

ORIGINAL

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COURT OF CLAIMS
OF OHIO

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IN THE COURT OF CLAIMS OF OHIO

YONG HUI SHEFFIELD, ET AL.,	:	
Plaintiffs	:	Case No. 2013-00013
v.	:	Judge Dale A. Crawford
THE OHIO STATE UNIVERSITY MEDICAL CENTER,	:	
Defendant/Third-Party Plaintiff,	:	
v.	:	
OHIO HEALTHCARE PURCHASING, INC., dba OHA SOLUTIONS STAFFING PROGRAM	:	
and	:	
MEDICAL STAFFING OPTIONS, INC.,	:	
Third-Party Defendants.	:	

**DEFENDANT-THIRD-PARTY PLAINTIFF'S MEMORANDUM CONTRA
MOTION FOR LEAVE TO FILE REPLY MEMORANDUM OF OHA SOLUTIONS**

Defendant-Third-Party Plaintiff, The Ohio State University Medical Center ("OSUMC"), respectfully submits that the motion for leave to file a reply memorandum to support its motion to dismiss by Third-Party Defendant, Ohio Healthcare Purchasing, Inc., dba OHA Solutions Staffing Program ("OHA Solutions"), is not well taken and should be overruled, because it has failed to show "necessity" as required by L.C.C.R. 4(C). Despite the arguments of OHA Solutions, OSUMC has not made any new arguments in its memorandum contra. Instead, OSUMC has only emphasized that it is clear from the terms of the agreement it had with OHA Solutions that OHA Solutions was supposed to require that the agencies it contracted with, such as Medical Staffing Options, Inc. ("MSO"), had the necessary insurance to indemnify OSUMC under the facts alleged in this case.

ON COMPUTER

OSUMC is suing OHA Solutions for its breach of contract, not for any negligence of MSO.

OSUMC is in agreement that it cannot sue OHA Solutions for the services provided by MSO nurses, like Paul Gullett, R.N., who are placed at OSUMC as a result of the Participation Agreement between OHA Solutions and OSUMC. See (Third-Party Complaint, Exhibit A: *OHA Solutions Staffing Program Participation Agreement* (“Ex. A, Participation Agreement”)). But that is not why OSUMC is suing OHA Solutions. OSUMC is suing OHA Solutions for its own “negligent failure to fulfill its material obligations under this Agreement.” (Ex. A, Participation Agreement, p. 3). Despite OHA Solutions’ argument, the exceptions in “paragraph V. E. and F.” do not apply in this situation. (Ex. A, Participation Agreement, p. 3). The gist of “paragraph V. E. and F” is that OHA Solutions will not be liable for the “products and/or services of any Agency or Agency Personnel” and the sole remedy of OSUMC would be to sue MSO if OSUMC was not pleased with the services of its agency personnel. This provision does not apply in this case, because OSUMC takes no issue in the services provided by Nurse Gullett. In fact, in this lawsuit, OSUMC is vigorously defending the “services” – or nursing care – provided by Nurse Gullett. Therefore, OSUMC agrees that it cannot sue OHA Solutions simply when it is alleged that an agency nurse committed malpractice.

However, OSUMC can sue OHA Solutions for its own breach of the Participation Agreement, and that is what it has done in this lawsuit. If all facts were equal in this matter – except that MSO did have the proper insurance and did affirmatively state to OSUMC that MSO would indemnify OSUMC – then there would be no Third-Party Complaint against OHA Solutions (or against MSO for that matter). But because OHA Solutions was

supposed to require MSO to have the necessary insurance to indemnify OSUMC, but failed in this contractual requirement, OSUMC has sued OHA Solutions to enforce the terms of the Participation Agreement.

OHA Solutions agreed that it would “require” MSO to have the necessary insurance to indemnify OSUMC in a such a situation as presented by the alleged facts in this case.

In the latest motion of OHA Solutions, it sets forth a four-page argument that “require” does not mean “to ensure.” Apparently, OHA Solutions takes issue with the fact that OSUMC alleged that OHA Solutions “*failed to ensure* that MSO had the proper professional liability coverage,” (Third-Party Complaint, ¶ 23, emphasis added), when OHA Solutions contracted to “*require*” MSO to have such insurance. (Ex. A, Participation Agreement, p. 5). It should be noted that OHA Solutions fails to define “require” or “to ensure” but simply assumes vastly different meanings to each term, with no explanation. Without any further evidence – which, if outside of the Third-Party Complaint, could not be considered – OHA Solutions’ motion to dismiss must fail.

As is the standard of review on a motion to dismiss, when this Court reviews these terms in the light most favorable to the non-moving party, it is clear that OHA Solutions had a duty to *require* that MSO had the proper insurance and ability to indemnify, but that OHA Solutions failed in its contractual duty.

In its motion for leave, OHA Solutions has once again failed to address two crucial points.

In its motion to dismiss and now in its motion for leave to file a reply memorandum, OHA Solutions continues to fail to address two important points: (1) its audit requirements under the Participation Agreement, and (2) the standard of review for a motion to dismiss.

Pursuant to its contract with OSUMC, OHA Solutions was required to audit MSO's insurance compliance, but it appears this was not done. It is not clear why this provision has not yet been addressed by OHA Solutions its recent motions. Nonetheless, the Participation Agreement states that OHA Solutions "shall conduct... an audit of Agency's [MSO's] records relating to the Agency's performance under the agreements between Provider [OHA Solutions] and the Agency [MSO]." (Ex. A, Participation Agreement, p. 5, emphasis added). The records related to MSO's performance under its contract with OHA Solutions would certainly include the insurance policy it was required to have. Unfortunately, if OHA Solutions merely relied upon the certificate of insurance from MSO's policy, then it breached its contract with OSUMC, because it was required to audit MSO's ability to perform under the contract, i.e. have the proper insurance so that it could indemnify the hospitals in which it was providing nursing services.

The proper judicial scrutiny of a Motion to Dismiss under Civ. R. 12(B)(6) for failure to state a claim upon which relief can be granted requires acceptance of all material allegations within the complaint as admissions by the opposing party and to take all reasonable inferences in the light most favorable to the nonmoving party. *State ex rel. Hanson v. Guernsey County Bd. Of Comm'rs* (1992), 65 Ohio St.3d 545, 548. Before dismissing the complaint, it must appear from the complaint that plaintiff can prove no set of facts entitling him to recovery. *Id.* (citing *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242, 245). When reviewing the Third-Party Complaint in the light most favorable to OSUMC, it is clear that the motion of OHA Solutions must be overruled.

Conclusion

Based on the allegations set forth in the Third-Party Complaint, OHA Solutions failed to ensure that MSO had the proper professional liability coverage for Nurse Gullett while he was assigned at OSUMC. Taking all allegations in the light most favorable to the Third-Party Plaintiff, the motion to dismiss cannot be accepted. Because OHA Solutions has failed to show necessity in filing a reply memorandum in support of its motion to dismiss, its motion for leave should be overruled. In addition, OSUMC respectfully urges this Court to overrule the motion to dismiss of OHA Solutions.

Respectfully submitted,

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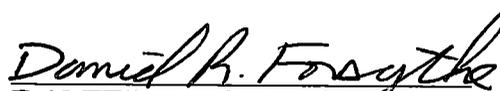
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by regular U.S. Mail, postage prepaid, this 3RD day of October, 2014, to:

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