SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD LATIN** **PART** **46V**

Justice

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INDEX NO. 159897/2018

JOHN RUTLEDGE,

MOTION DATE 10/12/2021

Plaintiff,

MOTION SEQ. NO. 001 002

- v -

MOUNT SINAI HEALTH SYSTEM, INC. and MT. SINAI ST. LUKES HOSPITAL,

DECISION + ORDER ON MOTION

Defendants.

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MOUNT SINAI HEALTH SYSTEM, INC. and MT. SINAI ST. LUKES HOSPITAL,

Third-Party
Index No. 595253/2020

Third-Party Plaintiffs,

-against-

TACT CORPORATION OF NYC D/B/A TACT MEDICAL STAFFING,

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 80, 82, 83, 84, 85, 91, 92, 93

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 86, 87, 88, 89, 90

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, defendants/third-party plaintiffs' Mount Sinai Health Systems, Inc. ("MSHS") and Mt. Sinai St. Luke's Hospital's ("MSSL") motion for, inter alia, summary judgment pursuant to CPLR 3212, dismissing plaintiff's complaint and any and all cross claims and third-party defendant Tact Corporation of NYC d/b/a Tact Medical Staffing ("TACT") motion for, inter alia, summary judgment pursuant to CPLR 3212, dismissing defendants/third-party plaintiffs MSHS and MSLH's third-party complaint and all claims, are determined as follows:

Plaintiff, John Rutledge, was allegedly involved in an accident on March 20, 2018, when he tripped over the electrical plug of an "out of order" vital sign machine. The accident occurred during the course of his employment as a travel nurse who performed services for MSHS and MSSL pursuant to his contract with third-party defendant TACT, a nursing staffing agency. On or about April 4, 2018, plaintiff applied for Workers' Compensation benefits from his general employer, TACT.

Defendants/third-party plaintiffs, MSHS and MSSL now seek summary judgment dismissing plaintiff's complaint on the basis that plaintiff was a special employee of MSHS and MSSL at the time of his alleged incident, and as a result is precluded by N.Y. Workers' Compensation Law §§§10, 11, and 29(6).

In addition, third-party defendant TACT also moves for summary judgment, seeking dismissal of defendants/third-party plaintiffs MSHS and MSSL third-party complaint and all claims against TACT. TACT argues that plaintiff's accident was not the type of event expressly contemplated by the indemnification provision, TACT's obligation to indemnify MSHS and MSSL had not been triggered, TACT did not breach its contract with MSHS and MSSL, did not direct, control or supervise plaintiff's work, did not have notice of any hazardous condition, or notice of the loose plug on the floor as alleged by plaintiff, and did not cause, create, or contribute to any condition alleged by plaintiff.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating that absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez,* 68 NY2d at 324; *see also Zuckerman v City of New York,* 49 NY2d 557 [1980]; *Chance v Felder,* 33 AD3d 645, 645-646 [2d Dept 2006]).

In support of defendants/third-party plaintiffs MSHS and MSSL motion, they submits, inter alia, the deposition testimony of plaintiff, the master agreement between MedAssets Performance Management Solutions, Inc. and TACT, and deposition testimony of Robert Abrams, president of TACT.

Deposition of Plaintiff John Rutledge

Plaintiff testified that on March 20, 2018, he was an agency nurse employed by TACT Medical Staffing and assigned to MSSL Hospital. He averred that the offer to work at MSSL was made about a week prior to the accident. He explained that he was not assigned to any other hospitals other than MSSL. Plaintiff averred that he was a night nurse with his day beginning at 7:00 p.m. and concluding at 7:30 a.m. Plaintiff stated that as a registered nurse working the night shift, he was assigned to a district and would administer care to those patients. He described a district as a unit with a particular number of beds and the hospital divides the number of patients that are on the floor by the number of nurses. Plaintiff testified that a normal work week, had he

"gotten through that day" would be three twelve hour shifts per week which were assigned by the unit manager. The plaintiff's unit manager at the time of the accident was a MSSL employee, Maureen Sullivan.

