

**Primo v Varughese**

2023 NY Slip Op 30919(U)

March 22, 2023

Supreme Court, New York County

Docket Number: Index No. 805368/2019

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. JOHN J. KELLEY **PART** **56M**

*Justice*

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SHERILLA PRIMO, as the Administrator of the Estate of  
JUANITA JONES, deceased,

Plaintiff,

**INDEX NO.** 805368/2019

**MOTION DATE** 11/16/2022

**MOTION SEQ. NO.** 001

- v -

NIDHI M. VARUGHESE and RICHMOND UNIVERSITY  
MEDICAL CENTER

Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

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

In this action to recover damages for medical malpractice, the defendant Richmond University Medical Center (RUMC) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against it. The plaintiff opposes the motion. The motion is denied.

The plaintiff asserted that the defendant physician Nidhi M. Varughese committed malpractice at the RUMC emergency room in evaluating and treating the plaintiff's decedent, Juanita Jones, for ischemia of the right leg and atrial fibrillation. The plaintiff contended that, despite the decedent's right leg complaints to Varughese on August 23, 2017, and the presentation of atrial fibrillation, Varughese failed to recognize the signs and symptoms of thrombosis of the popliteal artery and peripheral vascular disease that had been caused by the atrial fibrillation, and consequently delayed treatment of those conditions. The plaintiff further averred that the delay in diagnosis required her decedent to undergo extensive vascular surgery that otherwise would not have been required. As a consequence of this alleged malpractice, the plaintiff claims that her decedent developed permanent limitations in the use of her right leg for

the approximately three months remaining in her life, along with renal failure, pressure sores, hypertension, and septicemia, and that her decedent ultimately died on November 18, 2017 as a proximate result of her underlying conditions, as exacerbated by the surgery.

The plaintiff asserted in her complaint that RUSC was vicariously liable for Varughese's malpractice. RUMC now moves for summary judgment, contending that, inasmuch as Varughese was an independent physician who was not its employee, it cannot be held liable for her malpractice or negligence. In support of its motion, RUMC submits the pleadings, the plaintiff's bill of particulars, the transcripts of the parties' depositions, a statement of undisputed material facts, and relevant medical records. It also submits the expert affirmation of Gregory Mazarin, M.D., who is board certified in emergency medicine. Dr. Mazarin emphasized that Varughese was not RUMC's employee, noting that the plaintiff made no claims that any physicians who were employed by RUMC committed any act or omission constituting malpractice. He thus focused on the conduct of nurses and other hospital staff employed by RUMC, and concluded that the nursing staff properly triaged the plaintiff's decedent and that the decedent thereafter was treated solely by Varughese. Dr. Mazarin did not comment at all upon whether Varughese's evaluation, testing, treatment, and diagnoses of the decedent comported with applicable standards of care. In opposition, the plaintiff submitted her attorney's affirmation, a counterstatement of material facts, and the report of the decedent's autopsy. The plaintiff argued that RUMC failed to establish that it could not be held vicariously liable for Varughese's malpractice, and that it failed to establish, prima facie, that Varughese was not negligent.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the

pleadings and other proof such as affidavits, depositions, and written admissions (see CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, “[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility” (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (see *Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *id.*; *Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]).

“The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even ‘arguable’” (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; see *Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (see *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

“In general, under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment, but not for negligent treatment provided by an independent physician, as when the physician is retained by the patient himself” (*Valerio v Liberty Behavioral Mgt. Corp.*, 188 AD3d 948, 949 [2d Dept 2020], quoting *Seiden v Sonstein*, 127 AD3d 1158, 1160 [2d Dept 2015]; see *Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]; *Dupree v Westchester County Health Care Corp.*, 164 AD3d 1211, 1213 [2d Dept 2018]). However, “vicarious liability for the medical

malpractice of an independent physician may be imposed under a theory of apparent or ostensible agency” (*Valerio v Liberty Behavioral Mgt. Corp.*, 188 AD3d at 949, quoting *Keesler v Small*, 140 AD3d 1021, 1022 [2d Dept 2016]; see *Hill v St. Clare's Hosp.*, 67 NY2d at 79).

“In order to create such apparent agency, there must be words or conduct of the principal, communicated to a third party, which give rise to the appearance and belief that the agent possesses the authority to act on behalf of the principal. The third party must reasonably rely on the appearance of authority, based on some misleading words or conduct by the principal, not the agent. Moreover, the third party must accept the services of the agent in reliance upon the perceived relationship between the agent and the principal, and not in reliance on the agent's skill”

(*Keesler v Small*, 140 AD3d at 1022, quoting *Dragotta v Southampton Hosp.*, 39 AD3d 697, 698 [2d Dept 2007]; see *Valerio v Liberty Behavioral Mgt. Corp.*, 188 AD3d at 949; *Loaiza v Lam*, 107 AD3d 951, 952 [2d Dept 2013]). “In evaluating whether a doctor is the apparent agent of a hospital, a court should consider all attendant circumstances to determine whether the patient could properly have believed that the physician was provided by the hospital” (*Valerio v Liberty Behavioral Mgt. Corp.*, 188 AD3d at 949, quoting *Loaiza v Lam*, 107 AD3d at 952-953).

Additionally, “[a]n exception to this general rule exists where a plaintiff seeks to hold a hospital vicariously liable for the alleged malpractice of an attending physician who is not its employee where a patient comes to the [hospital] seeking treatment . . . [but] not from a particular physician of the patient's choosing” (*Muslim v Horizon Med. Group, P.C.*, 118 AD3d 681, 683 [2d Dept 2014] [internal quotation marks omitted]; see *Valerio v Liberty Behavioral Mgt. Corp.*, 188 AD3d at 949). Stated another way,

“a hospital may be held vicariously liable, based on the principle of agency by estoppel, for the acts of an independent physician where the physician was provided by the hospital or was otherwise acting on the hospital's behalf, and the patient reasonably believed that the physician was acting at the hospital's behest”

(*Malcolm v Mount Vernon Hosp.*, 309 AD2d 704, 705 [1st Dept 2003], quoting *Sarivola v Brookdale Hosp. & Medical Ctr.*, 204 AD2d 245, 245-246 [1st Dept 1994] [citation omitted]).

“Thus, in order to establish its entitlement to judgment as a matter of law defeating a claim of

vicarious liability, a hospital must demonstrate that the physician alleged to have committed the malpractice was an independent contractor and not a hospital employee, and that the exception to the general rule did not apply” (*Valerio v Liberty Behavioral Mgt. Corp.*, 188 AD3d at 949-950, quoting *Muslim v Horizon Med. Group, P.C.*, 118 AD3d at 683 [some internal quotation marks omitted]).

In *Sklarova v Coopersmith* (180 AD3d 510, 510 [1st Dept 2020]), for example, although the plaintiff there retained a particular surgeon to perform a shoulder procedure, that surgeon did not choose the anesthesiologist who would assist with the surgery that was performed at the defendant hospital. It turned out that the hospital did not employ or control the anesthesiologist who ultimately was assigned to the procedure. Nonetheless, the Appellate Division, First Department, reinstated the plaintiff’s claims against the hospital, concluding that there were triable issues of fact as to whether the anesthesiologist was negligent, and whether the doctrine of ostensible agency rendered the hospital vicariously liable for the anesthesiologist’s conduct. Similarly, in the instant dispute, the plaintiff’s decedent was not referred to any one particular emergency room specialist, let alone referred to Varughese in particular. Rather, upon recognizing that the numbness and weakness in her right foot might present an emergency situation, she was transported by ambulance from her granddaughter’s house to the RUMC emergency room, where she complained of those symptoms. RUMC assigned Varughese to the decedent as an appropriate emergency room physician who was then on duty and could examine and treat the plaintiff, without any input from the plaintiff’s decedent as to which physician she wished to see.

Moreover, “a defendant who employs an independent contractor to perform services that the defendant has undertaken to perform, is liable for the negligence of the independent contractor” (*Mduba v Benedictine Hosp.*, 52 AD2d 450, 453 [3d Dept 1976]). Hence, a

“defendant hospital, having held itself out to the public as an institution furnishing doctors, staff and facilities for emergency treatment, was under a duty to perform those services and is liable for the negligent performance of those services by

the doctors and staff it hired and furnished to [a patient]. Certainly, the person who avails himself of hospital facilities has a right to expect satisfactory treatment from any personnel who are furnished by the hospital”

(*id.*; see *A.A. v St. Barnabas Hosp.*, 176 AD3d 582, 583 [1st Dept 2019]; *Malcolm v Mount Vernon Hosp.*, 309 AD2d at 705-706). The court notes that *Mduba* has not been limited by the courts to emergency treatment (see *A.A. v St. Barnabas Hosp.*, 176 AD3d at 583; *Schacherbauer v University Assoc. in Obstetrics & Gynecology, P.C.*, 56 AD3d 751, 752 [2d Dept 2008]; *Galina v Lewis*, 2020 NY Slip Op 32276[U], \*5, 2020 NY Misc LEXIS 3262, \*10-11 [Sup Ct, N.Y. County, Jul. 1, 2020]), although the rule of that decision clearly is applicable to emergency room treatment and treatment subsequent to the initial emergency room encounter.

Consequently, RUMC failed to meet its prima facie burden on the issue of vicarious liability, as it failed to demonstrate that the two exceptions to the general rule concerning vicarious liability were inapplicable (see *Valerio v Liberty Behavioral Mgt. Corp.*, 188 AD3d at 950; *Diller v Munzer*, 141 AD3d 628, 629 [2d Dept 2016]; *Keitel v Kurtz*, 54 AD3d 387, 390 [2d Dept 2008]; *Welch v Scheinfeld*, 21 AD3d 802, 808-809 [1st Dept 2005]; *Filemyr v Lombardo*, 11 AD3d 581, 581 [2d Dept 2004]). RUMC failed to demonstrate that the plaintiff's decedent came to its facilities seeking treatment from Varughese in particular, rather than, as the plaintiff contended, simply presenting herself to the hospital's emergency room for evaluation and treatment by any qualified physician who was working at the hospital on that date. RUMC also failed to demonstrate that it did not furnish Varughese to the plaintiff's decedent for the purposes of evaluation and treatment.

Since, under the circumstances presented here, RUMC failed to negate its potential vicarious liability for Varughese's negligence, to secure summary judgment it was obligated to establish, prima facie, that Varughese did not depart from good and accepted practice. RUMC simply failed to address whether Varughese satisfied the applicable standard of care for emergency room physicians, or whether she departed from that standard, focusing solely on the conduct of its own employees. Consequently, it failed to establish its prima facie entitlement to

judgment as a matter of law, and its motion must be denied, regardless of the sufficiency of the plaintiff's opposition papers.

In light of the foregoing, it is

ORDERED that the motion is denied.

This constitutes the Decision and Order of the court.

3/22/2023  
DATE

  
JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: