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| Washington v Racanelli |
| 2016 NY Slip Op 30429(U) |
| March 11, 2016 |
| Supreme Court, New York County |
| Docket Number: 805035/2013 |
| Judge: Joan B. Lobis |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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MICHELE WASHINGTON and CHARLES GOODEN,

Plaintiffs,

Index No. 805035/2013

-against-

**Decision, Order
and Judgment**

JOSEPH L. RACANELLI, M.D. MULTI-DIAGNOSTICS
SERVICES INC. and THE HELEN B. ATKINSON
HEALTH CENTER,

Defendants.

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In this motion, defendant Multi-Diagnostics Services, Inc. (MDS) moves for summary judgment dismissing all claims against them. Plaintiffs and defendant Joseph Racanelli, M.D. both oppose the motion. For the reasons below, the Court denies the motion.

MDS notes that plaintiff discontinued the case as against The Helen B. Atkinson Health Center. The Court additionally notes that in a prior order which resolved motion sequence number two, the Court dismissed the claim that the radiologist Dr. Racanelli was negligent for failing to compare plaintiff's prior mammograms to the images taken on February 10, 2011, but did not dismiss the claim that Dr. Racanelli negligently misread the February 10, 2011 images. Accordingly, the Court dismisses the claims against MDS based on Dr. Racanelli's negligent failure to consider the prior mammograms and does not discuss MDS' arguments relating to these

claims. Moreover, as plaintiff limited its claims against MDS to vicarious liability, the Court does not address MDS' argument that it is not independently liable for the alleged malpractice.¹

Plaintiff Michele Washington (Ms. Washington) had a mammogram at the Helen B. Atkinson Health Center (the Health Center) in February 2011. MDS, which had a contract with the Center pursuant to which it delivered radiological equipment and provided nurses and technical staff, performed the mammogram. MDS states that Ms. Washington had a family history of breast cancer. MDS points out that Ms. Washington stated she had mammograms in the past, but did not provide an authorization to MDS so it could obtain her prior results. It does not indicate whether it requested them. MDS transmitted the mammogram images to Dr. Racanelli, who noted that Ms. Washington's prior results were not available. He concluded that, based on his examination of the images, the results were normal. On February 22, 2011, Dr. Racanelli sent a letter on MDS' stationery stating that "we" were pleased to inform her of the normal test result. MDS describes this letter as one which MDS sent to Ms. Washington. MDS indicates that although the letter suggested she obtain prior test results for comparison, plaintiff did not present any prior mammogram results to MDS. Subsequently, in April of 2012, Ms. Washington was diagnosed with breast cancer. This medical malpractice action asserts that defendants failed to timely diagnose and treat Ms. Washington – in particular, based on Dr. Racanelli's alleged misreading of the mammogram. It further asserts loss of consortium on behalf of Ms. Washington's husband Charles Gooden.

¹ In opposition, plaintiffs raise arguments as to MDS' independent liability for its failure to procure earlier mammogram reports for comparison. Because the Court has dismissed this cause of action as against Dr. Racanelli, however, plaintiffs' argument on this issue is moot. Thus, the Court does not address the argument or MDS' counter-argument.

In its motion, MDS argues that Dr. Racanelli was an independent contractor and it is not vicariously liable for his interpretation of the mammogram images. Moreover, it says, neither apparent nor ostensible agency applies because there was no reliance by Ms. Washington. Such reliance was impossible, MDS states, because MDS did not represent to her that Dr. Racanelli worked with it or had authority to act on its behalf, and it did not tell her Dr. Racanelli would interpret the mammogram. It argues that Ms. Washington did not seek out MDS but was referred there by her primary care facility. It points out that Ms. Washington never met Dr. Racanelli and did not recognize the name "MDS" at her deposition. In support of their contentions MDS submits the expert affirmation of Dr. Tova C. Koenigsberg, who is licensed in New York and board certified in diagnostic radiology, and who relies on the Mammography Quality Standards Act.

Both Dr. Racanelli and plaintiffs oppose the motion. Dr. Racanelli argues that vicarious liability exists. He states that MDS can only offer radiological services by contracting out the work to him and other radiologists. If MDS' argument succeeds, he states, MDS would be able to insulate itself from liability altogether. This, he argues, would be a contradictory and unfair result. He points to Mooi Yap v. Multi-Diagnostic Serv., Inc., Index No. 16486/2009 (Sup. Ct. Kings County October 12, 2011), in which the trial court rejected MDS' argument that it was not vicariously liable for the acts of Dr. Racanelli on the facts before it and instead found that such liability existed as a matter of law.

In addition to the above, Dr. Racanelli points out that Ms. Washington should have been aware that it was MDS that performed the mammography. Ms. Washington received an

instruction sheet bearing MDS' name at the top, and an MDS nurse examined her and noted Ms. Washington's medical history on a form MDS provided to Dr. Racanelli. He argues that it is significant that MDS owns two vans and Ms. Washington's mammogram was performed in a van. Ms. Washington authorized MDS to send her test results to the Health Center. Dr. Racanelli states that together this establishes Ms. Washington knew MDS was not part of the Health Center. Moreover, Ms. Washington went to MDS rather than to him for the mammogram. According to Dr. Racanelli, this case is analogous to one in which a patient presents at an emergency room and treats with a doctor who appears to the patient to be a hospital employee. He contends that this principal has been applied to radiologists. He points to several cases in support of this argument. Plaintiffs' opposition relies on Dr. Racanelli's arguments.

In reply, MDS reiterates that Ms. Washington admits she did not believe that MDS either provided her with mammography services or independently contracted the services of Dr. Racanelli. Because she was not aware of the involvement of Dr. Racanelli, she could not have believed that Dr. Racanelli was an agent of MDS. It states that all opposing arguments are based on speculation. It states that and that it bears no responsibility for the work of the radiologists who read the mammograms.

The Court already has ruled on the arguments relating to summary judgment on liability, finding an issue of fact as to whether Dr. Racanelli committed malpractice by misreading the mammogram images. As for the question of whether MDS is vicariously liable, although "as a general rule, a principal is not liable for the wrongful acts of an independent contractor," Sampson v. Contillo, 55 A.D.3d 588, 590 (2nd Dep't 2008), the principle can be vicariously liable

due to apparent or ostensible agency. Loaiza v. Lam, 107 A.D.3d 951, 952 (2nd Dep't 2013). Such liability can exist if the patient seeks treatment from the hospital or treatment center rather than from the physician himself or herself. See Brink v. Muller, 86 A.D.3d 894, 896 (3rd Dep't 2011). The patient must accept the services in question based on his or her relationship with the hospital or treatment center rather than based on the skill of the physician or on his or her particular skill. Id. To prevail on a motion for summary judgment on this basis, a movant must establish that, as a matter of law, there is no issue as to ostensible or apparent agency. Contreras v. Adeyemi, 102 A.D.3d 720, 722 (2nd Dep't 2013).

Here, as MDS states, there is no actual agency relationship between it and Dr. Racanelli. For the reasons Dr. Racanelli sets forth and the reasons discussed by Ms. Washington at her deposition, however, issues of fact exist as to ostensible or apparent authority. Ms. Washington did not seek out Dr. Racanelli to read her mammography results, and did not even know that he was the radiologist who read them. Instead, she had her mammogram in the MDS vehicle pursuant to a referral from the Health Center and she relied on MDS rather than any particular doctor to perform the mammogram. See Loaiza, 107 A.D.3d at 952. It is not disputed that Ms. Washington received an information form and the results of her mammogram on paper using the MDS letterhead, that she did not meet Dr. Racanelli, and that she did not go to MDS because of Dr. Racanelli's affiliation. MDS' private contractual relationship was unknown to her. Contrary to MDS' suggestion, these facts do not support their argument but raise issues as to whether Ms. Washington reasonably believed that MDS' mammography results were read by an agent under their control. See Schacherbauer v. Univ. Assoc. in Obstetrics & Gynecology, P.C.,

56 A.D.3d 751, 752 (2nd Dep't 2008); Mooi Yap, Inc., Index No. 16486/2009 (Sup. Ct. Kings County October 12, 2011).

Accordingly, it is

ORDERED that the motion is granted to the extent of severing and dismissing all claims against MDS relating to Dr. Racanelli's alleged failure to compare Ms. Washington mammogram with prior mammogram results; and it is further

ORDERED that the remaining claims against MDS, alleging vicarious liability based on Dr. Racanelli's alleged misreading of the X-rays, survive; and it is further

ORDERED that, as this action already has been discontinued against the Health Center, the caption is amended as follows:

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-against-

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DIAGNOSTICS SERVICES INC.,

Defendants.

-----X

Index No. 805035/2013

**Decision, Order
and Judgment**

The Motion Support and Trial Support Clerks shall amend the caption accordingly, and the parties shall use the amended caption going forward; and it is further

ORDERED that the parties shall appear in Part 6, 60 Centre Street room 345, at 9:30 a.m. on March 29, 2016, to schedule a new trial date.

Dated: *Mar. 11*, 2016

ENTER:



JOAN B. LOBIS, J.S.C.