He testified that he contacted TACT and was recruited to join them. Plaintiff explained that TACT would always issue his checks. When plaintiff was asked if he was aware of any agreement between TACT and MSSL, he replied that there is no other agreement other than "leasing me out." The plaintiff stated, "I'm TACT's nurse and they're leasing me out to Mount Sinai for a specific period of time. Mainly 13 weeks." The plaintiff explained that once he is assigned to a specific facility by TACT, they provide instructions insofar as they advise where to report, the hospital location and the name of the contact person at the hospital for the first day of orientation. As far as his work as a nurse and taking care of patients, plaintiff stated that the charge nurse would provide his instruction. Furthermore, the plaintiff testified that TACT did not provide any instructions as to administering patient care. If the plaintiff had to lodge a complaint, he explained that he would advise the charge nurse. Rutledge testified that pursuant to his agreement with TACT, he was contracted to work a minimum of three twelve-hour shifts. If the hospital had a need for him to work additional hours, the hospital would communicate with TACT.

He explained that, generally, prior to the date of the assignment, an agreement is signed approximately a week prior to beginning the job. Plaintiff was asked during the orientation if he was assigned to anyone at TACT on a regular basis, and he replied that there was no need for that. The plaintiff stated that he attended orientation at Mount Sinai for a week prior to the date of accident. Rutledge testified that there is a "classroom phase" which he completed, followed by a "clinical phase," which he was about to begin on the date of the accident. Rutledge confirmed that he was compensated for the week of orientation.

The plaintiff stated that he would begin his work day at Mount Sinai, not a TACT office. His day would conclude by reporting to the staffing office in Mount Sinai where he would routinely record the amount of time he worked on the agency's master sign-in sheet. The equipment he would utilize to perform his job function, including an infusion pump and vital sign machine, were provided by Mount Sinai. The plaintiff explained that the person who can ultimately fire him would be the contact person from Mount Sinai who interacts with his agency. He further explained that if he were to receive a performance review, it would be from a Mount Sinai employee.

As to the date of the accident, plaintiff explained that the accident occurred sometime in between the time he arrived at the hospital and his meeting with the charge nurse. At the time of the accident, he arrived at the unit and walked from one end to the other to see what the "census" of patients was like. Plaintiff then averred that he wanted to see who the charge nurse was and approached the nursing station. He walked between an EKG machine and an "out of order" vital signs machine to access the nursing station. When he approached, plaintiff stated that he stepped on "what turned out to be a plug, and my knee twisted, and I bent over writhing in pain and that's when it all started." He explained that he did not see the machines when he was walking down the corridor. Additionally, plaintiff stated that as he was approaching the counter to look for the charge nurse, he did not see the machines since he was looking forward. Plaintiff explained that after the accident, he spoke with someone from TACT and completed an incident report. The report stated in pertinent part:

> There was a piece of equipment that was "out of order"- it is a vital signs machine, and it's plug was on the floor and NOT secured on unit (as it should have been). I stepped on the round plug and my foot rolled (right foot) causing my right knee to buckle. This happened in front of the nurses station

Rutledge took a photograph of the "out of order" vital signs machine because he, "wanted it on record that this thing was out of order. It was where it should not have been, and this is what caused me all this angst with my knee." He averred that all hospitals have a specific storage place for equipment that is out of order. Moreover, he stated that the hospital is responsible for making sure that machines that are out of order are moved away from the hospital floor.

The plaintiff testified that as a result of his injury he received payments and a final settlement from workers' compensation through TACT.

Deposition of Maria Vezina, Mount Sinai Health System, Inc.

Vezina is the chief nursing officer for Mount Sinai Morningside, formerly St. Luke's. She has been in this position for six years and prior to that she was employed by Mount Sinai Hospital as senior director of nursing. Vezina testified that her current duties include the oversight of the budget and recruitment for the hospital, and oversight of the nursing managers and program. Additionally, she stated that she delegates the recruiting duties to the nursing manager and the director of recruitment and receives weekly updates as to their progress. Vezina confirmed that Maureen Sullivan was the nurse manager in March 2018.

