Thomas v Coghill
2020 NY Slip Op 32131(U)
July 1, 2020
Supreme Court, New York County
Docket Number: 162547/2015E
Judge: George J. Silver

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 10

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ANASTASIA THOMAS and KEIFFE CARSON,

Plaintiff,

- against - INDEX NO: 162547/2015E

ALICE COGHILL, M.D., MIDTOWN PRIMARY CARE, SUZANNE FRASCA, D.O., BETH ISRAEL AMBULATORY CARE SERVICES CORP., ILONA COHEN, M.D., BETH ISRAEL MEDICAL CENTER, MICHELE BALTUS, M.D. and HUNTINGTON MEDICAL GROUP, P.C.,

Defendants.

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HON. GEORGE J. SILVER:

This is an action for medical malpractice. Presently before the court is defendant BETH ISRAEL AMBULATORY CARE SERVICES CORP.'s ("Beth Israel Ambulatory Care") motion for an order pursuant to CPLR § 3217 "so-ordering" a stipulation of discontinuance as to Beth Israel Ambulatory Care, and removing Beth Israel Ambulatory Care from the caption. Although plaintiffs ANASTASIA THOMAS and KEIFFE CARSON ("plaintiffs") and Beth Israel Ambulatory Care signed the subject stipulation of discontinuance, defendants MICHELE BALTUS, M.D. ("Dr. Baltus") and ILONA COHEN, M.D. ("Dr. Cohen") have not signed the stipulation.[1] The non-signing defendants have submitted no opposition to the motion, and are not asserting any cross-claims against Beth Israel Ambulatory Care.

[1] Pursuant to a so-ordered stipulation dated July 10, 2018, the action has been discontinued with prejudice as to defendants ALICE COGHILL, M.D. and MIDTOWN PRIMARY CARE.

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 plaintiffs and Beth Israel Ambulatory Care, but not by the attorneys for Drs. Baltus and Cohen, constituted a release of Beth Israel Ambulatory Care from the action within the meaning of General Obligations Law § 15--108 (*see,* General Obligations Law § 15--303; *Tereshchenko v. Lynn*, 36 A.D.3d 684, 685 [2d Dept. 2007]; *Hanna v Ford Motor Co.*, 252 A.D.2d 478, 479 [2d Dept. 1998]; *Killeen v. Reinhardt*, 71 A.D.2d 851, 853 [2d Dept. 1979]). Said stipulation served to relieve Beth Israel Ambulatory Care "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 A.D.3d at 686, *supra*). However, any verdict in favor of plaintiffs and against the remaining defendants will be reduced in the amount of Beth Israel Ambulatory Care equitable share of the damages, if any (*see,* General Obligations Law § 15--108 [a]; *Tereshchenko*, 36 A.D.3d at 686, *supra*; *Killeen*, 71 A.D.2d 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 A.D.2d 31, 32 [1st Dept. 2001]; *Citibank v.*

Nagrotsky, 239 A.D.2d 456, 457 [2d Dept. 1997]; *County of Westchester v. Welton Becket Assocs*., 102 A.D.2d 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 Drs. Baltus and Cohen, CPLR § 3217(a) is inapplicable. However, CPLR § 3217(b) is applicable, and no co-defendant has submitted opposition specifically attacking the discontinuance of Beth Israel Ambulatory Care from this matter. Therefore, the request to discontinue the action as against Beth Israel Ambulatory Care with prejudice is granted, and the complaint is dismissed as against Beth Israel Ambulatory Care. In addition, Beth Israel Ambulatory Care is to be deleted from the caption of this action.

Furthermore, although Beth Israel Ambulatory Care will not be liable for contribution under CPLR article 14, any verdict in plaintiffs' favor and against the remaining defendants will be reduced in the amount of Beth Israel Ambulatory Care's equitable share of damages, if any (*see, Tereshchenko*, 36 A.D.3d at 686, *supra*; *Killeen*, 71 A.D.2d 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 Beth Israel Ambulatory Care as part of the total liability assigned to "all persons liable" for purposes of CPLR article 16 (*see, Hendrickson v. Philbor Motors, Inc*., 102 A.D.3d 251, 955 NYS2d 384 [2d Dept. 2012]; *Anderson v. House of Good Samaritan Hosp*., 44 A.D.3d 135, 840 NYS2d 508 [4th Dept. 2007]).

Moreover, defendant has suffered measurable prejudice here since it has had to expend the cost of making the instant motion in the face of no credible opposition. Likewise, plaintiff's prosecution of this case has been halted by the needless diversion of the remaining defendants' intransigence towards signing the subject stipulation of discontinuance. Under New York State practice, a court may impose monetary sanctions for "frivolous conduct" (see, e.g., 22 NYCRR § 130–1.1 [authorizing imposition of costs and attorney's fees for engaging in "frivolous conduct"]). Conduct is frivolous under 22 NYCRR section 130–1.1 if it is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" [22 NYCRR § 130–1.1(c)(1)] or it is "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR § 130–1.1(c)(2)), or "it asserts material factual statements that are false" 22 NYCRR § 130–1.1(c)(3). Significantly, in the present case, the remaining co-defendants have managed to run afoul of the provisions within 22 NYCRR section 130–1.1. Indeed, here, where none of the remaining co-defendants have advanced credible opposition, let alone any opposition, to Beth Israel Ambulatory Care's instant request, it is axiomatic that the failure to sign the subject stipulation of discontinuance amounts to "frivolous conduct" that taxes the court's finite resources. As such, the remaining co-defendants are put on notice that the court does not countenance such conduct, and future similar behavior may result in the court awarding costs in connection with applications such as the instant motion.

Accordingly, it is hereby

ORDERED that BETH ISRAEL AMBULATORY CARE SERVICES CORP.'s motion pursuant to CPLR § 3217 for a court-ordered discontinuance is granted; and it is further

ORDERED that BETH ISRAEL AMBULATORY CARE SERVICES CORP.'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 NEW YORK - PART 10

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ANASTASIA THOMAS and KEIFFE CARSON, Index №. 162547/2015E

-against-

SUZANNE FRASCA, D.O., ILONA COHEN, M.D., BETH ISRAEL MEDICAL CENTER, MICHELE BALTUS, M.D. and HUNTINGTON MEDICAL GROUP, P.C.,

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; and it is further

ORDERED that the parties are directed to appear for a virtual conference before the court on July 27, 2020 at 11:30 A.M.

This constitutes the decision and order of the court.

Dated: July 1, 2020

George J. Silver

HON. GEORGE J. SILVER, J.S.C.