

Gopie v Kalra

2020 NY Slip Op 33942(U)

October 8, 2020

Supreme Court, Queens County

Docket Number: 702911/2018

Judge: Peter J. O'Donoghue

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE
Justice

IA Part MD

AMAWATTEE GOPIE, as Guardian for the Personal
Needs and Property Management of AMITA GOPIE,
Incapacitated,
Plaintiff,

x

Index
Number 702911 2018

-against-

Motion
Date September 2, 2020

RAJESH KALRA, M.D., QUEENS URGENT CARE
CENTER, NCR QUEENS URGE CARE
INTERNATIONAL LLC, GORDON ANDAN, M.D.,
NEW YORK SURGICAL ARTS, P.C., SAMUEL
CARUTHERS, M.D., MONOCACY ANESTHESIA
COMPANY, LUIS CENEDESE, M.D., BEAUTE DES
ARTES, LLP, and MARGARITA SURIKOVA, R.N.,

Motion Seq. No. 3

Defendants.

X

The following papers read on this motion by defendants Rajesh Karla, M.D., Queens Urgent Care Center and NCR Queens Urge Care International LLC for an order so-ordering the stipulation of discontinuance without prejudice, dismissing the action against them and deleting these defendants from the caption.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits..... EF 95-105
Opposing Affirmation-Exhibits..... EF 106-109

Upon the foregoing papers this motion is determined as follows:

In this action to recover damages for negligence, medical malpractice and lack of informed consent, plaintiff's counsel and counsel for defendants Rajesh Karla, M.D., Queens Urgent Care Center and NCR Queens Urge Care International LLC executed a stipulation, dated April 9, 2020, to discontinue the within action without prejudice, against said defendants. The stipulation states that there are no cross claims against said defendants. Counsel for defendant Samuel Caruthers, M.D. also executed said stipulation. Counsel for defendants Luis Cenedese M.D., Beaute Des Artes LLP and Margarita Surikova, R.N., and counsel for defendants Gordon Andan, M.D. and New York Surgical Arts have not executed said stipulation. Defendant Monocacy Anesthesia Company has not appeared in this action and has found to be in default pursuant to an order of this court dated, September 27, 2018 and entered on October 16, 2018.

The moving defendants now seek an order discontinuing the action against them pursuant to CPLR 3217 (b), as this action is brought by a guardian on behalf of an incapacitated person, and not all of the defendants have executed the stipulation of discontinuance.

Defendants Luis Cenedese M.D., Beaute Des Artes LLP and Margarita Surikova, R.N., do not oppose the discontinuance of the action against the movents and only seek to reserve all rights afforded to them pursuant to CPLR Articles 14 and 16 and General Obligations Law § 15-108, regarding all potential defenses at the time of trial. The opposing defendants have not interposed any cross claims against the movants, but have each asserted CPLR Articles 14 and 16 as affirmative defenses in their answers.

The remaining defendants who appeared in this action have not submitted opposition to the within motion. It is noted that counsel for the opposing defendants asserts that plaintiff's counsel has purportedly settled the matter as to defendants Gordon Andan, M.D. and New York Surgical Arts, and as to defendant Samuel Caruthers, M.D., but that no such stipulations of settlement have been executed and so-ordered, or filed with the court.

Where a party is not able to discontinue a claim without a court order, the Court has broad discretion pursuant to CPLR 3217 (b) to grant or deny an application to discontinue an action (*Tucker v Tucker*, 55 NY2d 378 [1982]). A motion for should be granted so long as there is no prejudice to the rights of any party (*see Parraguirre v 27th St. Holding, LLC*, 37 AD3d 793 [2nd Dept 2007]; *Burnham Serv. Corp. v National Council on Compensation Ins.*, 288 AD2d 31, 32 [1st Dept 2001]). 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, plaintiff's counsel executed the subject stipulation of discontinuance and plaintiff does

not oppose the within motion.

An order of discontinuance pursuant to CPLR 3217(b) is not the functional equivalent of a trial on the merits. Therefore, the remaining defendants may seek to include any liability attributable to Dr. Karla, Queens Urgent Care Center and NCR Queens Urge Care International LLC, as part of the total liability assigned to “all persons liable” for purposes of CPLR article 16 (*see Belus v Southside Hosp.*, 46 Misc3d 1202 [A] [Sup Ct, Suffolk County 2014]).

The subject stipulation of discontinuance signed by the attorney for plaintiff but not the attorneys for all of the defendants is a release of Dr. Karla, Queens Urgent Care Center and NCR Queens Urge Care International LLC 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]). Thus, said stipulation serves to relieve Karla, Queens Urgent Care Center and NCR Queens Urge Care Center International LLC “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 at 686). However, any verdict in favor of plaintiff and against the remaining defendants will be reduced in the amount of Karla, Queens Urgent Care Center and NCR Queens Urge Care Center International LLC’s equitable share of the damages, if any (*see* General Obligations Law § 15–108 [a]; *Tereshchenko v Lynn*, 36 AD3d at 686; *Killeen v Reinhardt*, 71 AD2d at 853; *Belus v Southside Hosp.*, 46 Misc3d 1202 [A]).

Accordingly, it is **ORDERED** that defendants’ Rajesh Karla, M.D., Queens Urgent Care Center and NCR Queens Urge Care International LLC’s motion for an order discontinuing the action without prejudice, is granted; and it is further

ORDERED that the complaint is dismissed as to defendants Rajesh Karla, M.D., Queens Urgent Care Center and NCR Queens Urge Care International LLC; and it is further

ORDERED that the new caption shall read as follows:

(SEE NEXT PAGE)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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AMAWATTEE GOPIE, as Guardian for the Personal
Needs and Property Management of AMITA GOPIE,
Incapacitated,

Index Number 702911 2018

Plaintiff,

-against-


GORDON ANDAN, M.D., NEW YORK SURGICAL
ARTS, P.C., SAMUEL CARUTHERS, M.D.,
MONOCACY ANESTHESIA COMPANY,
LUIS CENEDESE, M.D., BEAUTE DES
ARTES, LLP, and MARGARITA SURIKOVA, R.N.,

Defendants.

-----X

and it is further **ORDERED** that the remaining defendants may seek to include any liability attributable to defendants Rajesh Karla, M.D., Queens Urgent Care Center and NCR Queens Urge Care International LLC as part of the total liability assigned to "all persons liable" for purposes of CPLR article 16.

Dated: October 8, 2020


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J.S.C.

FILED & RECORDED
10/8/2020
2:17 PM
COUNTY CLERK
QUEENS COUNTY