As to her involvement with TACT, Vezina explained that her role is to "ensure we have contracts signed and standards in place that match the standards we use to employ anyone." She testified that she is not involved in the negotiation of these contracts, but only sets the standard. Vezina averred that she utilizes registered nurses from TACT. At her deposition, she was asked if an agency employee is injured on Mount Sinai premises, if the injured person is considered an employee of the agency or an employee of the hospital, and she replied, "an employee of the agency." She also confirmed that as an employee of the agency, it would be the agency's workers' compensation that would provide benefits. Procedurally, Vezina explained that if a person who came to be employed from an agency was injured, the incident would immediately be reported to the agency. Since the individual is not an employee of Mount Sinai, she testified that they do not use their employee accident injury report, the report is sent to the agency. Venzia confirmed that once a nurse from TACT is on the unit, the nurse takes direction from the nurse manager, charge nurse or if the nurse is in orientation, the nurse preceptor.

Venzia testified that TACT would not be present anywhere on hospital grounds while any of their recruits are being utilized. She further stated that an agency nurse is someone who is committed to work for the day, whereas a travel nurse is an agency nurse

that is committed for several weeks. She also confirmed that a travel nurse is paid through the agency, not the hospital itself. The hospital also does not provide any benefits for the travel nurse. She was asked if all nurses working at Mount Sinai Morningside were directly supervised by Mount Sinai personnel only, and Venzia answered in the affirmative. Moreover, she confirmed that a nurse working at Mount Sinai Morningside would not be supervised by anyone who is not affiliated with Mount Sinai. She further stated that after a nurse passes through the first day of orientation, only the hospital provides the nurse assignments. Venzia also testified that the hospital would not provide any benefits for the travel nurses.

As to the "out of order" vital signs machine, Vezina explained that if the machine was not in working order, it would have been called in to be picked up by the Biomedical Services Department of the hospital. After Venzia was shown a picture of the machine at her deposition, she explained that biomedical was contacted to pick it up since it was right in front of the nurses station. Generally, biomedical retrieves the machine and sends a replacement. Venzia was unaware as to who placed the machine in front of the nurses station. She averred that even when the machine is not in use, the machine is always plugged in to charge. If there is a period of time when the machine is not going to be used for several hours, the machines are charged. She was not aware of any other incidents involving persons stepping on a plug from a vital signs machine or any other type of machinery that is kept on the ward. She further confirmed that TACT did not have any role in the maintenance, removal or storage of any machines within the hospital premises.

As to the employment of the plaintiff, Venzia testified that there was an agreement between Med Assets, TACT and Mount Sinai that was in effect on March 20, 2018. She clarified that Med Asset obtains recruits from different agencies, TACT is the entity that employs the agency nurse, and Mount Sinai's role in the agreement is requesting a non-employee to serve in a capacity of covering whatever the need depending on the clinical specialty. She testified that:

> "[i]f someone is injured on the job and they have their Workers' Comp covered, or if they go to the emergency room because they don't feel well, their insurance—they're not treated as an employee. They're treated as a non-employee, and so the agreement has to kick in. It's very clear in those agreements what happens to an employee versus a non-employee."

Venzia testified that the purpose of Med Assets Performance Management Solutions was to meet the needs of recruitment requested for agency nurses, not for employed nurses. Med Assets is no longer Mount Sinai's vendor, but on the date of the accident the agreement between Med Assets, TACT and Mount Sinai was in effect. She explained that the role of Med Assets under the agreement is that they obtained the recruit

from different agencies, TACT employed the nurse, and Mount Sinai was the entity requesting a registered nurse who is a non-employee.

She was asked if once a travel nurse is recruited from an agency and starts on the unit, whether it be orientation or continues further, if the direction and control of that nurse falls on Mount Sinai. In response, Venzia testified that, "I don't think that would be correct, because there is a contract in place that does cover many, many items with respect to that person, so it's not a total hands-off situation." She stated that TACT is not involved in directing patient care, "but there are other things that happen day to day when a person is on your unit as a non-employee, and that's where there's things in the contract that could apply."

Venzia confirmed that as far as the hospital is concerned, a travel nurse from TACT is a non-employee of the hospital. She also clarified that the hospital believes that pursuant to the contract, that a travel nurse is an employee of TACT.

Deposition of Robert Abrams for TACT

Abrams testified that he is the current president of TACT and has been since 1987. He explained that he oversees the whole company and has an overall idea of the complete and total operation of the company on a daily basis. Abrams averred that TACT has approximately twenty-one employees. He confirmed that TACT's contract with MedAssets sets the actual bill rate that TACT can charge the hospital for services. Abrams stated that TACT employees get paid through a W2 and receive health insurance, disability insurance, malpractice coverage, and workers' compensation coverage. He averred that the travel nurses are not required to contribute any part of their pay to any of these benefits.

As to travel nurses, Abrams confirmed that after they submit their resume, they have to complete an interview process with a TACT recruiter. Once a candidate completes the interview process and background check, they are paired with a particular hospital depending on their skill set. He explained that, thereafter, the candidates are interviewed by the hospital and then decide if they will hire the candidate. Abrams was uncertain if the plaintiff had a contract with Mount Sinai but confirmed that he had a contract with TACT. As far as payment to the plaintiff, Abrams confirmed that the plaintiff was paid either by check or direct deposit. He further added that as far as plaintiff's W2 is concerned, TACT would be the employer of record. Abrams explained that as the employer of record, "[w]e can terminate anybody on any given day, internal or external." In addition to TACT, Mount Sinai also has the right to terminate employees supplied by TACT, after notifying TACT of their intent to terminate. However, Abrams testified that the hospital makes the final determination as to whether a TACT nurse is terminated.

If a travel nurse is injured for some reason at the hospital, Abrams stated that the travel nurse is required to file an incident or accident report with TACT. It was Abrams' understanding that MedAssets and Mount Sinai considered the plaintiff to be a TACT employee. He was asked about the agreement between MedAssets and TACT from March

2018, and whether or not the plaintiff would be considered a TACT employee. Abrams stated that there should be a section of the master agreement outlining that the plaintiff is considered to be a TACT employee.

Generally, if a hospital has a complaint with respect to one of the TACT travelling nurses, Abrams stated that they would go directly to their recruiter. He testified that the difference between the twenty-one employees of TACT and a travelling nurse is that the individuals who work for TACT are supervised by their internal managers. Abrams testified that TACT does not require the traveling nurse to wear anything on their uniform indicating any affiliation with TACT. He confirmed that if a traveling nurse needed to call out sick on a particular day, they would notify the hospital and TACT. Abrams explained that in March of 2018, TACT did not have any employees at Mount Sinai to provide any supervision over the traveling nurses. Additionally, he confirmed that TACT did not have any full-time employees that reported to Mount Sinai on any type of basis to perform any type of supervision. Moreover, Abrams explained that the agreement between TACT and MedAssets provided that TACT was required to maintain a Workers' Compensation policy and that plaintiff was considered a TACT employee.

Deposition Testimony of Maureen Sullivan

Sullivan testified that she was a registered nurse employed by Mount Sinai St. Luke's from February 2010 until December 2019. She stated that on the date of plaintiff's accident she was the nurse manager. Sullivan averred that plaintiff started his orientation on her service in February. On the date of plaintiff's accident, Sullivan explained that she was sitting at the nurse's station but did not have visual contact with the plaintiff. She recalled the plaintiff stating that he tripped over a plug. She further testified that at the time of the accident, the only machine she saw was a work station on wheels, it was plugged in, and was not defective. As to the machine that was "out of order," she stated that generally, if the machine is not in use it would still be plugged in. She did not have a recollection of the "out of order" machine being present on that day. Sullivan averred that after plaintiff's accident one of the nurses brought him down to the emergency room to be evaluated. She confirmed that no one from TACT contacted her to inquire as to plaintiff's accident.

She was asked when plaintiff began his first day on the job, she replied, "I believe I mentioned before that there was an orientation, some didactics in class, and then there was an orientation on the unit with a preceptor. So, no, it was not his first day on the unit. I believe he started in February." Additionally, she stated that the plaintiff "was about a month into his travel assignment at St. Luke's…" As to instruction, Sullivan testified that there would be a charge nurse who was responsible for creating the daily shift assignment, but could not recall who the charge nurse was on the date of plaintiff's incident. She confirmed that she can fire or dismiss a travel nurse from an outside agency. As to travel nurse attire, Sullivan explained that they did not wear the uniform of the Mount Sinai nurses, with no indication on their person that they were an employee of Mount Sinai hospital.

As to day-to-day supervision of travelling nurses, Sullivan confirmed that the agency would not play any role in that. For her unit, she would communicate with the travel nurse and indicate the units specific needs and work out a schedule absent TACT's involvement. She further testified that a traveling nurse is under the authority of Mount Sinai supervisors just as much as a regular staff nurse.

Master Agreement between MedAssets and Tact

Section 3 of the master agreement is entitled "Agency" and states as follows:

> All Staff remain solely and exclusively the employees of Agency [TACT] (and not Customer [Mt. Sinai]) at all times. For avoidance of doubt, Agency [TACT] irrevocably waives any right to assert that any Customer [Mt. Sinai] or MedAssets is a "special employer" of any Staff, or that any Staff is a "borrowed" or "special employee" of any Customer [Mt. Sinai] or MedAssets.

"Workers' Compensation Law §§11 and 29(6) provide that the receipt of workers' compensation benefits is the exclusive remedy that a worker may obtain against an employer for losses suffered as a result of an injury sustained in the course of employment" (*see Silkas v Cyclone Realty, LLC,* 78 AD3d 144, 150 [2d Dept 2010]). "A person may be deemed to have more than one employer for purposes of the Workers' Compensation Law, a general employer and a special employer" (*see Schramm v Cold Spring Harbor Lab.,* 17 AD3d 661, 662 [2d Dept 2005]). "A special employee is described as one who is transferred for a limited time of whatever duration to the service of another" (*see Thompson v Grumman Aerospace Corp.,* 78 NY2d at 553 [1991]). While a person's categorization as a special employee is usually a question of fact, "the determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact"(*id.*). Although no one factor is decisive in determining whether a special employment relationship exists, a key consideration is the employer's right to direct the work and the degree of control exercised over the employee (*see Silkas,* 78 AD3d at 144).

"Whether such a complete transfer of control has occurred is ordinarily a fact-sensitive inquiry not amenable to resolution on summary judgment. Only where the defendant is able to demonstrate conclusively that it has assumed exclusive control over 'the manner, details and ultimate result of the employee's work' is summary adjudication of special employment status, and consequent dismissal of any action proper" (*see Bellamy v Columbia University,* 50 AD3d 160 [1st Dept 2008]). Summary judgment in cases involving temporary employment may be awarded "upon a finding that a special employment relationship was made out as a matter of law," and upon a determination that "the defendant's direct control over the plaintiff's work was essentially admitted" (*see Villanueva v Southeast Grand St. Guild Hous. Dev. Fund Co., Inc.,* 37 AD3d 155 [1st Dept 2007]). "Plaintiff of course has no burden to establish the precise nature of his relationship to the defendant; it [is] rather the defendant's burden to establish that

plaintiff was, in essence, its employee" (*see Bellamy v Columbia University*, 50 AD3d 160 [1st Dept 2008]).

Here, the defendants/third-party plaintiffs failed to establish, prima facie, the existence of a special employment relationship between the plaintiff and MSHS and MSLH. As stated above, plaintiff testified that while at MSSL, he was supervised by MSSL staff, participated in a training course at MSSL, received his daily assignments from a charge nurse, who was a MSSL employee, and denied receiving any instructions for his work at MSSL from any TACT employee. Plaintiff further testified that he completed the first half of his orientation and was in the process of commencing the second half, when the accident occurred. Additionally, it is established that the nurse manager employed by the defendants determined plaintiff's work hours, schedule, daily assignments, and supervised plaintiff's work. Moreover, no representative from TACT was on site at the hospital. However, Ms. Vezina stated that, "there are many other situations that you may have that TACT is still involved. It's not a total hands-off situation" and "there are other things that happen day to day when a person is on your unit as a non-employee, and that's where there's thing in the contract that could apply."

