

Pletroforte v Belle Harbor Home of the Sages

2020 NY Slip Op 32266(U)

June 16, 2020

Supreme Court, New York County

Docket Number: 805149/2014

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 NEW YORK - PART 10

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HELEN PIETROFORTE, by her legal guardian,
JANET BREW,

Plaintiffs,

- against -

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BELLE HARBOR HOME OF THE SAGES, *et al.*

Defendants.

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HON. GEORGE J. SILVER:

This is an action sounding in allegations of medical malpractice. Presently before the court is defendant GRAMERCY PARK MEDICINE, P.C.'s motion for an order pursuant to CPLR §3217(b) "so-ordering" a stipulation of discontinuance as to defendants and amending the caption by deleting defendants' respective names. Although plaintiff and the majority of defendants have signed the subject stipulation of discontinuance, co-defendants BELLE HARBOR HOME OF THE SAGES, INC. and NORTH-SHORE LONG ISLAND JEWISH HEALTH SYSTEM, INC. and LONG ISLAND JEWISH MEDICAL CENTER ("the non-signing defendants"). At oral argument, the non-signing defendants articulated that they have not signed the stipulation of discontinuance because they are not required to do so. This argument is advanced despite the fact all other defendants have signed the subject stipulation, and the non-signing defendants have asserted no cross-claims asserted against defendant GRAMERCY PARK MEDICINE, P.C.. As no cross-claims exist, it is

axiomatic that the non-signing defendants rights are not prejudiced under CPLR article 16.

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 attorneys for plaintiff and all defendants except the non-signing defendants, constituted a release of defendant GRAMERCY PARK MEDICINE, P.C. 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 defendant GRAMERCY PARK MEDICINE, P.C. "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 v Lynn*, 36 AD3d 684, 686 [2d Dept 2007]). However, any verdict in favor of plaintiff and against the non-signing defendants will be reduced in the amount of defendant GRAMERCY PARK

MEDICINE, P.C.'s 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 the the non-signing defendants, CPLR §3217(a) is inapplicable. However, CPLR §3217(b) is applicable, and none of the non-signing defendants have submitted persuasive opposition attacking the discontinuance of defendant GRAMERCY PARK MEDICINE, P.C. from this matter. Therefore, the request to discontinue the action as against defendant GRAMERCY PARK MEDICINE, P.C., with prejudice, is granted and the complaint is dismissed as against defendant GRAMERCY PARK

MEDICINE, P.C.. In addition, defendant GRAMERCY PARK MEDICINE, P.C.'s name is to be deleted from the caption of this action. Addressing the concerns of the non-signing defendants, although the non-signing defendants will not be liable for contribution under CPLR article 14, any verdict in plaintiffs' favor and against the non-signing defendants will be reduced in the amount of defendant GRAMERCY PARK MEDICINE, P.C.'s 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 the non-signing defendants may seek to include any liability attributable to defendant GRAMERCY PARK MEDICINE, P.C. 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 defendant GRAMERCY PARK MEDICINE, P.C.'s motion pursuant to CPLR §3217 (b) for a court-ordered discontinuance is granted; and it is further

ORDERED that the Clerk of the Court is directed to amend the caption by removing defendant GRAMERCY PARK MEDICINE, P.C.; and it is further

ORDERED that defendant GRAMERCY PARK MEDICINE, P.C.'s counsel is

directed to serve a copy of this order, with notice of entry, and all remaining parties within 20 days of its entry; and it is further

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

ORDERED that the remaining parties are directed to appear for a conference *virtual* before the court at ~~111 Centre Street, New York, NY, Part 10, Room 1227, on~~ July 15, 2020 at 9:30 AM.

Dated:

JUNE 16, 2020

George J. Silver

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

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