SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. HASA A. KINGO** **PART** **05M**

Justice

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PAUL FRANTZ, KATHLEEN SUZANNE MADDEN,

Plaintiff,

- v -

RAUL FIRPO, JONATHAN KORNGOLD, THE CITY OF NEW YORK

Defendant.

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INDEX NO. 151063/2024

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to DISCONTINUE.

Upon the foregoing papers, Plaintiffs' motion, pursuant to CPLR § 3217 (b), for leave to discontinue the action as against defendant The City of New York (the "City"), and the opposition thereto, is decided as follows.

BACKGROUND AND PROCEDURAL HISTORY

This is an action sounding in negligence to recover damages for injuries allegedly sustained in an accident on February 24, 2023. Plaintiffs commenced the action under Index No. 151063/2024 against defendants Raul Firpo, Jonathan Korngold, and the City. Defendants Firpo and Korngold interposed an answer with cross claims on June 4, 2024. The City interposed its answer on September 19, 2025.

The record reflects that Plaintiffs previously moved for a default judgment against the City on September 17, 2025; the City answered on September 19, 2025; Plaintiffs then sought to withdraw the default motion; and the court granted the withdrawal on October 21, 2025.

As to discovery, Plaintiffs represent that they served a bill of particulars and responses to combined demands on defendants Firpo and Korngold in July 2024, but have not served discovery responses on the City; no preliminary conference has been held; and no depositions have been scheduled.

ARGUMENTS

Plaintiffs contend that a motion for leave to discontinue is addressed to the court's sound discretion and is generally granted absent substantial prejudice, circumvention of a court order,

avoidance of an adverse determination, or other improper result. Plaintiffs argue that the action is in its early stages and that discontinuance as to the City will not prejudice the remaining defendants.

Defendants Firpo and Korngold oppose discontinuance *with prejudice*, principally on the ground that they have asserted cross claims against the City, and that the case is in its infancy—before a preliminary conference and before depositions—such that discontinuance with prejudice would substantially prejudice their ability to explore potential municipal liability and, if warranted, implead the City.

They argue, alternatively, that any discontinuance should be without prejudice.

In reply, Plaintiffs maintain that the opposition does not supply admissible proof of prejudice warranting denial; however, Plaintiffs expressly state that, should the court find prejudice, they do not oppose discontinuance against the City without prejudice.

DISCUSSION

CPLR § 3217 (b) provides that, after issue is joined, an action may be discontinued "by leave of the court" upon such terms and conditions as the court deems proper. A motion for leave to discontinue is entrusted to the court's discretion (see *Tucker v Tucker*, 55 NY2d 378 [1982]; *Turco v Turco*, 117 AD3d 719 [2d Dept 2014]; *GMAC Mtge., LLC v Bisceglie*, 109 AD3d 874 [2d Dept 2013]).

That discretion, however, is not unbounded. Courts generally grant discontinuance absent a showing that it would prejudice a substantial right of another party, circumvent an order of the court, avoid the consequences of a potentially adverse determination, or produce other improper results (see *Jamaica Hosp. Med. Ctr., Inc. v Oxford Health Plans [NY], Inc.*, 58 AD3d 686 [2d Dept 2009]; *Kaplan v Village of Ossining*, 35 AD3d 816 [2d Dept 2006]; *DuBray v Warner Bros. Records*, 236 AD2d 312 [1st Dept 1997]).

Here, the record does not demonstrate that Plaintiffs seek discontinuance to evade a court order, to gain an unfair litigation advantage, or to avoid an imminent adverse determination of the kind that has warranted denial in other contexts (see, e.g., *Baez v Parlavay Mobile Homes, Inc.*, 125 AD3d 905 [2d Dept 2015]; *Montalto v Colgate Scaffolding Corp.*, 128 AD3d 916 [2d Dept 2015]; *Rothenberg v Congregation Anshei Sfard*, 125 AD3d 631 [2d Dept 2015]; *Tucker*, 55 NY2d 378).

Indeed, discovery has not meaningfully commenced: no preliminary conference has been held and no depositions have been scheduled.

At the same time, the opposition raises a legitimate concern as to prejudice if discontinuance were granted *with prejudice*. Defendants Firpo and Korngold have asserted cross claims against the City, and the litigation remains at a stage where party depositions and municipal discovery—if ultimately relevant—have not yet occurred.

Under these circumstances, discontinuance with prejudice could, as a practical matter, impair the remaining defendants' ability to pursue contribution and/or indemnification theories that may be informed by discovery, and could foreclose the opportunity to bring the City back into the litigation if facts later warrant such relief.

The court therefore exercises its discretion to permit discontinuance as against the City, but without prejudice, which appropriately balances Plaintiffs' request to remove the City as a party at this juncture against the remaining defendants' interest in preserving their litigation options as discovery proceeds. Notably, Plaintiffs expressly do not oppose discontinuance without prejudice if the court finds prejudice in a with-prejudice discontinuance.

Finally, because the City will no longer be a party to the case upon entry of this order, administrative reassignment to a non-City part is appropriate.

Accordingly, it is

ORDERED that Plaintiffs' motion is granted to the extent that Plaintiffs' claims against defendant THE CITY OF NEW YORK are discontinued, without prejudice; and it is further

ORDERED that the discontinuance as against defendant THE CITY OF NEW YORK includes any and all claims asserted against it in this action, and defendant THE CITY OF NEW YORK is severed and discontinued as a party at this juncture; and it is further

ORDERED that Plaintiffs shall serve a copy of this decision and order, with notice of entry, upon all appearing parties, and upon the Clerk of the Court, within 20 days of entry; and it is further

ORDERED that, upon such service, the Clerk of the Court shall amend the caption by deleting THE CITY OF NEW YORK therefrom; and it is further

ORDERED that, upon entry and service of this decision and order with notice of entry, this matter is referred to a non-City part for all further proceedings, as the City is no longer a party to this action at this juncture; and it is further

ORDERED that the caption shall hereafter read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------x
PAUL FRANTZ and KATHLEEN SUZANNE MADDEN,

Plaintiffs,

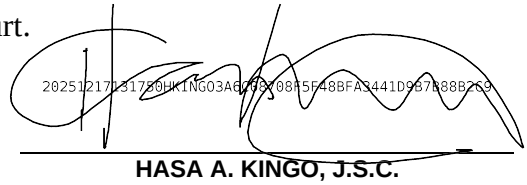
-against-

RAUL FIRPO and JONATHAN KORNGOLD,

Defendants.

----------x

This constitutes the decision and order of the court.



12/17/2025
DATE

HASA A. KINGO, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:	X	INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE