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

PRESENT: BRANSTEN Justice PART 6

PEARSON, S

-v-

NYC HEALTH & HOSPITALS CORP.

INDEX NO. 108731/04

MOTION DATE 12/20/05

MOTION SEQ. NO. 6

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion to/for discontinue

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

FILED

JAN 13 2006

COUNTY CLERK'S OFFICE

Dated: 1-9-06

EILEEN BRANSTEN J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

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SHANICE PEARSON, an Infant by her Mother and Natural Guardian, MICHELLE PEARSON,

Plaintiff,

-against-

Index No. 108731/04
Motion Date: 12/20/05
Motion Seq. No.: 006

NEW YORK CITY HEALTH & HOSPITALS CORPORATION (HARLEM HOSPITAL CENTER), NEVILLE MORGAN and LILLETH MORGAN,

Defendants.

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PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 3217, plaintiff Shanice Pearson ("Shanice"), an Infant by Her Mother and Natural Guardian, Michelle Pearson ("Mrs. Pearson") moves for an order permitting her to voluntarily discontinue the action without prejudice to renewal. Defendants New York City Health and Hospitals Corporation (Harlem Hospital Center) ("HHC") and Neville and Lilleth Morgan ("Mr. and Mrs. Morgan") oppose the motion.

Background

Shanice was born on December 2, 2000. Affirmation in Support of Motion ("Aff."), at ¶ 5. Shortly thereafter, in March of 2001, the family moved to 673 Cauldwell Avenue, Bronx, New York, where they lived for one-and-a-half years. Mr. and Mrs. Morgan were their landlords. Plaintiff claims that, during the period that Shanice lived at 673 Cauldwell Avenue, she was exposed to and ingested lead paint, which caused her to develop high

levels of lead toxicity in her blood. Specifically, in 2002, when she was two-years old, Shanice had a blood-lead level of 16 to 11 ug/dL.* Aff., Ex. 5, at ¶ 13. In 2003, when she was three-years old, she had a blood-lead level of 10 to 11 ug/dL. *Id.* HHC provided pediatric medical care to Shanice during this period at Harlem Hospital Center ("Harlem"), but Mrs. Pearson avers that Harlem staff never advised her of the risk of lead poisoning. Aff., at ¶ 2.

In this medical malpractice action – commenced on June 9, 2004 – Mrs. Pearson alleges that HHC negligently failed to perform a Risk Assessment or provide Anticipatory Guidance for Lead Poisoning, which significantly contributed to the presence of lead in Shanice's blood. Furthermore, she claims that Mr. and Mrs. Morgan negligently maintained unsafe premises, which caused Shanice to ingest toxic amounts of lead paint.

At the direction of the Court, plaintiff filed the note of issue on June 30, 2005.

Mrs. Pearson now moves for leave to permit her to discontinue the action without prejudice to renewal based on her experts' assertions that, at this time, Shanice is not old enough to be evaluated for damages resulting from lead paint exposure. Aff., at ¶ 13. She explains that Shanice is now only five-years old and that developmental injuries resulting from lead paint exposure are not fully discernable until a child reaches at least seven-years

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* According to the Center for Disease Control, a blood-lead level above 10 ug/dL is considered "elevated."

old. Aff., at ¶ 13. She requests, therefore, that she be permitted to discontinue the action without prejudice to renewal by January 1, 2008, when Shanice will be eight-years old. Aff., at ¶ 3.

In support of her motion, Mrs. Pearson submits the notarized Functional Assessment Report of Vicki Sudhalter, Ph.D. ("Dr. Sudhalter"), a psychologist, who opines that Shanice is functioning within the normal range of intelligence at this time, but recommends that Shanice be tested at an older age when more of her functional abilities and skills will be apparent. Affirmation of Dr. Sudhalter, at 3.

In addition, Mrs. Pearson relies on the affidavit of Theodore I. Lidsky, Ph.D. ("Dr. Lidsky"), a psychologist specializing in behavioral neuroscience and neuropsychology. Aff., Ex. 5, at ¶ 1. Dr. Lidsky concludes with a reasonable degree of neuroscientific certainty, after review of the medical records, that Shanice will likely suffer neuropsychological difficulties as she matures but that "it is not possible at her present young age to determine the full extent of the brain injury and concomitant neuropsychological deficits from which she suffers." Aff., Ex. 5, at ¶ 13. He also cites a recent report from the Center for Disease Control, *Managing Elevated Blood Lead Levels Among Young Children: Recommendations From the Advisory Committee on Childhood Lead Poisoning Prevention*, which provides that there is a "'time lag' for the emergence of the cognitive symptoms of lead poisoning."

Aff., Ex. 5, at ¶ 15. Finally, he concludes that Shanice should not be tested for neurological difficulties until she is at least seven-years old. Aff., Ex. 5, at ¶ 17.

Defendants oppose the motion, pointing out that summary judgment motions are submitted and pending in this case and arguing that plaintiff cannot now move to voluntarily discontinue the action without prejudice to avoid an unfavorable determination on the merits. Mr. and Mrs. Morgan's Affirmation in Opposition ("Opp."), at ¶ 2. They claim, moreover, that plaintiff should not be permitted to discontinue the action now because she has already filed a note of issue signifying that the case is ready for trial. Opp., at ¶ 5. Finally, they argue that they will be significantly prejudiced by a discontinuance because they have invested a significant amount of time and resources to defending this action and have already laid bare their defenses by making a motion for summary judgment. Opp., at ¶ 16.

