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IN THE COURT OF CLAIMS OF OHIO

YONG HUI SHEFFIELD, ET AL.,

Plaintiffs,

v.

THE OHIO STATE UNIVERSITY
MEDICAL CENTER,

Defendant and
Third-Party Plaintiff,

v.

OHIO HEALTHCARE PURCHASING, INC.,
DBA OHA SOLUTIONS STAFFING
PROGRAM, ET AL.

Third-Party Defendants.

Case No. 2013-00013

Judge Dale A. Crawford

MOTION OF THIRD-PARTY DEFENDANT
OHIO HEALTHCARE PURCHASING, INC., ETC.,
FOR LEAVE TO FILE REPLY MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS THIRD-PARTY COMPLAINT

Now comes Third-Party Defendant, Ohio Healthcare Purchasing, Inc. d/b/a OHA Solutions Staffing Program (the "OHA Solutions"), and hereby moves the Court to issue an order granting it leave to file a reply memorandum in support of its motion to dismiss. This motion is made pursuant to Loc. R. 4(C) and is supported by the attached memorandum. The proposed reply memorandum is attached hereto as Exhibit A.

ON COMPUTER

Respectfully submitted,



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MEMORANDUM IN SUPPORT

OHA Solutions seeks leave to file a reply memorandum in support of its motion to dismiss for two reasons. Those reasons are described below and represent a summary of the proposed reply memorandum.

First, OSUMC acknowledges in its memorandum that the Participation Agreement includes “exceptions” which preclude OHA Solutions from being liable. OSUMC asserts that such “exceptions do not apply here.”¹ This is a new argument – and it is incorrect.

Section V.(F) expressly states that OHA Solutions shall not be liable “for the services rendered by any Agency or Agency Personnel [MSO] to Participating Institution [OSUMC].” This provision further states that OSUMC’s “sole remedy regarding the performance of any Agency or Agency Personnel... shall be against the Agency and that provider [OHA Solutions] is not liable to the Participating Institution [OSUMC] for such performance... other than as described in paragraph A above.”

“Paragraph A above” states that OHA Solutions shall hold OSUMC harmless against liabilities resulting from OHA Solutions’ negligent failure to fulfill its material obligations under this Agreement, *except* as described in paragraph V.E. and F. below.” (Emphasis added.) The reference back to paragraph V.(F) confirms that if the nature of the liability at issue arises from “the services rendered by any Agency or Agency Personnel” to OSUMC, *i.e.*, nursing negligence, then the “sole remedy” of OSUMC “shall be against the Agency [MSO] and that Provider [OHA Solutions] is not liable.”

That is, OSUMC has told this Court in its memorandum that the exceptions in Section V of the Participation Agreement do not apply. OHA Solutions seeks leave to address this argument which is plainly dispositive.

¹ OSUMC Memorandum, p. 7.

Second, Count 2 of the Third Party Complaint is based upon an assertion that OHA Solutions "failed to ensure" that MSO had the proper professional liability coverage. This argument begs a response to point out that the term "to ensure" actually does appear several times in the Participation Agreement. But it appears nowhere in Article V governing indemnity.

OHA Solutions would like to address this issue and point out that when OSUMC wanted the contractual term that established an obligation of OHA Solutions "to ensure" the performance of third parties, the term "to ensure" was used. As such, the use of this term in one provision of the contract and its exclusion in another provision reflects a plain intent to exclude an obligation "to ensure" in the "Indemnification" section.

WHEREFORE, for the foregoing reasons, Third-Party Defendant OHA Solutions respectfully requests the Court to issue an order granting it leave to file a reply memorandum in support of its motion to dismiss.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served via regular U.S. Mail, postage prepaid, this 30th day of September 2014, upon the following:

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This bar to liability applies here because the alleged liability at issue arises solely from the “alleged and negligent conduct” from the services provided by a nurse employee of MSO.²

While there is a carve out in this exclusion of liability – “... other than as described in paragraph A above” – it does not apply. Paragraph A is a hold-harmless clause which states in part:

“Provider [OHA Solutions] shall hold Participating Institution [OSUMC]... harmless from and against any and all liabilities... resulting from or arising out of... Provider’s [OHA Solutions] negligent failure to fulfill its material obligations under this Agreement, *except as described in paragraph V. E. and F. below.*” (Emphasis added.)

So, OHA Solutions is to hold OSUMC harmless if it engages in a “negligent failure to fulfill its material obligations under this Agreement.” But then there is a carve out to this carve out. The sentence goes on to establish that the hold-harmless provision does not apply to the circumstances “described in paragraph V. E. and F.” The circumstances described in Paragraph F. concerns liability “for services rendered by any Agency or Agency Personnel.”

So, if the nature of liability arose from nursing services provided by MSO, then the hold-harmless provision does not apply. To hold otherwise would render meaningless the clause “except as described in paragraph V. E. and F. below.”

An example of when the hold-harmless clause might apply is found in Sec. IV of the Participation Agreement, governing confidentiality:

“Provider [OHA Solutions] agrees to inform Participating Institution [OSUMC] of any breach of the immediately preceding confidentiality clause and to take prompt corrective action to minimize the potential injury and to reimburse all costs and expenses associated with any actual injury to Participating Institution and require agencies to do the same.”

Pursuant to Sec. V. (A), if the conduct of OHA Solutions rises to the level of a “negligent failure to fulfill its material obligations under this Agreement,” then OHA Solutions might be required to hold OSUMC harmless from liabilities to third parties

² Third-Party Complaint, ¶¶ 12 and 13.

resulting from such breach. Under this scenario, the liability of OSUMC would not arise from services provided by Agency Personnel, such as MSO. So, the hold-harmless clause would apply because the carve out at the end would not apply.

That is, throughout the Participation Agreement there are numerous obligations imposed upon OHA Solutions. Sec. V. (A) provides that if OHA Solutions engages in a “negligent failure” to perform one of those material obligations, OHA Solutions is to hold OSUMC harmless from resulting third party liability – “*except*” if such liability arises from nursing services provided by an agency, such as MSO.

To interpret the hold-harmless paragraph as including an obligation to hold OSUMC harmless against liability arising from MSO nursing personnel would render meaningless the last clause of that paragraph – “except as described in paragraph V. E. and F. below.” Contracts are to be interpreted in a manner that gives all words meaning and effect and terms should not be rendered meaningless. See Eastham v. Chesapeake Appalachia, LLC, No. 2:12-cv-615, 2013 U.S. Dist. LEXIS 133476, *13-14 n. 3 (S.D. Ohio Sept. 18, 2013) (“... courts must give effect to every clause and term rather than leave a portion of the contract meaningless.”); Neely v. Crown Solutions Co., LLC, No. 3:13-cv-109, 2013 U.S. Dist. LEXIS 162958, *29-30 (S.D. Ohio Nov. 15, 2013) (“..., the court should reconcile all of an agreement’s provisions when read as a whole, giving effect to each and every term.”); and Cleveland Elec. Illuminating Co. v. City of Cleveland, 37 Ohio St.3d 50, 53, 524 N.E.2d 441 (1988) (instructing courts to give effect to the words used in a contract and not “delete words used”).

In summary, Sec. V. (F) of the Participation Agreement provides that OHA Solutions “is not liable” to OSUMC for any services provided by MSO and OSUMC’s “sole remedy regarding the performance” of MSO’s nurse “shall be against” MSO. While subsection A in that same section creates a hold-harmless obligation of OHA Solutions, the last clause of

that paragraph expressly removes the hold-harmless clause where the liability arises from “the performance of any Agency or Agency Personnel,” including MSO. Since the entire third party complaint against OHA Solutions is premised upon services provided by MSO personnel, such claims are barred as a result of the express language of Sec. V. (A) and (F).

II. There Is No Contractual Obligation “To Ensure” Third Party Compliance.

Count 2 of the Third Party Complaint is based upon an assertion that OHA Solutions failed “to ensure” that MSO had the proper professional liability coverage. OSUMC references the term “to ensure” eight times in its memorandum. It argues that “OHA Solutions had the duty *to ensure* that MSO had the proper professional liability coverage in this case.”³ But that term is not in the indemnification Section V.

OSUMC acknowledges the ruling of the Tenth District that determining the intent of the parties to a contract “rests in the language that they have chosen to employ.” Brogan v. Coughlin Servs., Inc., 10th Dist. No. 12AP-810, 2014-Ohio-469, at ¶ 12. And that is exactly what should occur here – focus on “the language that they have chosen to employ.”

When OSUMC wanted OHA Solutions “to ensure” the performance of a third party, it actually used the term “to ensure.” That term is in the Participation Agreement in Sections IV, IX, and XII. But it is nowhere in Section V governing indemnity. For example, Section IV of the Participation Agreement governs confidentiality and states in part:

“Provider [OHA Solutions] agrees to keep confidential, and *to ensure* that its ... representatives, contractors and agents keep confidential, Participating Institution’s Confidential Information... .

Provider agrees to use, and *to ensure* that its ... representatives, contractors and agents use Participating Institution’s Confidential Information only as necessary... .” (Emphasis added.)

³ Id.

On the topic of confidentiality, OSUMC elevated the burden on OHA Solutions. Instead of simply “requiring” third parties to keep confidential OSUMC’s “Confidential Information,” OSUMC imposed a higher burden “to ensure” the maintenance of confidentiality.

OSUMC knew when to elevate the obligation, changing the contractual burden from “shall require” to “to ensure.” Indeed, throughout the Participation Agreement, if OHA Solutions was only “required,” it used that term, not “to ensure”:

- “Provider ***shall require*** Agency Personnel working in Participating Institution’s facilities to submit time worked data... .” (Section III.);
- “Provider ***shall require*** Agencies to indemnify and hold harmless Provider and Participating Institution... against all actions... resulting from... any intentional or negligent acts... .” (Section V. B.);
- “Provider ***shall require*** Agencies to indemnify and hold harmless Provider and Participating Institution... against all actions... resulting from... failure to pay compensation, workers’ compensation, unemployment compensation... .” (Section V. C.); and
- “Provider ***shall require*** Agencies to indemnify Provider and Participating Institution... for the costs and expenses... for any Agency Personnel who may receive an injury, infectious disease or a biohazard exposure... .” (Section V. D.);⁴

Again, OSUMC knew when to use “shall require” and when to use “to ensure.” “To ensure” is nowhere in the indemnification provisions of Section V. Yet, OSUMC argues that OHA Solutions “was required ***to ensure*** that MSO had proper professional liability coverage for the nurse.”⁵

When parties use a term in one part of a contract and do not use it in another part of a contract, it shows an intent that it was meant to be used where it was placed and was not meant to be used where it was not placed. Nour v. Shawar, et al., 10th Dist. No. 13AP-1070 and 1076, 2014 Ohio 3016. In Nour, the Tenth District was presented with an issue that also concerned contract indemnification. There were two indemnity provisions at issue.

⁴ See also, Sections VI, VIII, IX, XI, and XII.

⁵ OHUMC Memorandum in Opposition, p. 1. Emphasis added.

One provision expanded the scope of indemnification to include “counsel fees,” but the second provision did not include that term. The court held:

“The clear implication of such an omission is that Nour’s right of indemnification from Shawar is more limited than Shawar’s right to indemnification from Nour.

...

The parties in this case knew how to draft an indemnification provision that included recovery of ‘reasonable counsel fees.’ ... When we consider the two indemnification provisions in the sublease together, the only reasonable interpretation... is that Nour does not have the right of indemnity for ‘reasonable counsel fees.’ Had the parties so intended, they would have added a second sentence to Section 11.2.” *Id.*, ¶¶ 12-13.

In Continental Tire N. Am. v. Titan Tire Corp., 6th Dist. No. WM-09-010, 2010 Ohio 1355, the court noted that “as with most contracts of indemnity, such provisions are to be strictly construed and ‘... certainly given no greater scope than the language of the agreement clearly and unequivocally expresses.” *Id.*, ¶ 47, quoting Palmer v. Pheils, 6th Dist. No. WD-01-010, 2002 Ohio 3422, ¶ 39.

The court was presented with two indemnification provisions. One provision included indemnification for “any claim, liability, expenses, loss or other damage (including reasonable attorney fees and expenses).” But the other provision provided for indemnity only “against any claim” and “the reasonable costs and expenses related to enforcement of the indemnification rights.” It did not include “reasonable attorney fees and expenses.”

The court held:

“A rule of construction appears applicable: *‘expressio unius est. exclusio alterius* of the expression of one thing implies the exclusion of another thing... .’ (Citation omitted.) Section 7.1 demonstrates that the drafters of this contract knew how to include language that would include attorney fees within ‘Claims’ subject to indemnification with respect to the seller. The absence of such language in a parallel provision relating to purchaser indemnification exhibits an intention that a reciprocal obligation does not exist.”

The same rule of construction applies here. Just as in Nour and Continental Tire, the parties “knew how to include language” that would expand OHA Solutions’ obligation “to ensure” the performance of certain events. The parties used the term “to ensure” in Sections IV, IX, and XII of the Participation Agreement. But that term is not to be found anywhere in Section V governing indemnification and insurance.

OSUMC is asking this Court to rewrite the agreement so that it reads, “Provider shall require **and agrees to ensure** Agencies to indemnify and hold harmless... .” This language is not there and cannot be rewritten now.

Accordingly, since Count 2 is solely based upon the assertion that “OHA Solutions was contractually obligated to OSUMC to ensure that MSO had proper professional liability coverage,” and since that provision is nowhere in the indemnification provisions of Section V. of the agreement, Count 2 must be dismissed.

WHEREFORE, for the foregoing reasons, Third-Party Defendant OHA Solutions respectfully requests the Court to issue an order dismissing the Third-Party Complaint against OHA Solutions.

Respectfully submitted,



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