140). BD contends that the '706 patent lacks the limitation in claims 1 and 24 of the '544 patent that the lengths of the distal and proximal segments of the arm must prevent the guard from moving distally beyond the second position. (D.I. 125, 132). The court agrees with the plaintiff and finds the defendant's argument unpersuasive. The basis for the defendant's argument is whether the "hinged arms" of the '706 patent constitute spring means as the court has construed that term. Tyco asserts that if the "hinged arms" of the '706 patent constitute spring means, then the '706 patent anticipates the '544 patent. However, the defendant's reliance on one claim element is misplaced. Rather, a claim is anticipated when each and every claim element . . . [is] shown, either expressly or inherently, in a single prior art reference. *In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997). The '706 patent specification states that the base wall of the cap extends out beyond the end of the needle. The arm, therefore, permits the guard to move out past the needle tip. (Col. 4, ll. 23-25; col. 5, ll. 13-21; Fig. 5). In addition, the '706 patent states that a "tether cord is used as a stop to stop extension of the arm section and cap at the desired position. The cord prevents the arm section from sliding all the way off the needle." (Col. 5, ll. 22-26). The inventors of the '706 patent, therefore, determined that a result of the invention is that the arm permits the guard to move out past the needle tip and designed an alternative embodiment to prevent that result.

The '706 patent, therefore, does not disclose a hinged arm with proximal and distal segments of the arm having respective lengths for preventing the guard from moving distally beyond said second position. Rather, it discloses a spring loaded arm that permits the guard to move out past the

needle tip, and a tether cord to stop the arm and prevent the guard from moving out past the needle tip.

Because the ‘706 patent does not contain each element of claims 1 and 24⁹ of the patent in suit, there exists no dispute as to at least one genuine issue of material fact necessary for a finding of anticipation by a publication. Accordingly, Tyco’s motion for summary judgment is denied and BD’s motion for summary judgment is granted as to the ‘706 patent.

2. The ‘618 Patent

The ‘618 patent discloses a protective enclosure for a needle consisting of a tubular sleeve and needle guard interconnected by a pair of opposed connecting arms. The needle guard is provided with a needle pocket which functions to capture the tip end of the needle when the connecting arms are manipulated properly. In order for the needle pocket to capture the tip end of the needle, one of the connecting arms is longer than the other connecting arm. When pressure is applied to the central hinge joint, the longer connecting arm is pushed toward the shorter connecting arm, causing the needle guard to cock upward, moving the guard past the needle tip so that the needle tip fits into the needle pocket. Tyco asserts a similar argument as to why the ‘618 patent anticipates claims 1-4, 6, 15, 24, and 27 of the patent-in-suit as it asserts in Section IV.B.1. above. BD asserts the same argument as to why the ‘618 patent does not anticipate claims 1-4, 6, 15, 24, and 27 of the patent-in-suit. Again, the court finds this argument is unavailing. The flaw in the defendant’s argument is its focus on only the “spring means” element of the independent claims, rather than every element.

⁹ Because claims 2-4, 6, and 15 are dependent on claim 1 and because claim 27 is dependent on claim 24, the court finds, on summary judgment, that those claims are not anticipated by the ‘706 patent.

The '618 patent does not disclose a hinged arm with proximal and distal segments of the arm having respective lengths for preventing the guard from moving distally beyond said second position. Rather, it discloses two connecting arms, one being longer than the other, such that when pressure is applied to the longer arm it pushes toward the shorter arm and permits the guard to move out past the needle tip.

Because the '618 patent does not contain each element of claims 1 and 24¹⁰ of the patent in suit, there exists no dispute as to at least one genuine issue of material fact necessary for a finding of anticipation by a publication. Accordingly, Tyco's motion for summary judgment is denied and BD's motion for summary judgment is granted as to the '618 patent.

3. The '828 Patent

The '828 patent discloses a self-capping needle assembly containing a hub and cap connected by a tether. The tether includes at least one flexible arm extending from the hub to the cap, which is collapsed or folded in a neutral position in its first position. After the needle is used, the technician pushes the collapsed arm(s) to create a force that moves the guard toward the second (extended) position. Again, Tyco asserts that applying what it refers to as BD's interpretation of the "spring means" claim construction, the '828 patent anticipates claims 1-4, 6, 12-13, 15, 24 and 27 of the patent-in-suit. BD contends that there is no spring means, as the term was construed by the court, disclosed in the '828 patent.¹¹ Further, BD contends that the '828 patent teaches away from using spring means to move the guard along the cannula toward the second position. The court

¹⁰ Because claims 2-4, 6, and 15 are dependent on claim 1 and because claim 27 is dependent on claim 24, the court finds, on summary judgment, that those claims are not anticipated by the '618 patent.

¹¹ See the court's order of November 14, 2003 as to claim construction (D.I. 77).

agrees with BD. The '828 patent specification states that the device is collapsed or folded and neutral in the first position. The movement of the guard toward the second position is not provided by a hinged arm connected to a spring that moves the guard along the cannula toward the second position. Rather, the movement of the guard is supplied by the force created when the technician pushes on the collapsed arm(s) of the tether. The '828 patent, therefore, does not disclose a "spring means connected to said hinged arm for urging said guard along said needle cannula toward said second position."

Because the '828 patent does not contain each element of Claims 1 and 24¹² of the patent in suit, there exists no dispute as to at least one genuine issue of material fact necessary for a finding of anticipation by a publication. Accordingly, Tyco's motion for summary judgment is denied and BD's motion for summary judgment is granted as to the '828 patent.

V. CONCLUSION

Based on the evidence before it, the court concludes that there remain genuine issues of material fact with regard to non-infringement. Based on the evidence before it, the court concludes that the '544 patent is not anticipated by the prior art.

Dated: September 16 , 2004

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE

¹² Because claims 2-4, 6, 12, and 15 are dependent on claim 1, because claim 13 is dependent on claim 12, and because claim 27 is dependent on claim 24, the court finds, on summary judgment, that those claims are not anticipated by the '828 patent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BECTON DICKINSON AND COMPANY,)

Plaintiff,)

v.)

TYCO HEALTHCARE GROUP LP,)

Defendant.)

Civil Action No. 02-1694 GMS

ORDER

For the reasons stated in the court's Memorandum Opinion of this same date, IT IS HEREBY

ORDERED that:

1. The defendant's Motion for Summary Judgment (D.I. 119) is DENIED.
2. The plaintiff's Motion for Summary Judgment of Literal Infringement (D.I. 127) is DENIED.
3. The plaintiff's Motion for Summary Judgment Dismissing Tyco's Anticipation Defense (D.I. 125) is GRANTED.

Dated: September 16 , 2004

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE