

Galpern v Giglio

2023 NY Slip Op 30474(U)

February 15, 2023

Supreme Court, New York County

Docket Number: Index No. 153365/2021

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN

PART 58

Justice

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INDEX NO. 153365/2021

TAMARA GALPERN,

MOTION SEQ. NO. 002

Plaintiff,

- v -

**DECISION + ORDER ON
MOTION**

GRAZIANO D. GIGLIO DDS, JANE DOE,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for

RENEWAL

In this intentional tort and dental malpractice action, defendants move, pursuant to CPLR 2221(e), for leave to renew their motion to dismiss the complaint. Plaintiff opposes.

Factual and Procedural Background

As set forth in this Court's August 8, 2022 order (NYSCEF Doc No. 38), plaintiff commenced this action in April 2021 after she was allegedly injured during a dental procedure at defendant Giglio D. Graziano's place of business, asserting causes of action for dental malpractice and various intentional torts (NYSCEF Doc No. 1). Following joinder of issue (Doc Nos. 7, 9), defendants moved to, among other things, dismiss the complaint, arguing that plaintiff failed to timely file a certificate of merit and notice of dental malpractice action (Doc No. 21).

By decision and order of August 8, 2022, this Court denied the motion, and directed plaintiff to pursue one of two options: (1) file a certificate of merit to continue pursuing her dental malpractice claim, or (2) discontinue such claim (Doc No. 38). Shortly thereafter, plaintiff filed a unilateral notice of discontinuance signed only by her attorney (Doc No. 39). Defendants move for leave to renew their original motion and seek, among other things, an order compelling plaintiff

to either file a certificate of merit, file a stipulation of discontinuance executed by all parties, or amend her complaint and bill of particulars to remove references to Graziano's "duties and negligence as a dentist" (Doc No. 42).

Legal Analysis and Conclusions

Defendants contend that plaintiff's unilateral notice of discontinuance is insufficient to discontinue her dental malpractice claim because the CPLR requires either a voluntary discontinuance executed by all parties or a court order made upon motion, neither of which happened here.

Plaintiff contends that her notice of discontinuance is sufficient pursuant to CPLR 3217(b) because it came after a court order.

Generally, a motion for leave to renew may only be granted when the moving party has demonstrated the existence of new facts not offered on the original motion, and that such facts would change the prior determination (*see* CPLR 2221(e); *Innovative Concepts & Design, LLC v AL Infinity, LLC*, 209 AD3d 609, 610 [1st Dept 2022]). However, such motions are addressed to the sound discretion of the trial court (*see Wang v LaFrieda*, 189 AD3d 732, 732 [1st Dept 2020], *lv dismissed* 37 NY3d 1042 [2021]), and renewal may be granted in the interest of justice "so as not to 'defeat substantive fairness'" (*Metcalf v City of New York*, 223 AD2d 410, 411 [1st Dept 1996], quoting *Lambert v Williams*, 218 AD2d 618, 620-621 [1st Dept 1995]; accord *Garner v Latimer*, 306 AD2d 209, 209-210 [1st Dept 2003]).

Here, plaintiff was required to file a certificate of merit within 30 days of service of this Court's August 8, 2022 order with notice of entry, or discontinue her dental malpractice claim. Her failure to timely file such certificate, and her attempt to discontinue the claim by filing a unilateral notice of discontinuance, evidence her intent to no longer pursue her malpractice claim,

and she will suffer no prejudice if it is discontinued. Although defendants offer no new facts or change in the law that would traditionally warrant a grant of leave to renew, the interest of justice requires as much to ensure substantive fairness (*see Global Liberty Ins. Co. v Larunceau*, 187 AD3d 570, 571-572 [1st Dept 2020] [granting renewal after plaintiff provided evidence that motor vehicle accident staged by defendants]; *Garner*, 306 AD2d at 210 [granting renewal after party inadvertently failed to include physician's affidavit and opposing party not prejudiced]). Therefore, defendants' motion for leave to renew is granted, and, upon renewal, plaintiff's dental malpractice claim is dismissed.

The parties' remaining contentions are either without merit or need not be addressed given the findings set forth above.

Accordingly, it is hereby:

ORDERED that defendants' motion for leave to renew is granted, and, upon renewal, the branch of the motion seeking dismissal of the complaint is granted to the extent that plaintiff's ninth cause of action for dental malpractice is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's ninth cause of action against defendants for dental malpractice is severed, and the action shall continue against defendants as limited herein; and it is further

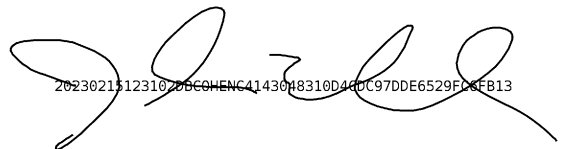
ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on*

Courthouse and County Clerk Procedures for Electronically Filed Case (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the branch of the motion seeking to compel plaintiff to provide discovery responses is granted to the extent of directing an in-person conference with the Court; and it is further

ORDERED that the parties shall appear for a conference in person at 71 Thomas Street, Room 305, at 10:00 a.m. on March 14, 2023.



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2/15/2023

DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: