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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

2:09-CV-1361 JCM (LRL)

VALLEY HEALTH SYSTEMS, LLC
d/b/a SPRING VALLEY HOSPITAL
MEDICAL CENTER,

Plaintiff,

v.

NURSES ‘R’ SPECIAL, INC., et al.,

Defendants.

ORDER

Presently before the court is plaintiff Valley Health System, LLC’s (“Valley”) motion for partial summary judgment. (Doc. #22). Defendant Nurses ‘R’ Special (“Nurses”) moves to strike plaintiff’s motion for failing to comply with Local Rule 56-1. (Doc. #25). In the alternative, defendant has responded (doc. #26) to the substance of plaintiff’s motion and provided a supplement (doc. #29). Plaintiff responded to the motion to strike (doc. #33) and replied (doc. #30) to the defendant’s opposition.

I. STATEMENT OF FACTS

The current litigation stems from an underlying action (“the Butts action”) in which plaintiff Butts sued various defendants including Valley. In the Butts action, Nurse Nesbith, a nurse supplied to Valley by Nurses, was found negligent in her treatment of Mr. Butts by special jury verdict. Her negligence was also found to be a proximate cause of Mr. Butts’ death. Valley tendered the defense of Nurse Nesbith to Nurses on two occasions, but Nurses rejected each tender. Nurses was briefly

1 a party in the Butts action after the plaintiff filed an amended complaint, but was dismissed based
2 on the statute of limitations. No findings of fact were made regarding Valley whatsoever, other than
3 that Nurse Nesbith was one of its agents. In the instant action, Valley now sues Nurses for indemnity
4 of the underlying verdict in the Butts action.

5 Nurses entered into a written contract with Broadlane whereby Nurses supplied staff to
6 outside customers, including Valley. "Broadlane provides contracting services to negotiate contracts
7 for certain services on behalf of individuals or entities that designate Broadlane as their group-
8 purchasing agent ("Customers")." (Doc. #22, exhibit A). Under the terms of their contract, Nurses
9 was considered a "Supplier" and Valley was considered a "Customer." *Id.* The contract also included
10 an indemnity provision which is at issue in this case.

11 **II. MOTION FOR PARTIAL SUMMARY JUDGMENT**

12 Summary judgment is appropriate when, viewing the facts in the light most favorable to the
13 nonmoving party, there is no genuine issue of material fact which would preclude summary
14 judgment as a matter of law. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). The moving
15 party bears the burden of informing the court of the basis for its motion, together with evidence
16 demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S.
17 317, 323 (1986). Once the moving party has satisfied its burden, it is entitled to summary judgment
18 if the non-moving party fails to present, by affidavits, depositions, answer to interrogatories, or
19 admissions on file, "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v.*
20 *Catrett*, 477 U.S. 317, 324 (1986); FED. R. CIV. P. 56(c).

21 *A. Indemnification of Valley*

22 Per the choice of law provision found in the contract between Nurses and Broadlane, Texas
23 law governing indemnity actions applies. The indemnity provision at issue in this case reads:

24 Indemnification of Customers. Supplier shall indemnify, defend, and hold each
25 Customer and its affiliates officers, directors, and agents harmless from and against
26 all damages, claims, penalties, interest, or other losses arising from a breach of this
27 Agreement by Supplier (including Staff) or arising from Services. This indemnity
28 must include provision of a defense to any third party claims and the advance of costs
related to this defense but does not extend any portion of the loss due to a Customer's
negligence or willful misconduct.

1 (Doc. #26) (emphasis omitted).

2 Texas case law dictates that an indemnitor, who denies its duty to indemnify, is not privy to
3 a judicial determination of an indemnitee's liability to an injured party. *Gulf, Colorado & Santa Fe*
4 *Railway v. G.C. McBride*, 322 S.W.2d 492, 495 (Tex. 1958). Specifically, the Supreme Court of
5 Texas found that “[when] an indemnitor denies any obligation under the indemnity agreement and
6 obtains a summary judgment, the indemnitor waives any right to insist upon a judicial determination
7 of the liability of the indemnitee to the injured party.” *Id.* Accordingly, “[h]aving settled the claim
8 without obtaining a judicial determination of its liability, [the indemnitee] assume[s] the risk of
9 being able to prove the facts which might have rendered it liable to the plaintiff as well as the
10 reasonableness of the amount which it paid. It will be necessary, therefore, for [the indemnitee] to
11 establish that from its standpoint the settlement was made in good faith and was reasonable and
12 prudent under the circumstances.” *Id.* (citations omitted).

13 Plaintiff argues that the court in *Missouri Pacific R.R. Co. v. Southern Pacific Co.*, 430
14 S.W.2d 900 (Ct. App. Tex. 1968), addresses a factually analogous situation to this case. This court
15 agrees. In *Missouri Pacific*, the court found that “[Indemnitee-] Southern Pacific was not, under the
16 circumstances, required to prove its liability of [an injured railroad worker] as a condition to its
17 recovery of indemnity from [indemnitor-] Missouri Pacific.” *Id.* at 904. Indeed, the court in the
18 underlying case found that Southern Pacific, through its agency relationship with the injured railroad
19 worker (Liles), was not negligent. *Id.* at 903. Admittedly, this is a key factual difference between this
20 case and *Missouri Pacific* since Valley's negligence, if any, was never determined by the jury.
21 However, the court in *Missouri Pacific* concluded that in failing to participate in the defense or
22 settlement of the injured party's claim after being called upon to do so by indemnitee-Southern
23 Pacific, indemnitor-Missouri Pacific “waived any right to a judicial determination of Southern
24 Pacific's liability as a condition to Southern Pacific's recovery of indemnity from it.” *Id.* at 904.
25 Therefore, indemnitor-Nurses' failure to participate in the defense of Mr. Butts' claim, after being
26 called upon to do so by indemnitee-Valley, waives its right to a judicial determination of Valley's
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1 liability as it asks for in its opposition.¹

2 Additionally “Liles’ cause of action against [indemnitor-] Missouri Pacific was barred [by
3 a statute of limitations].” *Id.* The court recognized that there were many instances where “joint tort
4 feorsors cause injury to a third party [and] one of them may be protected by the law from liability to
5 the injured party.” *Id.* However, “in those cases, the joint tortfeasor from whom indemnity or
6 contribution was sought never became liable to the injured party” like Missouri Pacific did. *Id.*
7 Accordingly, the *Missouri Pacific* court found that “the running of the statute of limitations did not
8 even extinguish that liability” between Missouri Pacific and Liles. *Id.* Rather, “it merely deprived
9 him of his remedy for enforcing it.” *Id.*

10 B. *The Settlement*

11 Nurses incorrectly asserts that “Valley did not settle with the Butts plaintiffs” when it
12 attempts to distinguish this case from the aforementioned Texas case law. (Doc. #26). Specifically,
13 Nurses claims that the Texas case law provided by Valley is not relevant to its position since those
14 cases ended in settlement and here Valley went to trial. Although Valley did go to trial and had
15 judgment entered against it based on Nurse Nesbith’s conduct, that verdict was controlled by a high-
16 low agreement. “A high-low agreement is a settlement in which a defendant agrees to pay the
17 plaintiff a minimum recovery in return for the plaintiff’s agreement to accept a maximum amount
18 regardless of the outcome of the trial.” *Rodriguez v. Villarreal*, 314 S.W.3d 636, 641 (Ct. App. Tex.
19 2010) (citation omitted). Considering “Valley’s loss was capped at \$1 million dollars [sic] in the
20 underlying action despite a substantially higher jury verdict” (doc. #30), Valley’s “settlement [in the
21 Butts action] was made in good faith and was reasonable and prudent under the circumstances.”²
22 *Gulf*, 322 S.W.2d at 495. Accordingly, this case did involve settlement.

25 ¹ “[T]he issue of Valley’s own negligence was never determined by the jury, and is required
26 before the contract’s indemnity provision can be interpreted. As such, Nurses is entitled to litigate
27 that issue in this case, in order to determine Valley’s percentage negligence as compared with
28 Nurses. Only then can the indemnity provision be applied.” (Doc. #26, P. 6)

² The jury verdict exceeded \$1.5 million. (Doc. #22, exhibit B)

1 C. *Denying Tender of Defense*

2 Valley claims that pursuant to the terms of the underlying contract between Nurses and
3 Broadlane, Nurses had a duty to defend Valley. In contrast, Nurses claims that “the denial of tender
4 was appropriate, and not a breach of contract . . . [arguing that]. . . had [it] accepted Valley’s tender
5 by taking over the defense of Valley prior to trial, it would have been forced to waive its valid
6 defenses, which include pointing the finger at Valley for its own negligence.” *Id.* However, the court
7 in *English v. BGP International, Inc.*, 174 S.W.3d 366, 373 (Ct. App. Tex. 1968), stated that when
8 “pleadings sufficiently allege separate negligence causes of action, that still does not relieve [the
9 indemnitor] of its duty to defend [the indemnitee] in the underlying lawsuits. When some theories
10 of liability fail to give rise to the duty to defend but other theories do, the party should be required
11 to provide a defense.”

12 Specifically, the *English* court found guidance from cases involving the duty to defend in the
13 insurance context:

14 [W]e find little reason why the principles regarding an insurer’s duty to defend
15 should not apply with equal force to an indemnitor’s contractual promise to defend
16 its indemnitee. *See generally Gen. Motors Corp. v. Am. Ecology Env’tl. Svcs. Corp.*,
17 (citation omitted) (applying the same principles regarding the duty of an insurer to
defend in the insurance context to the duty of an indemnitor who has contractually
agreed to defend its indemnitee).

18 *Id.* at 372. The *English* court further explained that competing theories of liability do not relieve the
19 indemnitor’s duty to defend:

20 Typically, an insurer has a duty to defend, despite theories of liability asserted . .
21 .which are not covered under the policy, if there are *any* theories of recovery that fall
22 within . . . the policy.” *See generally Gen. Motors Corp. v. Am. Ecology Env’tl. Svcs.*
23 *Corp.*, (citation omitted) (emphasis original); *Fid. & Guar. Ins. Underwriters, Inc.*
24 *v. McManus*, 633 S.W.2d 787, 788 (Tex. 1982) (explaining that when a petition only
alleges facts excluded by an insurance policy, the insurer is not required to defend).
It is only when no facts sufficiently fall within the agreement that the party is excused
from its duty to defend.

25 *McManus*, 633 S.W.2d at 788 (citation omitted). Thus, Nurses had a duty to defend Valley regardless
26 of whether there were any competing theories of liability since one of its own nurses, an employee
27 of its company, was implicated in the underlying Butts action.

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D. *Conclusion*

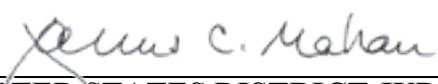
Nurses breached its contract with Valley when it denied Valley's tender of defense of the Butts action. Nurses had a duty to defend Valley, pursuant to the indemnity provision found in their contract, regardless of whether there were competing theories of liability that might have implicated Valley.

Accordingly,

IT IS HEREBY ORDERED ADJUDGED AND DECREED that plaintiff Valley Health System, LLC's motion for partial summary judgment (doc. # 22) regarding its breach of contract claim is hereby GRANTED.

IT IS FURTHER ORDERED that defendant Nurses 'R' Special motion to strike plaintiff's motion for failing to comply with local rule 56-1 is hereby DENIED.

DATED April 12, 2011.


UNITED STATES DISTRICT JUDGE