Analysis

CPLR 3217(a)(2) provides that a party may discontinue its claim against another party by filing a stipulation of discontinuance "in writing signed by the attorneys of record for *all* parties." (Emphasis added.) If any party is unwilling to sign the stipulation, the court may nevertheless order discontinuance as it sees proper. CPLR 3217(b). The authority to grant or deny a motion to discontinue is within the sound discretion of the trial court and

discontinuance should be granted "unless substantial rights have accrued or [the] adversary's rights would be prejudiced thereby." *Louis R. Shapiro, Inc. v. Milspemes Corp.*, 20 A.D.2d 857 (1st Dept. 1964); *see also, Hockmeyer v. Bloch*, 159 A.D.2d 444, 445 (1st Dept. 1990). The public policy underlying allowing discontinuance is that "a party cannot be compelled to litigate, absent special circumstances." *Hockmeyer v. Bloch*, 159 A.D.2d, at 445; *see also*, *Farr v. Farr*, 111 A.D.2d 146 (2d Dept. 1985).

Here, plaintiff submits a proposed stipulation of voluntarily discontinuance. Aff., Ex. 3. The stipulation is insufficient, however, because HHC and Mr. and Mrs. Morgan have refused to sign it. *Ferrara v. New York Downtown Hosp.*, 180 Misc. 2d 33, 37 (Sup. Ct., New York County, Mar. 4, 1999). Nonetheless, the Court will grant discontinuance in the interest of justice and for the protection of Shanice's rights.

Although defendants are correct in asserting that plaintiff's attorneys have delayed in making this motion and have continuously failed to abide by Court orders directing them to timely file and respond to motions, the Court must act to protect the rights of Shanice, who may suffer serious effects of lead poisoning as a result of defendants' alleged negligence. Despite the actions or inactions of her attorneys, the facts are clear: Shanice was exposed to lead paint and her blood showed high levels of lead toxicity when she was two- and three-years old. Her mother consulted attorneys, who commenced this action when Shanice was just four-years old. Now, at five years of age, Shanice is not old enough to

demonstrate neurological and neuropsychological dysfunction such that her doctors can determine whether she was adversely effected by exposure to lead. Instead, Shanice's doctors opine that they will only be able to meaningfully test her for developmental difficulties when she reaches seven years of age, in 2007.

If the Court does not permit plaintiff to discontinue the case and it proceeds to trial, it is possible that Shanice will lose any possibility of recovery because, at this time, serious cognizable damages are not apparent. Plaintiff would then be precluded from bringing an action against defendants in 2008 even if Shanice later manifests severe and concrete injuries as a result of her exposure to lead. Thus, the most equitable and fair result can be achieved by allowing plaintiff to discontinue this action without prejudice to renewal. That way, if it is later proven that Shanice suffers from developmental deficits as a result of defendants' alleged negligence, she can seek recovery for her injuries.

The cases that defendants cite do not mandate a different result. It is true that a plaintiff cannot discontinue an action without prejudice as a tactical means of avoiding an unfavorable result. *Lui v. Chinese-Am. Planning Council, Inc.*, 300 A.D.2d 80 (1st Dept. 2002) (plaintiff moved to discontinue to avoid paying attorneys' fees); *Matter of Baltia Air Lines, Inc. v. CIBC Oppenheimer Corp.*, 273 A.D.2d 55, 56 (1st Dept. 2000), *lv. denied* 95 N.Y.2d 767, *rearg. denied* 96 N.Y.2d (2001); *NBN Broadcasting, Inc. v. Sheridan Broadcasting Networks, Inc.*, 240 A.D.2d 319 (1st Dept. 1997); *see also*, *Angerame v.*

Nissenbaum, 208 A.D.2d 579 (2d Dept. 1994). In this case, however, Mrs. Pearson moves to discontinue not to avoid a decision on the pending summary judgment motions, but because Shanice is not yet old enough to exhibit the full magnitude of injuries that she may suffer from because of defendants' alleged negligence. Indeed, plaintiff submitted opposition to defendants' motions for summary judgment accompanied by the affidavit of Dr. Lidsky, who opined to a reasonable degree of neuroscientific certainty that Shanice's brain *is* damaged by lead poisoning. Aff., Ex. 5, at ¶ 18.

Additionally, the interests of justice compel the Court to grant the discontinuance. That Shanice may well later develop neurological difficulties as a result of her exposure to lead paint is more than a mere hypothetical possibility. It is well-documented that children with blood-lead levels of more than 10 ug/dL during their formative years are likely to develop neuropsychological and functional difficulties as they mature. Aff., Ex. 5, at ¶ 16. Although, ideally, Shanice will not need to recommence this action because hopefully she will never develop serious side effects of lead poisoning, the Court must act to protect Shanice's rights in case she does develop serious lead-exposure injuries as she matures. Shanice must be afforded an opportunity to prove her case at an age once neuropsychological deficits become testable, not now, when her injuries are not fully apparent and she runs the risk of not being compensated for her full range of injuries.

Finally, on this record, defendants have not demonstrated that they will be severely prejudiced by a discontinuance without prejudice to renewal. Although they have incurred many costs in defending the case thus far and in moving for summary judgment, neither HHC nor the Morgans requested or cross-moved for costs, and thus, the Court will not *sua sponte* grant them. Also, evidence in this case will be preserved and if plaintiff recommences this action, defendants will have the use of the work product they have already generated and, of course, will, at that time, be able to re-examine Shanice for injuries as well. The statute of limitations, moreover, has not run on Shanice's claims; as such, she will permitted to discontinue the action now without prejudice.

Accordingly, it is

ORDERED that plaintiff's motion for an order permitting her to discontinue the action without prejudice to renewal before January 1, 2008 is granted and the complaint is hereby dismissed without prejudice. The Clerk is respectfully directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
January 9, 2006

ENTER

Hon. Eileen Bransten