

Della-Mura v White Plains Hosp. Med. Ctr.
2022 NY Slip Op 31085(U)
March 31, 2022
Supreme Court, New York County
Docket Number: Index No. 805297/2019
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

ANTHONY DELLA-MURA, Plaintiff, INDEX NO. 805297/2019, MOTION DATE 02/01/2022, MOTION SEQ. NO. 002

- v -

WHITE PLAINS HOSPITAL MEDICAL CENTER, THE WHITE PLAINS HOSPITAL, THE MOUNT VERNON HOSPITAL, VISITING NURSE SERVICE OF NEW YORK, VISITING NURSE SERVICE OF NEW YORK HOME CARE, BENJAMIN BROWN, M.D., ADAM WHITEHEAD, M.D., SUSAN CUSHIN, M.D., JOHN CAPPA, M.D., HOWARD MIZRACHI, M.D., FRED A CHU, M.D., FOTIS NIFOROS, M.D., ANDREW DEROGATIS, M.D., ELIOT RHEE, M.D., PETER CHU, D.O., DIANA SCHECTER, M.D., and WHITE PLAINS OUTPATIENT WOUND CARE CENTER,

DECISION + ORDER ON MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128

were read on this motion to/for DISMISSAL

In this action to recover damages for medical malpractice, the defendants White Plains Hospital Medical Center, White Plains Hospital, Adam Whitehead, M.D., Freda Chu, M.D., Peter Chu, D.O., Susan Cushin, M.D., Andrew Derogatis, M.D., Howard Mizrachi, M.D., Fotis Niforos, M.D., Eliot Rhee, M.D., and White Plains Outpatient Wound Care Center (collectively the White Plains defendants) move for leave to enter judgment dismissing the complaint insofar as asserted against them, with prejudice. The defendants Visiting Nurse Service of New York and Visiting Nurse Service of New York Home Care (together the VNS defendants), in papers incorrectly denominated as a cross motion, separately move for the same relief as to them. The defendant John Cappa, M.D., in papers incorrectly denominated as a cross motion, also separately moves for the same relief as to him. The plaintiff did not oppose the motions. The

motions are granted, and the White Plains defendants, the VNS defendants, and Cappa may enter judgment dismissing the complaint insofar as asserted against each of them, with prejudice.

By order dated April 21, 2020, as amended July 14, 2020, the court (Rakower, J.) granted the motion of the plaintiff's attorney for leave to withdraw as his counsel, and directed the parties appear for a remote preliminary conference, which was ultimately adjourned until September 8, 2020. The plaintiff, however, failed to appear at that conference. By order dated September 14, 2020, the court directed the plaintiff to respond, within 20 days, to certain enumerated discovery requests that were then outstanding, and rescheduled the remote preliminary conference for October 27, 2020. In that order, the court cautioned the plaintiff that his "failure to respond to the outstanding discovery and/or appear at the compliance conference on October 27, 2020 may result in dismissal." When the plaintiff failed to respond to the outstanding discovery requests or appear for the rescheduled remote preliminary conference, the court (Rakower, J.), by order dated October 27, 2020, directed that

"the action is dismissed without prejudice. The action may be restored within one year with an affirmation of a medical expert who attests that there is merit to the claims. One year from the date of this order, if the case . . . has not been otherwise restored, Defendants can move for a judgment dismissing the action with prejudice."

The plaintiff did not restore the action by October 27, 2021, and the White Plains defendants, the VNS defendants, and Cappa now all seek leave to enter a judgment dismissing the complaint with prejudice insofar as asserted against them. The plaintiff did not oppose their respective motions.

The court notes that neither the VNS defendants' motion nor Cappa's motion was a proper cross motion because those parties did not seek relief against a moving party; instead, their motions were, in effect, separate motions (*see* CPLR 2215; *Asiedu v Lieberman*, 142 AD3d 858, 858 [1st Dept 2016]; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]; *Guzetti v City of New York*, 32 AD3d 234 [1st Dept 2006]; *Gaines v Shell-Mar Foods*,

Inc., 21 AD3d 986 [2d Dept 2005]; *Sheehan v Marshall*, 9 AD3d 403 [2d Dept 2004]; *Lucheux v William Macklowe Co., LLC*, 2017 NY Slip Op 31044[U], 2017 NY Misc LEXIS 187 [Sup Ct, N.Y. County, May 11, 2017]). CPLR 2214(b) requires such a separate motion to be made on at least eight days' notice. The mislabeling of a motion as a cross motion, however, may be treated as a "technical" defect to be disregarded, particularly where the nonmoving party does not object and the consideration of the application results in no prejudice to the nonmoving party (see *Sheehan v Marshall*, 9 AD3d at 404). In any event, the VNS defendants uploaded their notice of cross motion to the NYSCEF electronic filing system on December 1, 2021, and Cappa uploaded his notice of cross motion on December 2, 2021, dates that were both more than eight days prior to the December 17, 2021 return date. Hence, these motions can be heard as properly noticed motions.

Because all of the movants are simply seeking to enforce the terms of Justice Rakower's October 27, 2020 order, the motions must be granted. Inasmuch as not all of the defendants moved for leave to enter a judgment, the court shall sever the action against each set of movants so that they may enter separate judgments.

Accordingly, it is

ORDERED that the motion of the defendants White Plains Hospital Medical Center, White Plains Hospital, Adam Whitehead, M.D., Freda Chu, M.D., Peter Chu, D.O., Susan Cushin, M.D., Andrew Derogatis, M.D., Howard Mizrachi, M.D., Fotis Niforos, M.D., Eliot Rhee, M.D., and White Plains Outpatient Wound Care Center for leave to enter a judgment dismissing the complaint insofar as asserted against them, with prejudice, is granted, the action against the defendants White Plains Hospital Medical Center, White Plains Hospital, Adam Whitehead, M.D., Freda Chu, M.D., Peter Chu, D.O., Susan Cushin, M.D., Andrew Derogatis, M.D., Howard Mizrachi, M.D., Fotis Niforos, M.D., Eliot Rhee, M.D., and White Plains Outpatient Wound Care Center is severed, and the Clerk of the court is directed to enter judgment dismissing the complaint, with prejudice, insofar as asserted against the defendants White Plains Hospital

Medical Center, White Plains Hospital, Adam Whitehead, M.D., Freda Chu, M.D., Peter Chu, D.O., Susan Cushin, M.D., Andrew Derogatis, M.D., Howard Mizrachi, M.D., Fotis Niforos, M.D., Eliot Rhee, M.D., and White Plains Outpatient Wound Care Center; and it is further,

ORDERED that the separate motion of the defendants Visiting Nurse Service of New York and Visiting Nurse Service of New York Home Care for leave to enter a judgment dismissing the complaint insofar as asserted against them, with prejudice, is granted, the action against the defendants Visiting Nurse Service of New York and Visiting Nurse Service of New York Home Care is severed, and the Clerk of the court is directed to enter judgment dismissing the complaint, with prejudice, insofar as asserted against the defendants Visiting Nurse Service of New York and Visiting Nurse Service of New York Home Care; and it is further,

ORDERED that the separate motion of the defendant John Cappa, M.D., for leave to enter a judgment dismissing the complaint insofar as asserted against him, with prejudice, is granted, the action against the defendant John Cappa, M.D., is severed, and the Clerk of the court is directed to enter judgment dismissing the complaint, with prejudice, insofar as asserted against the defendant John Cappa, M.D.

This constitutes the Decision and Order of the court.



JOHN J. KELLEY, J.S.C.

3/31/2022
DATE

MOTION:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER	
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	
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MOTION 2:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER	
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	
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MOTION 3:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>		