[Cite as *Yuko v. Doe*, 2017-Ohio-8280.]

IVANA YUKO, et al. Plaintiffs v. JOHN DOES 1-3 Defendants and GLOBAL SPECTRUM, L.P. Defendant/Third-Party Plaintiff v. CLEVELAND STATE UNIVERSITY Third-Party Defendant	Case No. 2016-00281-PR Judge Patrick M. McGrath DECISION

{¶1} Before the court in this case, which is removed from the Cuyahoga County Court of Common Pleas, are two summary judgment motions filed on July 27, 2017:

- Third-party defendant Cleveland State University's summary judgment motion on Global Spectrum, L.P.'s third-party complaint, and
- Global Spectrum, L.P.'s summary judgment motion on its third-party complaint against Cleveland State University.

The court holds that Cleveland State University's summary judgment motion should be granted, that Global Spectrum's summary judgment motion on its third-party complaint against CSU should be denied, and that this removed case should be remanded to the Cuyahoga County Court of Common Pleas for further proceedings.

I. Introduction

{¶2} According to court filings, on October 11, 2013, while Ivana Yuko worked at a career services fair at the Wolstein Center at Cleveland State University (CSU), she sustained an injury. Later Ivana and her husband, John Yuko, sued (1) Global Spectrum, L.P. (which managed the Wolstein Center on behalf of CSU at the time of the Ivana Yuko's injury) and (2) the Ohio Bureau of Workers' Compensation (BWC) in the Cuyahoga County Common Pleas Court. The Yukos contended in their complaint that Ivana Yuko had been an employee of the CSU Career Services Office, and, while she was working at a career services fair, a metal pipe holding a drape, which was designed to serve as a backdrop, fell on her head. The Yukos asserted claims of negligence and loss of consortium against Global Spectrum and they sought a declaratory judgment against the BWC.

{¶3} The BWC moved the common pleas court to realign the parties; the court granted the BWC's motion. The BWC, with the Yukos as named plaintiffs, filed a "New Party Complaint" against Global Spectrum, asserting a subrogation claim against Global Spectrum.

{¶4} With leave of court, Global Spectrum brought a third-party complaint against CSU, relying on a license agreement between Global Spectrum and CSU Career Services Center. In its third-party complaint, Global Spectrum sought a declaratory judgment for contractual defense and indemnification, and asserted a breach-of-contract claim. On Global Spectrum's petition for removal, the matter was removed to this court.

{¶5} On July 27, 2017, CSU and Global Spectrum separately moved the court for summary judgment in their respective favor, with CSU seeking summary judgment on Global Spectrum's third-party complaint and Global Spectrum seeking summary judgment on its third-party complaint against CSU, as well as plaintiffs' complaint. CSU's summary judgment motion and the portion of Global Spectrum's summary

judgment motion on its third-party complaint are presently before the court—on the Yukos's motion, the court has deferred ruling on Global Spectrum's motion for summary judgment on the plaintiffs' complaint.

{¶6} Relevant to CSU's and Global Spectrum's summary judgment motions are two contracts: (1) a management agreement of August 2010 between CSU and Global Spectrum, and (2) a license agreement of July 2013 between Global Spectrum, as agent of CSU, and the CSU Career Services Center.

II. Standard for Summary Judgment

{¶7} Civ.R. 56(C) pertains to motions and proceedings for summary judgment, stating in part: "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, 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. No evidence or stipulation may be considered except as stated in this rule." In *State ex rel. Grady v. State Emp. Rels. Bd.*, 78 Ohio St.3d 181, 183, 677 N.E.2d 343 (1997), construing Civ.R. 56(C), the Ohio Supreme Court stated: "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 327, 4 Ohio Op. 3d 466, 472, 364 N.E.2d 267, 274." And in *Dresher v. Burt*, 75 Ohio St.3d 280, 298, 662 N.E.2d 264 (1996), a plurality opinion, the Ohio Supreme Court stated that "there is no *requirement* in Civ.R. 56 that *any* party submit affidavits to support a motion for summary judgment. *See, e.g*., Civ.R. 56(A) and (B). There *is* a requirement, however, that a moving party,

in support of a summary judgment motion, specifically point to something in the record that comports with the evidentiary materials set forth in Civ.R. 56(C)." (Emphasis sic.) And *Dresher* holds that

> a. a party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some *evidence* of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.

(Emphasis sic.)

{¶8} The court shall apply Civ.R. 56, as interpreted by relevant authority, to the summary judgment motions before it.

III. CSU's Summary Judgment Motion

{¶9} CSU moves for a summary judgment on Global Spectrum's third-party complaint against it, urging that an indemnity provision in the license agreement signed by a CSU employee fails, as a matter of law, because (1) the indemnity provision in the license agreement, as written, would obligate CSU to pay uncertain sums over an uncertain period in violation of certain provisions of the Ohio Constitution, and (2) a

management agreement between CSU and Global Spectrum supersedes the license agreement. To support its contentions, CSU relies on 1996 Ohio Atty.Gen.Ops. No. 96-060. With its summary judgment motion, CSU appended (1) an affidavit of Clare Rahm, (2) a copy of the management agreement between CSU and Global Spectrum, and (3) a copy of the license agreement between Global Spectrum and CSU Career Services Center. In Rahm's affidavit, Rahm avers that:

- She is the Associate Vice President in the Division of Student Affairs.
- She has been the contract administrator for CSU since 2005, and that she is responsible for overseeing contracts that CSU holds with third parties.
- From August 2010 to August 2015, CSU contracted with Global Spectrum to run the Wolstein Center. The management agreement attached to her affidavit is a true and accurate copy; the management agreement became effective on August 10, 2010; and that the management agreement governed the relationship between CSU and Global Spectrum.
- The license agreement attached to Rahm's affidavit is a true and accurate copy and that the license agreement is maintained in her office because it "is a record of the University acquired when Global Spectrum ceased to manage the Wolstein Center."
- The Career Services Center is a department of CSU.

{¶10} In opposition, Global Spectrum contends that CSU is not entitled to summary judgment because (1) CSU's position is based on an opinion of the Ohio Attorney General, which is non-binding law, (2) CSU's position that the license agreement is invalid does not set forth any admissible facts in support of such argument, (3) CSU "has waived the claim, and is estopped from claiming, that the indemnity provision is invalid and unenforceable," and (4) the license agreement, not the management agreement is the governing contract.

{¶11} Neither the Yukos nor the BWC filed timely responses to CSU's summary judgment motion on Global Spectrum's third-party complaint.

IV. Global Spectrum's Summary Judgment Motion on Its Third-Party Complaint

{¶12} Global Spectrum moves for a summary judgment on its third-party complaint against CSU, asserting that it is "entitled to summary judgment in its favor, as a matter of law, on its contractual claims against CSU in the Third-Party Complaint, where, CSU is in breach of the License Agreement for failing to provide: 1) insurance coverage for Global Spectrum as required by Section 11 of the License Agreement; and 2) defense and indemnification as required by Section 12 of the License Agreement." (Motion, 11.) In support of its summary motion, Global Spectrum filed (1) a deposition of Yolanda Burt (former director of the CSU Career Services Center), (2) a deposition of Matthew Herpich (former general manager of the Wolstein Center), (3) a deposition of Ivana Yuko, and (4) CSU's amended responses and objections to Global Spectrum's requests for production of documents.

{¶13} In response, CSU contends that the indemnity provision of the license agreement is unconstitutional and unenforceable against it and that Global Spectrum is the only party with a duty to indemnify.

{¶14} Neither the Yukos nor the BWC filed a timely response to Global Spectrum's summary judgment motion on Global Spectrum's third-party complaint.

V. Law and Analysis

{¶15} The management agreement between CSU and Global Spectrum is the governing contract. The license agreement does not supersede the management agreement.

