

**Rich v Cohen**

2018 NY Slip Op 34440(U)

August 22, 2018

Supreme Court, Nassau County

Docket Number: Index No. 604646/15

Judge: Antonio I. Brandveen

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This opinion is uncorrected and not selected for official publication.

ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN  
J. S. C.

DAVID RICH, as Administrator of the Estate of  
KELLY HUNTER RICH,

TRIAL / IAS PART 27  
NASSAU COUNTY

Plaintiff,

Index No. 604646/15

- against -

Motion Sequence No. 004

TODD J. COHEN, MD, WINTHROP  
CARDIOLOGY ASSOCIATES, PC,  
WINTHROP UNIVERSITY HOSPITAL, GINA  
C. GRECO, DO, EAST MEADOW FAMILY  
PRACTICE, PC, and PROHEALTH CARE  
ASSOCIATES, LLP,

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1</u>
Answering Affidavits .....	<u>2, 3</u>
Replying Affidavits .....	<u>4</u>
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of

the foregoing papers, including the affirmation in support of the motion with four exhibits, the two affirmations together an exhibit in opposition to it, this motion is decided as follows:

The defendants, Gina C. Greco, DO, East Meadow Family Practice, PC and ProHealth Care Associates, LLP move pursuant to CPLR 3217(b) so ordering the stipulation of discontinuance as to Dr. Greco, East Meadow Family Practice, PC and ProHealth Care Associates, LLP, and dismissing the complaint against Dr. Greco, East Meadow Family Practice, PC and ProHealth Care Associates, LLP. Dr. Greco, East Meadow Family Practice, PC and ProHealth Care Associates, LLP also move to be removed from the case caption.

The defendants, Todd J. Cohen, M.D. and Winthrop Cardiology Associates, P.C. oppose this motion. Dr. Cohen and Winthrop Cardiology Associates, P.C. point to their answer with the affirmative defense of equitable shares of liability to be determined pursuant to CPLR Article 16. Dr. Cohen and Winthrop Cardiology Associates, P.C. assert there is a difference in facts regarding the testimony of Dr. Greco and Dr. Cohen. Dr. Cohen and Winthrop Cardiology Associates, P.C. avers that difference is prejudice to Dr. Cohen's right to pursue apportionment of damages under CPLR Article 16 for any non-economic loss. Dr. Cohen and Winthrop Cardiology Associates, P.C. maintain the difference creates a special circumstance which must be considered by the Court. Dr. Cohen and Winthrop Cardiology Associates, P.C. maintain the stipulation of discontinuance should not be so ordered by the Court.

The defendant, Winthrop University Hospital also opposes this motion. Winthrop University Hospital points to its answer with the affirmative defense of

equitable shares of liability to be determined pursuant to CPLR Article 16. Winthrop University Hospital adopts the assertions by Dr. Cohen and Winthrop Cardiology Associates, P.C.

Dr. Greco, East Meadow Family Practice, PC and ProHealth Care Associates, LLP reply to the opposition by asserting the action should be discontinued, as there is no prejudice to a substantial right of any party or any showing by the opposition of some other unfairness. Dr. Greco, East Meadow Family Practice, PC and ProHealth Care Associates, LLP contend they should not be compelled to litigate without a showing of special circumstances or improper consequences.

Dr. Greco, East Meadow Family Practice, PC and ProHealth Care Associates, LLP point out Winthrop University Hospital's opposition is untimely where the movants demanded opposition at least seven days prior to the return date of this motion. Dr. Greco, East Meadow Family Practice, PC and ProHealth Care Associates, LLP note Winthrop University Hospital's opposition was served two days before the return date. Dr. Greco, East Meadow Family Practice, PC and ProHealth Care Associates, LLP assert the Court should not consider Winthrop University Hospital's opposition.

Dr. Greco, East Meadow Family Practice, PC and ProHealth Care Associates, LLP aver the discontinuance of the action against them would not deprive Dr. Cohen, Winthrop Cardiology Associates, P.C. and Winthrop University Hospital of their CPLR Article 16 rights. Gina C. Greco, DO, East Meadow Family Practice, PC and ProHealth

Care Associates, LLP note, since the other codefendants refused to sign the stipulation of discontinuance, the claims by Dr. Cohen, Winthrop Cardiology Associates, P.C. and Winthrop University Hospital are not dismissed on the merits, so the rights of the opposing codefendants are preserved regarding apportionment under CPLR Article 16. Dr. Greco, East Meadow Family Practice, PC and ProHealth Care Associates, LLP also point out Dr. Cohen, Winthrop Cardiology Associates, P.C. and Winthrop University Hospital never prosecuted any claims against Dr. Greco. Dr. Greco, East Meadow Family Practice, PC and ProHealth Care Associates, LLP add there would be substantial prejudice to Dr. Greco taking part in this litigation where no party has any claims against Dr. Greco.

Dr. Greco, East Meadow Family Practice, PC and ProHealth Care Associates, LLP assert Dr. Cohen, Winthrop Cardiology Associates, P.C. and Winthrop University Hospital failed to submit complete and executed copies of the deposition transcripts and the purported medical record referenced in the opposition. Dr. Greco, East Meadow Family Practice, PC and ProHealth Care Associates, LLP contend the opposition is insufficient because it fails to raise special circumstances or improper consequences regarding the relief sought by the movants.

“The determination of a motion for discontinuance rests within the sound discretion of the court, and is ordinarily granted absent prejudice to a substantial right of the defendant. Further, a court may grant such a motion ‘upon terms and conditions, as

the court deems proper” [citations omitted] (*Conte v. Getty Petroleum Corp.*, 202 A.D.2d 621, 622, 609 N.Y.S.2d 332 [2d Dept. 1994]). Here, Dr. Greco, East Meadow Family Practice, PC and ProHealth Care Associates, LLP satisfy their burden to so order the stipulation of discontinuance as to Dr. Greco, East Meadow Family Practice, PC and ProHealth Care Associates, LLP, and to dismiss the complaint only against them (CPLR 3217[b]). In opposition, neither Dr. Cohen, Winthrop Cardiology Associates, P.C. and Winthrop University Hospital provide any showing of special circumstances, improper consequences nor prejudice to a substantial right of Dr. Cohen, Winthrop Cardiology Associates, P.C. or Winthrop University Hospital regarding the relief sought by the movants (*see generally Marinelli v. Wimmer*, 139 A.D.3d 914, 30 N.Y.S.3d 571 (2d Dept. 2016); *see also Rothenberg v. Congregation Anshei Sfard*, 125 A.D.3d 631, 2 N.Y.S.3d 580 [2d Dept. 2015])). Moreover, the so ordering of the subject stipulation of discontinuance will be subject to the preservation of the rights of Dr. Cohen, Winthrop Cardiology Associates, P.C. and Winthrop University Hospital regarding any equitable share allocation rights pursuant to CPLR Article 16 (*see Moy v. St. Vincent's Hosp. & Med. Ctr. of New York*, 92 A.D.3d 651, 938 N.Y.S.2d 328 (2012); *see also Iervolino v. St. Mary's Hosp. for Children*, 44 Misc. 3d 1219(A), 997 N.Y.S.2d 98 [Sup. Ct., Queens County 2014]).

ORDERED that the motion is GRANTED regarding the stipulation of discontinuance as to Dr. Greco, East Meadow Family Practice, PC and ProHealth Care

Associates, LLP, and dismissing the complaint only against them without costs and disbursements, and it is also,

ORDERED that the action is amended, in accord with the granting of this motion, as to Dr. Greco, East Meadow Family Practice, PC and ProHealth Care Associates, LLP regarding the case caption.

This decision will constitute the decision and order of the Court. All applications not specifically addressed are denied.

So ordered.

Dated: **August 22, 2018**

ENTER:



J. S. C.

NON FINAL DISPOSITION

**ORIGINAL**

**ENTERED**

SEP 17 2018

NASSAU COUNTY  
COUNTY CLERK'S OFFICE