

Cuesta v New York City Health & Hosps. Corp.

2019 NY Slip Op 34157(U)

August 21, 2019

Supreme Court, Bronx County

Docket Number: 22880/l6E

Judge: George J. Silver

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

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ROSALIE CUESTA, as Administrator of the Estate of
JOSEPH ODDO, Deceased and ROSALIE CUESTA
Individually,

Plaintiff,

- against -

INDEX NO: 22880/16E

NEW YORK CITY HEALTH & HOSPITALS CORP.,
DEBBIE YANES, M.D., MT. SINAI HOSPITAL,
"JOHN DOE" M.D. (said name being fictitious and
Unknown), MONTEFIORE MEDICAL CENTER/
JACK D. WEILER HOSPITAL OF ALBERT
EINSTEIN COLLEGE OF MEDICINE, DANIELLE
WEINMAN, M.D. and VICTORIA ADEWUNMI, M.D.,

Defendants.

-----X
HON. GEORGE J. SILVER:

This is an action for medical malpractice. Presently before the court is defendant DEBBY YANES, M.D.'s ("Dr. Yanes") motion for an order pursuant to CPLR § 3217 "so-ordering" a stipulation of discontinuance as to Dr. Yanes. Although plaintiff ROSALIE CUESTA ("plaintiff") and Dr. Yanes signed the subject stipulation of discontinuance, defendants MT. SINAI HOSPITAL ("Mt. Sinai"), DANIELLE WEINMAN, M.D. ("Dr. Weinman"), VICTORIA ADEWUNMI, M.D. ("Dr. Adewunmi"), and MONTEFIORE MEDICAL CENTER ("Montefiore") have not signed the stipulation. The non-signing defendants have submitted no opposition to the motion, and are not asserting any cross-claims against Dr. Yanes.

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 records for all parties.” Where a party is unwilling to sign the stipulation, the court may nevertheless order discontinuance under CPLR § 3217(b). CPLR § 3217(b) provides that “an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper.”

The subject stipulation of discontinuance signed by the attorneys for plaintiff and Dr. Yanes, but not by the attorneys for Mt. Sinai, Drs. Weinman and Adewunmi, and Montefiore, constituted a release of Dr. Yanes from the action within the meaning of General Obligations Law § 15--108 (*see* General Obligations Law § 15--303; *Tereshchenko v Lynn*, 36 AD3d 684, 685 [2d Dept. 2007]; *Hanna v Ford Motor Co.*, 252 AD2d 478, 479 [2d Dept. 1998]; *Killeen v Reinhardt*, 71 AD2d 851, 853 [2d Dept. 1979]). Said stipulation served to relieve Dr. Yanes “from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules” (General Obligations Law § 15--108 [b]; *see Rosado v Proctor & Schwartz*, 66 NY2d 21, 24 [1985]; *Tereshchenko*, 36 AD3d at 686, *supra*). However, any verdict in favor of plaintiff and against the remaining defendants will be reduced in the amount of Dr. Yanes equitable share of the damages, if any (*see* General Obligations Law § 15--108 [a]; *Tereshchenko*, 36 AD3d at 686, *supra*; *Killeen*, 71 AD2d at 853, *supra*).

This court, in its sound discretion, has the authority to grant or deny an application to discontinue an action made pursuant to CPLR § 3217(b) (*Tucker v Tucker*, 55 NY2d 378 [1982]). In the absence of special circumstances, such as prejudice to the substantial rights of other parties to the action, a motion for a voluntary discontinuance should be granted (*see Burnham Serv. Corp. v National Council on Compensation Ins.*, 288 AD2d 31, 32 [1st Dept. 2001]; *Citibank v Nagrotsky*,

239 AD2d 456, 457 [2d Dept. 1997]; *County of Westchester v Welton Becket Assocs.*, 102 AD2d 34 [1984], *aff'd* 66 NY2d 642 [1985]). Although CPLR § 3217 (b) authorizes a voluntary discontinuance by court order on motion of “a party asserting a claim,” this provision may not 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 Corp.*, 67 NY2d 910 [1986]).

Here, since the subject stipulation has not been signed by counsel for defendants Mt. Sinai, Drs. Weinman and Adewunmi, and Montefiore, CPLR § 3217(a) is inapplicable. However, CPLR § 3217(b) is applicable, and no co-defendant has submitted opposition specifically attacking the discontinuance of Dr. Yanes from this matter. Therefore, the request to discontinue the action as against Dr. Yanes with prejudice is granted, and the complaint is dismissed as against her. In addition, her name is to be deleted from the caption of this action.

Furthermore, although Dr. Yanes will not be liable for contribution under CPLR Article 14, any verdict in plaintiff's favor and against the remaining defendants will be reduced in the amount of Dr. Yanes equitable share of damages, if any (*see Tereshchenko*, 36 AD3d at 686, *supra*; *Killeen*, 71 AD2d at 853, *supra*). In addition, inasmuch as the instant motion was one for discontinuance pursuant to CPLR § 3217, which is not the functional equivalent of a trial on the merits, the remaining defendants may seek to include any liability attributable to Dr. Yanes as part of the total liability assigned to “all persons liable” for purposes of CPLR Article 16 (*see Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 955 NYS2d 384 [2d Dept. 2012]; *Anderson v House of Good Samaritan Hosp.*, 44 AD3d 135, 840 NYS2d 508 [4th Dept. 2007]).

Accordingly, it is hereby

ORDERED that DEBBY YANES, M.D.'s motion pursuant to CPLR § 3217 for a

court-ordered discontinuance is granted; and it is further

ORDERED that DEBBY YANES, M.D.'s counsel is directed to serve a copy of this order, with notice of entry, on all remaining parties within 20 days of its entry; and it is further

ORDERED that the instant action shall continue as against the remaining defendants; and it is further

ORDERED that the caption of this action is amended to read as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 19A**

-----X

ROSALIE CUESTA, as Administrator of the Estate of
JOSEPH ODDO, Deceased and ROSALIE CUESTA
Individually,

Index No. 22880/16E

-against-

NEW YORK CITY HEALTH & HOSPITALS CORP., MT.
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fictitious and Unknown), MONTEFIORE MEDICAL
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EINSTEIN COLLEGE OF MEDICINE, DANIELLE
WEINMAN, M.D. and VICTORIA ADEWUNMI, M.D.

-----X

; and it is further

ORDERED that the remaining defendants may seek to include any liability attributable to defendant DEBBY YANES, M.D. as part of the total liability assigned to "all persons liable" for purposes of CPLR Article 16; and it is further

ORDERED that the remaining parties are directed to appear for a conference before the court, Part 19A Room 600, on October 30, 2019 at 9:30 a.m.

Dated:

August 21, 2019

George J. Siver
HON. GEORGE J. SIVER, J.S.C.
GEORGE J. SIVER