

**Perez v Visiting Nursing Serv. of N.Y.**

2019 NY Slip Op 32524(U)

August 27, 2019

Supreme Court, New York County

Docket Number: 805288/2015

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6

-----X  
LOURDES PEREZ, as Administratrix of the Estate of  
LUCIA OTILIA PEREZ, aka OTILIA PEREZ, Deceased,

Index No.  
805288/2015

Plaintiff,

**DECISION  
and ORDER**

- against -

Mot. Seq. 4

VISITING NURSING SERVICE OF NEW YORK, and  
COMMUNITY HEALTH CARE,

Defendants.

-----X  
VISITING NURSING SERVICES OF NEW YORK,

Third-Party Plaintiff,

- against -

COMMUNITY HOME CARE REFERRAL SERVICE,  
INC.

Third-Party Defendant.

-----X  
HON. EILEEN A. RAKOWER, J.S.C

Third-Party Defendant Community Home Care Referral Service, Inc. (“CHCRS”) moves for an Order pursuant to CPLR § 1010 dismissing the third-party action on the grounds of untimeliness and undue delay, or in the alternative pursuant to CPLR § 1010 severing the third-party action from the primary action. Defendant/Third-Party Plaintiff Visiting Nurse Service Of New York Home Care II, d/b/a Visiting Nurse Service Of New York Home Care, sued herein incorrectly as Visiting Nursing Service Of New York (“VNS”) opposes.

Relevant Background

Plaintiff Lourdes Perez, as Administratrix of the Estate of Lucia Otilia Perez, aka Otilia Perez, Deceased (“Plaintiff”) commenced this medical malpractice action

by filing a Summons and Complaint on July 15, 2015 against VNS and Community Home Care (“CHC”). On August 12, 2015, VNS served its Verified Answer and on September 5, 2015, CHC served its Verified Answer. On August 22, 2017, the action against CHC was discontinued without prejudice by stipulation. On May 9, 2018, the Note of Issue was filed. On or about March 5, 2019, VNS commenced a third-party action against CHCRS. On April 12, 2019, CHCRS served its Third-Party Answer.

### Parties’ Contentions

CHCRS argues that VNS provides no excuse for the “inordinate” delay in filing the third-party complaint. CHCRS asserts that the delay is severely prejudicial. CHCRS contends that CHC was on notice at the October 25, 2016 compliance conference that it was misnamed as a defendant to the action and CHC sent two letters to Plaintiff on March 9, 2016 and October 12, 2016 asking, “whether entity [CHC] was wrongly named as a defendant.” (CHCRS’s Aff. in Support at 5). CHCRS argues that the parties took three years to name CHCRS as a party without justification for the delay. CHCRS asserts that “it is entitled to fully develop a defense” to the direct claims against CHCRS and to the claims of indemnification and contribution. CHCRS contends that the Note of Issue has been filed over a year ago precluding CHCRS from making a summary judgment motion. Furthermore, CHCRS argues that “to force CHCRS into a trial in less the[n] (3) months is patently unfair, and substantially undermines the defendant’s ability to put forth a proper defense.” (CHCRS’s Aff. in Support at 6).

In opposition, VNS argues that the claims in the primary action and the third-party action are “almost identical allegations involving the at-home wound care of the decedent, that was allegedly provided by VNS and CHCRS during the same time frame from February 2014 to March 2014.” (VNS’s Aff. in Opp. at 7). VNS asserts that the factual and legal questions “are so interrelated that the interests of justice and judicial economy call for a single trial.” (*Id.*). Moreover, VNS contends that severance of the actions would be prejudicial. VNS asserts that discovery remains outstanding despite the Note of Issue being filed, non-party witness “Nurse Bojai” has not been deposed. VNS argues that if the cases are severed then the parties would be required to move forward with duplicative depositions and Defendants would be forced to testify at both trials, which would impose hardships and would be a waste of judicial resources.

### Legal Standard

CPLR § 1010 states that,

The court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. In exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party.

Severance of a third-party action “is not warranted when (1) plaintiff will not be prejudiced by delay in the main action, common questions of fact are present, and third-party defendant’s discovery rights can be accommodated; (2) there are common factual and legal issues and judicial economy would be served by having a single trial, and no one established that having a single trial would prejudice a substantial right; (3) a trial court ‘should only sever the actions to prevent prejudice or substantial delay to one of the parties’; and (4) severance is inappropriate unless a showing is made of prejudice to a party’s substantial rights, and in order to ‘avoid the waste of judicial resources and the risk of inconsistent verdicts, it is preferable for related actions to be tried together.’” *Hoffman v Biltmore 47 Associates, LLC*, No. 1080952006, 2014 WL 12756173, at \*2 [Sup. Ct, NY County 2014].

#### Discussion

It is impractical to order separate trials where CHCRS and VNS both rendered care to Decedent from February 2014 to March 2014, the period during which a sacral ulcer is alleged to have developed and worsened. However, discovery is warranted. CHCRS made discovery demands which remain outstanding. VNS and Plaintiff are to respond to the discovery demands dated April 12, 2019 within 20 days. Additionally, all outstanding authorizations shall be provided by September 3, 2019. Plaintiff and non-party witness “Nurse Bojai” shall be deposed on or before September 20, 2019. At the Compliance Conference held on August 27, 2019, CHCRS was unable to articulate any other outstanding discovery.

Wherefore, it is hereby,

ORDERED that Third-Party Defendant Community Home Care Referral Service, Inc.’s motion is denied; and it is further

ORDERED that all outstanding authorization shall be provided to Third-Party Defendant Community Home Care Referral Service, Inc. by September 3, 2019; and it is further

ORDERED that Plaintiff Lourdes Perez, as Administratrix of the Estate of Lucia Otilia Perez, aka Otilia Perez, Deceased and Defendant/Third-Party Plaintiff Visiting Nursing Service Of New York shall respond to Third-Party Defendant Community Home Care Referral Service, Inc.'s discovery demands dated April 12, 2019 within 20 days; and it is further

ORDERED that Plaintiff Lourdes Perez, as Administratrix of the Estate of Lucia Otilia Perez, aka Otilia Perez, Deceased be deposed on or before September 20, 2019; and it is further

ORDERED that non-party witness "Nurse Bojai" shall be deposed on or before September 20, 2019; and it is further

ORDERED that the parties are directed to appear in Part 6, located at 71 Thomas Street, Room 205, on September 10, 2019, at 9:30AM for a compliance conference.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: AUGUST 27, 2019



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Eileen A. Rakower, J.S.C.