{¶16} CSU's summary judgment motion presents the court with a question of law because it asks the court to engage in contract interpretation, namely to interpret two contracts: a management agreement and a license agreement. *See Delta Fuels, Inc. v.*

Ohio Dept. of Transp., 2015-Ohio-5545, 57 N.E.3d 220, ¶ 30 (10th Dist.) (contract interpretation is a question of law while performance of undisputed terms is generally a question of fact); *Kirby v. Barletto*, 10th Dist. Franklin No. 09AP-158, 2009-Ohio-5090, ¶ 25 (interpretation of an insurance contract involves a question of law to be decided by the court, not a jury). When interpreting a contract, a court is required to give effect to the intent of the parties, and that intent is presumed to be reflected in the plain and ordinary language of the contract language. *Smith v. Erie Ins. Co.*, 148 Ohio St.3d 192, 2016-Ohio-7742, 69 N.E.3d 711, ¶ 18.

A. Management Agreement of August 2010

{¶17} According to Section 2.1(a) of the management agreement of August 2010 between CSU and Global Spectrum, CSU engaged Global Spectrum to act as the sole and exclusive manager and operator of the Wolstein Center. The management agreement was set to be in effect through July 31, 2015, unless it was terminated sooner. Section 4.1.

{¶18} Article 14 of the management agreement pertains to indemnification. Section 14.1 provides:

> b. Manager [Global Spectrum] agrees to defend, indemnify, and hold harmless the University and its officials, trustees, officers, employees, agents, successors and assigns against any claims, causes of action, costs, expenses (including reasonable attorneys' fees) liabilities, or damages and to discharge any judgments (collectively, "Losses") suffered by such parties, arising out of or in connection with any (a) negligent act or omission, or intentional misconduct, on the part of the Manager or any of its employees or agents in the performance of its obligations under this Agreement or (b) breach by Manager of any of its representations, covenants or agreements made herein.

According to Section 14.4, the obligations of the parties contained in this Article 14 "shall survive the termination or expiration of this Agreement." And Section 14.5 states:

"University, to the fullest extent permitted by the State of Ohio and the laws and decisions thereunder, shall be responsible for any and all personal injury and/or property damage (excluding attorneys' fees) which is directly attributable to the negligent acts of omissions of University or its trustees, officers or employees while acting within the scope of their employment, as set forth in O.R.C. Section 2743.02. * * *."

{¶19} Thus, according to the plain language of Sec. 14.1 and related sections, Global Spectrum agreed, among other things, to defend, indemnify, and hold harmless CSU against any claims, causes of action, costs, expenses (including reasonable attorneys' fees) liabilities, or damages arising out of or in connection with any negligent act or omission, or intentional misconduct, on the part of Global Spectrum or any of its employees or agents in the performance of its obligations under the management agreement. And Global Spectrum agreed that its obligations would survive the termination or expiration of the management agreement.

{¶20} And, for its part, according to the plain language of Sec. 14.5, CSU agreed to be responsible "for any and all personal injury and/or property damage (excluding attorneys' fees) which is directly attributable to the negligent acts of omissions of University or its trustees, officers or employees while acting within the scope of their employment." And CSU agreed that its obligations would survive the termination or expiration of the management agreement. Sec. 14.4.

{¶21} The management agreement also contains Article 15, which pertains to insurance. According to Section 15.1, "Manager [Global Spectrum] agrees to obtain insurance coverage in the manner and amounts as set forth in Exhibit D, attached hereto, and shall provide to the University promptly following the Effective Date a certificate of certificates of insurance evidencing such coverage." Exhibit D, in turn, requires Global Spectrum to obtain commercial general liability insurance, umbrella or excess liability insurance, commercial automobile liability insurance, statutory workers'

compensation and employer's liability insurance, professional liability insurance and self-insured employment practices liability coverage; and liquor liability insurance. (Exhibit D to management agreement.)

{¶22} Thus, not only does the management agreement authorize Global Spectrum to act as the sole and exclusive manager and operator of the Wolstein Center, the management contains provisions requiring Global Spectrum to indemnify CSU under certain circumstances (Article 14) and to obtain certain insurance coverages (Article 15).

B. License Agreement of July 2013

{¶23} On July 17, 2013, Global Spectrum (as an agent on behalf of Cleveland State University) and Yolanda Burt (former director of the CSU Career Services Center) entered into a license agreement for an event scheduled to begin and end on October 11, 2013 (a career services fair). The license agreement thus constitutes an agreement pertaining to a discrete event (i.e., the career services fair)—not the entire management and operation of the Wolstein Center.

{¶24} The license agreement contains an indemnification provision at Section 12.A, which provides:

> c. Licensee [CSU Career Services Center] hereby agrees to indemnify, defend, save and hold harmless Licensor [Global Spectrum] and Cleveland State University, and their respective successors and assigns, and each of their respective partners, agents, officers, trustees, directors, employees and representatives (collectively, "Indemnitees") from and against any and all claims, suits, losses, injuries, damages, liabilities and expenses, including, without limitation, reasonable attorneys' fees and expenses ("Claims or Costs"), occasioned in connection with, arising or alleged to arise from, wholly or in part, (i) any breach of this Agreement by Licensee, or (ii) the exercise by Licensee of the privileges herein granted, or (iii) the acts or omissions, or violations of applicable law, rule, regulation or order, of or by Licensee or any of its agents, owners, officers, directors, members, managers,

> representatives, contractors, exhibitors, employees, servants, players, guests, or invitees, participants or artists appearing in the Event (including support personnel in connection with the presentation of the Event), persons assisting Licensee (whether on a paid or voluntary basis) or any person admitted to the Arena by Licensee, during the Term or any other time while the Arena (or part thereof) is used by or are under the control of Licensee. It is further the intent of this Agreement that this indemnity provision shall apply to any claims made by employees of Licensee against Licensor, and this Agreement is deemed a written agreement for indemnity under the State of Ohio Workers' Compensation laws. The provisions of this Section 12 shall survive any expiration or termination of this Agreement.

The license agreement also contains a provision (Section 11) requiring CSU Career Services Center to obtain, as its own cost and expense, commercial general liability insurance subject to specifications set forth in Section 11.A, and workers' compensation coverage.

{¶25} Thus, if the license agreement were the governing contract in this case, Section 12.A would appear to require the CSU Career Services Center to indemnify Global Spectrum for any claims made by employees of the CSU Career Services Center against Global Spectrum. And, if the license agreement were the governing contract in this case, Section 11.1 would appear to require the CSU Career Services Center to obtain, at its own expense, certain insurance coverages.

C. Discussion

{¶26} CSU's summary judgment motion requires this court to determine whether the management agreement between CSU and Global Spectrum or the license agreement between CSU Career Services Center and Global Spectrum is the governing contract in this case. Viewing the management agreement and the license agreement in tandem, the court finds that the management agreement is the governing contract.

{¶27} Several reasons support this finding. First, the management agreement, which sets forth the written terms for Global Spectrum's management of the Wolstein Center, became effective in August 2010, about 3 years before CSU Career Services Center and Global Spectrum entered into the license agreement for the career fair. Thus, for about 3 years before the license agreement was executed, CSU and Global Spectrum engaged in a course of performance where Global Spectrum agreed, among other things, to defend, indemnify, and hold harmless CSU for any negligent act or omission, or intentional misconduct, on the part of Global Spectrum or any of its employees or agents in the performance of its obligations under the management agreement.

{¶28} Second, even construing the licensing agreement in this case in favor of Global Spectrum, the court finds no language in the license agreement indicating that CSU and Global Spectrum intended the licensing agreement to supersede terms related to indemnification contained in the pre-existing management agreement. Compare License Agreement Section 18.A (license agreement reflects entire agreement between the parties [CSU Career Services Center and Global Spectrum] "*respecting the subject matter hereof* and supercedes any and all prior agreements, understandings or commitments, written or oral *between the parties hereto* [CSU Career Services Center and Global Spectrum]" (emphasis added)).

{¶29} Third, although the license agreement contains an indemnification provision at Section 12(A), the court does not find language in Section 12(A) that overrides the indemnification provisions contained in the pre-existing management agreement between CSU and Global Spectrum. And *even if* section 12(A) of the license agreement did contain language that could be construed to override the indemnification provisions contained in the management agreement, it seems odd that Yolanda Burt, as director of the CSU Career Services Center (which, according to Rahm's averment, is a department of CSU) would have had authority to execute an

agreement contravening provisions contained in a pre-existing management agreement entered into between the university as a whole and Global Spectrum regarding the management and operation of the Wolstein Center. Similarly, it seems odd that Global Spectrum's general manager at the Wolstein Center—the person executing the license agreement on behalf of Global Spectrum—would have authority to execute an agreement containing provisions contravening provisions contained in the management agreement that required Global Spectrum's general partner's signature as evidenced by the signature line in the management agreement. *See generally* 2 Restatement of the Law 2d, Contracts, Section 202, Comment b (1981) ("In interpreting the words and conduct of the parties to a contract, a court seeks to put itself in the position they occupied at the time the contract was made").

{¶30} Moreover, if the license agreement were to be construed to override the indemnification provisions and insurance provisions contained in the pre-existing management agreement, this would create an irreconcilable inconsistency. Such a result should be avoided. *See Walnut Private Equity Fund, L.P. v. Argo Tea, Inc.*, S.D.Ohio No. 1:11-cv-770, 2011 U.S. Dist. LEXIS 138884, at *22-23 (Dec. 2, 2011) (concluding that a state court did not make a clear error of law by rejecting an irreconcilable inconsistency when interpreting a contract) (citing "*Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) ('An unreasonable interpretation [of a contract] produces an absurd result or one that no reasonable person would have accepted when entering the contract.'); *see also Gore v. Beren*, 254 Kan. 418, 867 P.2d 330, 337 (Kan. 1994) ('In placing a construction on a written instrument, reasonable rather than unreasonable interpretations are favored by law. Results which vitiate the purpose or reduce terms of the contract to an absurdity should be avoided.'); *Born v. Hammond*, 218 Md. 184, 146 A.2d 44, 47 (Md. Court App. 1958) ('[I]f a contract was susceptible of two constructions, one of which would produce an absurd result and the

other of which would carry out the purpose of the agreement, the latter construction should be adopted.')").

{¶31} CSU contends that the license agreement fails, as a matter of law, because the indemnity provision in the license agreement, as written, would obligate CSU to pay uncertain sums over an uncertain period in violation of certain provisions of the Ohio Constitution. However, since the management agreement is the governing contract—not the license agreement—judicial restraint counsels against ruling on the state constitutional arguments raised by CSU as to the license agreement. *See State ex rel. Luken v. Corp. for Findlay Mkt. of Cincinnati*, 135 Ohio St.3d 416, 2013-Ohio-1532, 988 N.E.2d 546, ¶ 25 ("The '"cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more"'—counsels against deciding issues rendered moot by our determination that the redacted information constitutes trade secrets. *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, 838 N.E.2d 658, ¶ 34, quoting *PDK Laboratories, Inc. v. United States Drug Enforcement Administration* (D.C.Cir.2004), 362 F.3d 786, 799 (Roberts, J., concurring in part and in the judgment)"); *Meyer v. UPS*, 122 Ohio St.3d 104, 2009-Ohio-2463, 909 N.E.2d 106, ¶ 53.

{¶32} In opposition, Global Spectrum notes that on multiple occasions between 2011 and 2013, departments of CSU entered into licensing agreements that contained indemnification provisions. Global Spectrum maintains that CSU had an opportunity to revise or modify the license agreement in this case, but it did not do so. Global Spectrum urges that CSU led Global Spectrum to believe that the terms of the license agreement were mutually agreed upon and legally enforceable. Global Spectrum reasons that CSU is therefore estopped, as a matter of law, from claiming that the indemnity provision in the license agreement at issue is invalid and unenforceable.

{¶33} Global Spectrum's argument appears to invoke the doctrine of equitable estoppel. In *Ohio State Bd. of Pharmacy v. Frantz*, 51 Ohio St.3d 143, 145, 555 N.E.2d

630 (1990), the Ohio Supreme Court explained, "The purpose of equitable estoppel is to prevent actual or constructive fraud and to promote the ends of justice. It is available only in defense of a legal or equitable right or claim made in good faith and should not be used to uphold crime, fraud, or injustice. * * * The party claiming the estoppel must have relied on conduct of an adversary in such a manner as to change his position for the worse and that *reliance must have been reasonable in that the party claiming estoppel did not know and could not have known that its adversary's conduct was misleading*. *Heckler, supra*, at 59." (Emphasis added.)

{¶34} The court finds that Global Spectrum's estoppel argument is not well-taken. First, as the Ohio Supreme Court held nearly a hundred years ago, "It is incumbent upon persons dealing with public officers to ascertain whether their proposed action falls within the scope of their authority, and *whether the requirements of law affecting a contract proposed to be entered into have been complied with*." (Emphasis added.) *Frisbie Co. v. E. Cleveland*, 98 Ohio St. 266, 269, 120 N.E. 309 (1918), paragraph three of the syllabus. Thus, although CSU arguably could have revised or modified the license agreement, as Global Spectrum suggests, it was incumbent upon Global Spectrum in this case to determine whether the requirements of law affecting the license agreement had been complied with. Second, insofar as CSU Career Services's license agreement for a university-sponsored career services fair may be construed to be an exercise of a governmental function, it "is well-settled that, as a general rule, the principle of estoppel does not apply against a state or its agencies in the exercise of a governmental function." *Ohio State Bd. of Pharmacy v. Frantz*, 51 Ohio St.3d 143, 145-146, 555 N.E.2d 630 (1990)

{¶35} Moreover, the deposition of Matthew Herpich (Global Spectrum's general manager of the Wolstein Center at the time of Ivana Yukos's injury), which was timely filed in this action, shows that there is no genuine issue of material fact that Global Spectrum's agents—not CSU's agents—set up the pipe and drape at issue in this case.

Specifically, according to Herpich, "our steward, Tom Marquart" was the "leadership arm" who would have been responsible for overseeing the pipe and drape for the CSU Career Services's job fair. (Herpich Deposition, 24.) And, according to Herpich, Marquart "[s]ometimes but, not always," was actively involved in setting up pipe and drape assemblies. (Herpich Deposition, 29.).

{¶36} Additionally, according to Herpich, Global Spectrum had a contract with the International Alliance of Theatrical State Employees Local 27 and Global Spectrum paid union workers with "regular W-2 income" and the workers were on Global Spectrum's payroll. (Herpich Deposition, 25.) As explained by Herpich, Tom Marquart reported to Herpich, and the "union people" reported to Marquart. (*Id*., 25-26.) When Herpich was asked whether setting up pole and drape assemblies would be classified as a theatrical set up that were performed by union members, Herpich responded affirmatively. (Herpich Deposition, 41-42; 47-48.) And, after reviewing an exhibit, Herpich testified that two stagehands, one steward, and one electrician were employees who set up the career fair. (Herpich Deposition, 45.) And, according to Herpich's testimony, on the day of the career fair, a steward and electrician were on site. (Id.) Moreover, when CSU's counsel asked Herpich, "* * * I think this is pretty well established, but I just want to make sure everyone's clear. The pipe and draping was not set up by any Cleveland State employee; is that correct?," Herpich answered, "Correct." (Herpich Deposition, 49.)

{¶37} Construing the evidence in favor the non-moving parties as required by Civ.R. 56(C), the court determines that reasonable minds can come to but one conclusion, namely that Global Spectrum's agents—not CSU's agents—set up the pipe and drape assembly at issue in this case.

{¶38} And the court further determines that Global Spectrum has not sustained its burden for a summary judgment on its third-party complaint. To support its contention that a summary judgment should issue in Global Spectrum's favor, Global

Spectrum relies on the license agreement. The court, however, has determined that in this case the management agreement—not the license agreement—is the governing contract. And, because Global Spectrum relies on the license agreement—not the management agreement—to support its breach-of-contract claim and its claim that it is entitled to contractual defense and indemnification, it follows that these claims are ineffective.

D. Summary

{¶39} The court holds that the management agreement is the governing contract. According to the management agreement, Global Spectrum is generally required to hold CSU harmless for alleged negligence or intentional misconduct by Global Spectrum's agents and Global Spectrum is required to have obtained certain insurance coverages. Additionally, construing Matthew Herpich's testimony in favor of the non-moving parties as required by Civ.R. 56(C), the court determines that reasonable minds can come to but one conclusion, namely: Global Spectrum's agents—not CSU's agents—were involved in setting up the pipe and drape assembly at issue in this case.

VI. CSU should no longer be a party in this removed action.

{¶40} R.C. 2743.03(E)(1) permits a party who files a counterclaim against the state or makes the state a third-party defendant in an action commenced in any court, other than the court of claims, to file a petition for removal in the court of claims. According to R.C. 2743.03(E)(2), the court of claims "shall adjudicate all civil actions removed. The court may remand a civil action to the court in which it originated upon a finding that the removal petition does not justify removal, or upon a finding that the state is no longer a party."

{¶41} Here, several reasons militate for a finding that CSU should no longer be a party in this removed action. First, as discussed above, the court has found that a summary judgment should be issued in favor of CSU on Global Spectrum's third-party

complaint and that Global Spectrum's summary judgment on its third-party complaint should be denied. Second, Matthew Herpich's testimony squarely establishes that the pipe and draping at issue in this case were not set up by any CSU employee.
The court therefore finds that CSU should no longer be a party in this removed case.

VII. Conclusion

{¶42} Accordingly, for reasons set forth above, the court holds that (1) CSU's summary judgment motion should be granted, (2) Global Spectrum's summary judgment motion on its third-party complaint against CSU should be denied, (3) CSU should no longer be a party in this removed case, and (4), in accordance with R.C. 2743.03(E)(2) this removed case should be remanded to the Cuyahoga County Court of Common Pleas for further proceedings on the Yukos's complaint and the BWC's "New Party Complaint."

PATRICK M. MCGRATH
Judge

[Cite as *Yuko v. Doe*, 2017-Ohio-8280.]

IVANA YUKO, et al. Plaintiffs v. JOHN DOES 1-3 Defendants and GLOBAL SPECTRUM, L.P. Defendant/Third-Party Plaintiff v. CLEVELAND STATE UNIVERSITY Third-Party Defendant	Case No. 2016-00281-PR Judge Patrick M. McGrath JUDGMENT ENTRY

{¶43} For the reasons set forth in the decision filed concurrently herewith, the court GRANTS Cleveland State University's summary judgment motion of July 27, 2017, DENIES the portion of Global Spectrum's summary judgment motion of July 27, 2017 pertaining to its third-party complaint against Cleveland State University, HOLDS that Cleveland State University should no longer be a party in this removed case, REMANDS the matter to the Cuyahoga County Common Pleas Court for further proceedings, and ORDERS the clerk of this court to return all original papers to the Cuyahoga Common Pleas Court. Court costs shall be assessed against Global Spectrum. In accordance with Civ.R. 54(B), the court determines that there is no just

reason for delay. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

cc:

Edward T. Saadi
Special Counsel to Attorney General
970 Windham Court, Suite 7
Boardman, Ohio 44512

Jeanna V. Jacobus
Lee Ann Rabe
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Jeffrey M. Elzeer
26600 Detroit Road, Suite 300
Cleveland, Ohio 44115

Jerome T. Linnen, Jr.
789 West Market Street
Akron, Ohio 44303-1010

Filed September 14, 2017
Sent to S.C. Reporter 10/23/17