Therefore, as a result of conflicting deposition testimony, there are triable issues of fact as to who assumed exclusive control over the manner, details and ultimate result of plaintiff's work and who was plaintiff's actual employer at time of incident (*see Mermelstein v City of New York*, 174 AD2d 485 [1991]). The fact that TACT, as general employer, exerted the amount of control that it did establishes that it did not cede exclusive control to MSLH and MSHS (*see Bayona v Hertz Corp.*, 148 AD3d 608 [1st Dept 2017]). Furthermore, the master agreement between TACT and MedAsset specifically stated that plaintiff was deemed solely and exclusively an employee of TACT and not an employee of MSHS and MSLH (*see Bautista v David Frankel Realty, Inc.*, 54 AD3d 549 [1st Dept 2008]). Accordingly, defendants/third-party plaintiffs' motion is denied.

With respect to third-party defendant TACT's motion for summary judgment, seeking dismissal of defendants/third-party plaintiffs MSHS and MSLH's third-party complaint, it submits, inter alia, the master agreement for supplemental clinical staffing services dated June 4, 2017.

Third-party defendant TACT argues that TACT had no personnel at MSSL and played no role in supervising or directing plaintiff's work or storing machines such as the vital signs machine. TACT also asserts that it is undisputed that plaintiff's accident and MSSL liability stem solely from their non-delegable duty to keep its hospital free from hazardous conditions, which is separate and apart from the services plaintiff provided as a travelling nurse. TACT admits that it agreed to indemnify MSSL and MSHS for incidents arising out of any "service" defined by contract as work to be performed by plaintiff. However, TACT takes the position that plaintiff's accident was not the type event expressly contemplated by the indemnification provision, therefore not triggering the obligation to indemnify, plaintiff did not suffer a "grave injury," TACT did not breach its contract with MSSL and MSHS, TACT did not control or direct plaintiff's work, did

not have any notice of any hazardous condition at MSSL and MSHS, and did not have notice of the loose wire on the floor as alleged by plaintiff.

The Master Agreement for Supplemental Clinical Staffing Services

As referenced in Section 1 of the agreement, MedAssets' role is to negotiate contracts for particular products and services on behalf of MSSL and MSHS, and TACT is to provide services to MSSL and MSHS.

The agreement states in pertinent parts:

A. Indemnification of Customers.

> [TACT] must indemnify, defend and hold harmless [MT. SINAI]…harmless from and against all damages, claims or other losses arising from a breach of this Agreement by [TACT] or arising from any Service. As an example, [TACT] is specifically responsible for defending and indemnifying MT. SINAI if a third-party asserts that any Staff has committed professional negligence while providing patient care at [MT. SINAI]'s facility. This indemnity must include provision of a defense to any third-party claims and the advance of costs related to this defense, but does not extend to any portion of the loss due to a [MT. SINAI]'s negligence or willful misconduct.

Section 1.1.2 of the Agreement defines "Service" as any service listed on a Statement of Work (SOW), including any Staff Booking performed by any Booked Staff. "Staff Booking" is defined as the specific components of any Services that a customer orders from the Agency. "Booked Staff" means any Staff whom the Agency assigns to perform any Staff Booking.

With respect to warranties made by TACT under the Agreement:

> 4.7 Service Warranty. Agency represents and warrants that: (a) its employees and representatives have the skills and qualifications necessary to perform Services (including all Service-related support under this Agreement and any SOW) in a timely, competent, and professional manner in accordance with the highest industry standards and all applicable governmental requirements, laws, ordinances, rules and regulations; (b) Agency is able to fulfill the technical service requirements and all other services requirements of this Agreement or any SOW; and (c) Agency and each Booked Staff comply with The Joint Commission standards for the use of supplemental staffing services by hospitals. These warranties are in addition to any warranties provided at law or in equity.

> D. Insurance. Where additional endorsement on insurance policies is required by contract, each Customer [Mt. Sinai] is to be named on insurance policies to cover only the damages, claims or other losses arising from any negligent act or omission by Agency [TACT] and not the damages, claims or other losses due to the negligence or omissions of the Customer [Mt. Sinai] (or any of the Customer's agents, employees, or subcontractors, other than the Agency).

The right of a party to recover indemnification on the basis of a contractual provision depends on the intent of the parties and the manner in which that intent is expressed in the contract (*see Kurek v Port Chester Hous. Auth.*, 18 NY2d 450, 276 NYS2d 612 [1966]). The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 549 NYS2d 365 [1989]). A contract that provides for indemnification will be enforced so long as the intent to assume such role is sufficiently clear and unambiguous (*see Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 832 NYS2d 470 [2007]). It is well established that "[i]n contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003]).

Here, the indemnification provision in the Master Agreement dated June 4, 2017 clearly states that TACT "must indemnify, defend and hold each Customer and its affiliates, officers, directors and agents harmless from and against all damages, claims or other losses arising from a breach of the agreement by Agency or arising from any Service." As an example, the agreement states that TACT is responsible for defending and indemnifying Customer if a third party asserts that any staff has committed professional negligence while providing patient care at any Customer's facility. It is also apparent that based on the evidence submitted, and MSSL and MSHS failure to refute same in its opposition papers, that TACT did not have any actual or constructive notice of the alleged hazardous condition, and was not responsible for the maintenance, removal or storage of the vital signs machine. Moreover, no parties in this action dispute the fact that plaintiff was not providing patient care at the time he allegedly tripped over the loose plug of an out of order vital signs machine. By its plain terms, the indemnification provision at issue would be triggered in the event of a finding that plaintiff was professionally negligent while providing patient care, or if TACT breached the agreement, or the act arose from any service, which is not the case here.

Had the parties intended TACT to indemnify MSSL and MSHS for all claims arising from any work-related activity irrespective of negligence, they had only to say so unambiguously, as was done in such cases as *Brown v Two Exch. Plaza Partners* and *Torres v Morse Diesel Intl., Inc.* , where the indemnity provisions were expressly made applicable to claims arising out of the indemnitor's "performance of the [contract] Work" (76 NY2d 172 [1990]; 14 AD3d 401 [2005]). Such an intention is not "unmistakably clear from the language of the promise[s]" made here (*Hooper Assoc. v AGS Computers,* 74 NY2d 487, 492 [1989]), and it is not for the court "to rewrite the contract and supply a specific obligation the parties themselves did not spell out" (*see Tonking*

v Port Auth. of N.Y. & N.J., 3 NY3d 486 [2004]). There is no claim or proof that TACT or its employee, the plaintiff, actively contributed or was professionally negligent while providing patient care at MSSL and MSHS.

Additionally, the indemnification provision stated that, "[t]his indemnity must include provisions of a defense to any third-party claims and the advance of costs related to this defense, but does not extend to any portion of the loss due to a Customer's negligence or willful misconduct." It is not clear from the contract that TACT would indemnify Mt. Sinai from injury to the plaintiff as a result of an alleged hazardous condition at the hospital where plaintiff was assigned.

A party seeking common-law indemnification "must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*Correia v Professional Data Mgmt., Inc.*, 259 AD2d 60 [1st Dept 1999]; *see Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]; *Priestly v Montefiore Med. Ctr., Einstein Med. Ctr.*, 10 AD3d 493, 495, 781 NYS2d 506 [1st Dept 2004]). Here, MSHS and MSSL has not established that it was not guilty of any negligence beyond the statutory liability, nor has it proved that TACT was guilty of some negligence that contributed to the causation of the accident, other than suggesting that the plaintiff was not vetted properly.

Accordingly, it is ORDERED that defendants/third-party plaintiffs' motion is denied in its entirety; and it is further

ORDERED that, third-party defendant's motion for summary judgment is granted and the third-party complaint, along with any other claims and cross-claims against it is dismissed; and it is further

ORDERED that third-party defendant shall serve a copy of this order, with notice of entry, on defendants/third-party plaintiffs within 30 days of the date that this order is uploaded onto NYSCEF.

This constitutes the decision and order of the court.

1/3/2022
DATE

RICHARD LATIN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE