

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

TROPICAL NURSING, INC. )  
Plaintiff )  
 )  
 )  
v. ) Civil Action No. 2002-06-317  
 )  
 )  
GENESIS HEALTH VENTURES, INC. )  
d/b/a HILLSIDE HOUSE )  
Defendant )

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Date Submitted: April 29, 2005  
Date Decided: May 25, 2005

**OPINION AND ORDER**

Tropical Nursing, Inc., (hereinafter Tropical or Plaintiff) filed a complaint against Genesis Health Ventures, Inc., d/b/a Hillside House (hereinafter Hillside or Defendant) for damages resulting from the alleged improper hiring of two licensed practical nurses who had been placed by Tropical with Hillside as temporary employees. Hillside does not deny that the two licensed practical nurses were hired but denies this hiring was improper or that it has any responsibility to Tropical for any damages because of this

hiring. The claim is premised on the allegation that when Tropical placed temporary practical nurses with defendant, those persons could not be hired as permanent employees until they had worked a stated number of hours as temporary employees pursuant to placement by plaintiff.

The matter was tried on March 29, 2005 and decision was reserved. The record supports the following findings and conclusions.

Tropical is in the business of supplying part time nursing staff to various clients, including the defendant. The president and owner of Tropical is David Jwanisik who was the sole witness presented at trial by the plaintiff. In September 2001, the plaintiff, through David Jwanisik and Jeff Rickerman, contacted Hillside and met with two representatives, Ida Klinger and Rhonda Laux, to discuss the placement of nurses with defendant. The defendant was presented a list of rates which would be charged for temporary nurses placed through the plaintiff but this list was not acceptable to Ms. Klinger and Mr. Jwanisik agreed to submit a revised schedule.

While there was some conflict in the testimony, it was clear that Mr. Jwanisik offered to act as the sole supplier of temporary nursing staff for Hillside but Ms. Klinger did not agree to this proposal because, as she testified, she was not authorized to do so. A letter was sent to Ms. Klinger and Ms. Laux following the meeting and it appeared to summarize the items discussed at the meeting but significantly contained the rates which had been rejected by Ms. Klinger. A revised schedule of rates was sent to Ms. Klinger by Mr. Jwanisik. The revised rates were accepted by the defendant and thereafter the plaintiff began to supply personnel to the defendant. This ordinarily was done by a telephone call being placed to the plaintiff detailing the times when temporary staff was

needed and plaintiff would thereafter determine if it had a person available to fill the needed time.

The standard procedure was that the person who was supplied by plaintiff would appear at the designated time for work, would complete the work schedule and would complete a time card which was supplied by the plaintiff. The time card was a four copy document which detailed the name of the employee and the time worked and would be signed by the employee but would also be signed by the defendant through one of its employees. Copies of this time card were distributed as follows: a copy was left with the defendant when the employee completed the tour of duty, a copy was kept by the employee, and the original and a copy were returned to the plaintiff.

The time cards had certain conditions printed on the reverse side. One of the conditions was the requirement that the party hiring the temporary employee could not hire that person as a full time employee until the person had worked at least 1000 hours as a temporary employee. There was conflict in the testimony as to whether this issue was in fact discussed at the initial meeting between plaintiff and defendant's representatives.

The time cards for the employees whose hiring is the basis for this suit were signed by several different persons on the staff at Hillside including Ms. Klinger and Ms. Laux. None of the time cards for these employees were signed by the administrator of Hillside, Kathleen Duca.

Mr. Jwasinik would prepare invoices to Hillside which detailed the name of the temporary employee, the hours worked, the rate, and the total amount due. There was conflict in the testimony as to whether a complete copy of the time card was attached to

the invoice presented to Hillside or whether a copy was made of the face of the time card and was attached to the invoice without the conditions on the reversed side being part of that invoice.

It is clear, however, that one copy of the time card – the pink copy – was left with defendant whenever a temporary employee was placed by the plaintiff, and this copy, like the other three copies, included a face side and a reverse side and the face side drew reference to the reverse side for contract information.

Hillside basically denies responsibility for damages for hiring of temporary staff supplied by Tropical because, it argues, it never agreed to the conditions on the reverse side of each copy of the time card and that it was never advised of the conditions on the reverse side of the time cards. Hillside appeared to take contradictory positions as to its agreement with Tropical. Hillside, through Ms. Klinger, would not agree to initial rate schedule presented by Tropical. Hillside does not deny that it received a revised, lower, rate schedule and that this was approved by Ms. Klinger on a copy of the rate schedule which was sent to Hillside by Tropical by facsimile. Ms. Klinger testified that she accepted the revised schedule of charges after getting approval from Ms. Duca but the fact remains that it was Ms. Klinger who signed the agreement which spelled out the rates that would be charged. The agreement between the parties is bottomed on a collection of papers and not one specific paper. Thus the rate schedule was sent out in a facsimile to Hillside, the rate schedule was accepted, and the rates were applied to hours worked which were detailed in the time cards, and these had, on the reverse side, terms and conditions which were incorporated by language which noted that one was to “Please see back of time card for important contract information”. Hillside cannot argue that it is

bound by some portions of these papers but not all. The Court finds that a copy of the time card for each employee was left with Hillside after the employee ended a tour of duty and that the time cards were in fact signed by an authorized person acting for Hillside.

The Court has some difficulty in finding that no responsible person at Hillside was aware of the terms and conditions spelled out on the reverse side of each page of the time card. Ms. Duca appears to be a rather sophisticated administrator and she, as well as Ms. Klinger and Ms. Laux, do not appear to be persons who would have acted in these matters without being aware of all the ramifications that might attach to either the rate schedule or the time cards which governed the basis by which employees were compensated.

The Court concludes that Hillside is in fact bound by the terms and conditions which were spelled out in the rate schedule which was accepted and in the time cards which were endorsed and accepted each time an employee placed by Tropical worked at the Hillside facility.

Having concluded that Hillside is bound by the terms and conditions of the rate schedule and the time cards the Court needs to determine what damages, if any, are due to Tropical.

Tropical has submitted to the Court a calculation of damages which is based on the liquidated damages clause set out in the time cards. It appears that this liquidated damages clause cannot be accepted at face value because it appears to be more of a penalty rather than a calculation of reasonable damages. (See Tropical Nursing, Inc. v. Arbors at New Castle Subacute and Rehabilitation Center, C.A. No. 036-09-204, RRC,

04/04/05). The Court concludes that Tropical cannot be awarded damages calculated on the whole billing rate which would have been given to Hillside for any employee. That billing rate includes not only the profits which Tropical would have realized on any placement of an employee but includes also the net wage which Tropical would have paid to each employee.

The Court concludes that Tropical is entitled to damages but before a final order can be entered, plaintiff must recalculate its demand to show only those damages which it suffered by loss of income for the time which the employee was to work before the employee could be hired by Hillside without penalty. Counsel will recalculate the claim for damages based on this formula and will submit the result to counsel for Hillside for approval or comment and will then submit that calculation with approval and/or comment to the Court for the entry of a final order.

**IT IS SO ORDERED.**

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**Alfred Fraczkowski, Retired<sup>1</sup>**

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<sup>1</sup> Sitting by appointment pursuant to Del. Const.; Art IV §38 and 29 Del. C. §5610.