

Rivera v Island Med. Ctr.

2007 NY Slip Op 31492(U)

May 31, 2007

Supreme Court, Suffolk County

Docket Number: 0015389/2003

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 4-25-07
Mot. Seq. # 006 - MG
007 - XMG
008 - XMotD

-----X		
EVELYN RIVERA,	:	GLASSO LANGIONE
	:	Attorneys for Plaintiff
	:	600 Old Country Road, Suite 304
Plaintiff,	:	Garden City, New York 11530
	:	
- against -	:	MONTFORT, HEALY, et al.
	:	Attys for Defts Gill, Kim & Southside Hosp.
	:	1140 Franklin Avenue, P.O. Box 7677
ISLAND MEDICAL CENTER, DEVENDRA	:	Garden City, New York 11530-7677
GILL, M.D., DANIEL KIM, M.D., SOUTHSIDE	:	
HOSPITAL, BAB RADIOLOGY, HAROLD	:	VARDARO & HELWIG, LLP
WARREN, M.D., DANIEL LARKIN, M.D.,	:	Attorneys for Defendant Xerri
STUART KATZ, M.D. and JOSEPH XERRI,	:	732 Smithtown Bypass, Suite 203
M.D.,	:	Smithtown, New York 11787
	:	
Defendants.	:	WAGNER, DOMAN & LETO, P.C.
	:	Attys for Defts BAB, Lankin & Katz
	:	227 Mineola Boulevard
-----X	:	Mineola, New York 11501

Upon the following papers numbered 1 to 23 read on this motion to amend the answer; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers 9-14; 15-18; Answering Affidavits and supporting papers 19-21; 22-23; Replying Affidavits and supporting papers _____; Other ; ~~and after hearing counsel in support and opposed to the motion~~ it is,

ORDERED that this motion (006) by defendants Devendra Gill, M.D., Daniel Kim, M.D., and Southside Hospital for an order pursuant to CPLR 3217(b) to have the stipulation of discontinuance with prejudice "So Ordered" by this Court, unopposed by plaintiff, is granted to the extent that the complaint as asserted against them is dismissed with prejudice; and it is further

ORDERED that this motion (007) by defendants Joseph Xerri, M.D. for an order pursuant to CPLR 3217(b) to have the stipulation of discontinuance with prejudice "So Ordered" by this Court, unopposed by plaintiff, is granted to the extent that the complaint as asserted against him is dismissed with prejudice; and it is further

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ORDERED that this motion (008) by defendants BAB Radiology and Daniel Lankin, M.D. for an order pursuant to CPLR 3025(b) permitting defendants to amend their answer to plead General Obligations Law §15-108 as an affirmative defense as a set-off is granted to the extent that defendants may serve their amended answer within thirty days of the date of this order. That part of defendants' application to preserve their affirmative defense of Article 16 of the CPLR is denied.

This is an action sounding in medical malpractice wherein plaintiff seeks damages for injuries claimed to have arisen out of the alleged malpractice of defendants premised upon their failure to properly diagnose and treat plaintiff's colon cancer.

Plaintiff executed a Stipulation of Discontinuance dated June 30, 2006, releasing defendants Devendra Gill, M.D., Daniel Kim, M.D., Joseph Xerri, M.D. and Southside Hospital, with prejudice from this action (defendant Gill's exhibit C). That stipulation was signed by counsel for defendants Gill, Kim, Xerri and Southside Hospital, who seek to have the Stipulation "So Ordered" by this Court, as set forth in motions (006) and (007).

CPLR 3217(b) authorizes a voluntary discontinuance by court order on motion of a "party asserting a claim." This provision cannot be the basis for a dismissal motion by a party defending a claim unless the party asserting the claim consents or joins in the motion (*Shamley v ITT Corporation*, 67 NY2d 910, 501 NYS2d 810 [1986]). This matter was settled July 5, 2006, as between the plaintiff and defendant Kim in the amount of \$105,000.00; defendant Gill in the amount of \$210,000.00, and defendant Xerri in the amount of \$35,000.00 (defendant Gill Reply, exhibit A). Plaintiff additionally voluntarily discontinued this action against defendant Dr. Stuart Katz. Defendants BAB Radiology, Lankin and Katz's answers (defendant's exhibit D) have not asserted any cross-claims against defendants Gill, Kim or Southside Hospital.

Accordingly, motions (006) and (007) to "So Order" the Stipulation of Discontinuance with prejudice, (annexed as defendants Gill's, Kim's, Xerri, and Southside Hospital's exhibit C), is granted to the extent that the complaint asserted against defendants Gill, Kim, Southside Hospital and Xerri is dismissed with prejudice.

Counsel for defendants BAB Radiology and Daniel Lankin, M.D. have not signed the Stipulation of Discontinuance, and pursuant to the affirmation of counsel for BAB Nuclear Radiology and Daniel Lankin, M.D., defendants have been advised plaintiff will not discontinue as against them as the remaining tortfeasors.

In motion (008), defendants BAB Radiology and Daniel Lankin, M.D. seek an order pursuant to CPLR 3025(b) permitting them to amend their answers to plead General Obligations Law §15-108 as an affirmative defense as a set off, and to preserve their affirmative defense of Article 16 of the CPLR. In support of the application, the moving defendants have submitted an attorney's affirmation and a copy of their answer dated March 22, 2004. That answer, at paragraph 9, sets forth a third affirmative defense to the causes of actions in the complaint, asserting they will rely upon the provision of article 16 of the CPLR with regard to the limitation of joint and several liability.

Defendants Gill, Kim and Southside Hospital do not object to the proposed amendment by BAB Radiology and Lankin to assert the affirmative defense of a set off under General Obligations Law §15-108, but oppose defendant BAB Radiology and Daniel Lankin's application to preserve their affirmative defense of Article 16 of the CPLR, arguing BAB Radiology, Lankin and Katz's answers (defendant's exhibit D) have not asserted any cross-claims against defendants Gill, Kim or Southside Hospital.

Defendant Joseph Xerri, M.D., adopts the position set forth by co-defendants Gill, Kim and Southside Hospital, and requests that this court deny defendants BAB Radiology and Lankin's motion to the extent that it would allow them to assert cross claims for contribution or indemnification against the defendants who have settled and have been discontinued from this action.

CPLR 3025(b) provides in pertinent part that "[A] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuance.

GOL §15-108 provides, as here relevant, as follows:

(a) When a release or covenant not to sue...is given to one of two or more persons liable or claimed to be liable in tort for the same injury,...it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under [New York's comparative negligence law].

(b) A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in [New York's comparative negligence law].

In the instant action, plaintiff, by stipulation, discontinued the action with prejudice against defendants Gill, Kim, Southside Hospital and Xerri. This discontinuance with prejudice acted as a release within the meaning of GLO §15-108 (*see, Dembitzer v Broadwall Management Corp*, 2005 NY Slip Op 50303U, 6 Misc 3d 1035A, 800 NYS2d 345, 2005NY Misc LEXIS 420; citing *Hanna v Ford Motor Co.*, 252 AD2d 478, 479, 675 NYS2d 125 [2nd Dept [1998]]). As the Court stated in *Dembitzer*, supra, "[T]he release would be of cold comfort...if defendants could still sue it. The statute says they cannot. On the other hand, they, defendants have reaped the enormous benefits of trying a case against 'an empty chair' and of reducing their own liability by the percentage of the empty chair's fault. Thus, everyone has obtained either a distinct legal benefit (defendants...)or the benefit of its bargain (*i.e.*, plaintiff)."

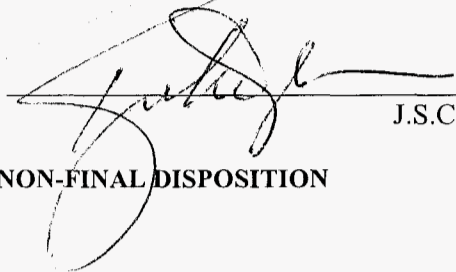
As set forth in *Dembitzer*, supra, "[I]t is hornbook law that common law indemnity can only be had by a party without fault that is being held vicariously liable for the fault of another. 'Where a party is held liable at least partially because of its own negligence, contribution against other culpable tort-feasors is the only available remedy' (*Glaser v M. Fortunoff of Westbury Corp*, 71 NY2d 643, 646, 524 NE2d 413, 529 NYS2d 59[1988]; *accord, Kagan v Jacobs*, 260 AD2d 442, 442-43, 687 NYS2d 732)... In any event, if, at trial, defendants are found to be blameless, they will need neither contribution nor indemnity. If on the other hand, they are found to be partially or wholly to blame, they will only be liable for their comparative share of the damages, rather than be jointly and severally liable for the entire amount of the

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damages, and they will not be entitled to indemnity (because of their fault) or contribution (because the damage award against them will be limited by operation of law).”

Accordingly, motion (008) is granted to the extent that defendants BAB Radiology and Lankin may serve an amended answer within thirty days of the date of this Order wherein they may assert the affirmative defense of GLO §15-108 as a set off. That part of their application which seeks to preserve their affirmative defense of Article 16 with regard to the limitation of joint and several liability is rendered academic based upon the provisions of GLO §15-108 and the Stipulation of Discontinuance entered into between plaintiff and defendants Gill, Kim, Xerri, and Southside Hospital, and is therefore denied.

Dated: MAY 31 2007.



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION