

Forte-Bochman v Zingale
2025 NY Slip Op 35354(U)
February 3, 2025
Supreme Court, Suffolk County
Docket Number: Index No. 205206/2022
Judge: Maureen T. Liccione
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Short Form Order

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SUPREME COURT – STATE OF NEW YORK
PART 78 – SUFFOLK COUNTY

P R E S E N T:

Hon. Maureen T. Liccione
Justice Supreme Court

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HEATHER FORTE-BOCHMAN, and
SAMANTHA BOCHMAN, as Co-Executrix of
the ESTATE of KATHLEEN N. FORTE,
Deceased, and HEATHER FORTE-BOCHMAN,
and SAMANTHA BOCHMAN, Individually,

Plaintiffs,

-against-

ROBERT G. ZINGALE, M.D., ROBERT G.
ZINGALE, M.D., P.L.L.C., MOUNT SINAI
HEALTH SYSTEM, MOUNT SINAI
PHYSICIANS LONG ISLAND, ICAHN
SCHOOL OF MEDICINE AT MOUNT,
JESSICA L. CAPORUSCIO, M.D., WILLIAM
MARTIN, M.D., CHRISTINE BLAINE, M.D.,
CHRISTINE BLAINE, M.D., P.C., and
CHRISTINE BLAINE, M.D., P.C., d/b/a
BLAINE PLASTIC SURGERY,

Defendants.
-----X

Mot. Seq. No. 001 – MD
Orig. Return Date: 12/4/2024
Mot. Submit Date: 12/4/2024

PLAINTIFFS' ATTORNEY

SULLIVAN PAPAIN BLOCK
MCMANUS COFFINAS &
CANNAVO, PC
1140 Franklin Avenue, Suite 200
Garden City, NY 11530

DEFENDANTS' ATTORNEYS

KELLY RODE & KELLY, LLP
Attorneys for Robert G. Zingale, M.D.,
and Robert G. Zingale, M.D., P.L.L.C.,
330 Old Country Road, Suite 305
Mineola, NY 11501

HEIDELL PITTONI MURPHY &
BACH, LLP

Attorneys for Mount Sinai Health
System, Mount Sinai Physicians Long
Island, ICAHN School of Medicine at
Mount Sinai, Jessica L. Caporuscio,
M.D., and William Martin, M.D.
99 Park Avenue
New York, NY 10016

BENVENUTO & GAUJEAN
Attorneys for Christine Blaine, M.D.,
Christine Blaine, M.D., P.C., and
Christine Blaine, M.D., P.C., d/b/a
Blaine Plastic Surgery
1800 Northern Blvd.
Roslyn, NY 11576

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Upon the e-filed documents numbered 68, and 74 through 96 and due deliberation, it is determined as follows:

ORDERED that the motion by defendants Robert G. Zingale, M.D. and Robert G. Zingale, M.D. PLLC is denied; and it is further

ORDERED that the parties **shall appear for a conference on March 6, 2025 at 9:30 a.m. at the Alan D. Oshrin Supreme Court Building, Court Annex Part 78, 1 Court Street, Riverhead, New York 11901** and that said date shall not be adjourned.

This is an action for medical malpractice and lack of informed consent against the defendants Robert G. Zingale, M.D., Robert G. Zingale, M.D. PLLC, Mount Sinai Health System, Mount Sinai Physicians Long Island, Icahn School of Medicine at Mount Sinai, Jessica L. Caporuscio, M.D., William Martin, M.D., Christine Blaine, M.D., Christine Blaine, M.D., P.C., and Christine Blaine, M.D., P.C., d/b/a Blaine Plastic Surgery. Plaintiffs argue that defendants failed to timely and properly diagnose Stage IV invasive skin cancer, and continuously misdiagnosed an open wound on the decedent's back as a pressure ulcer when the wound was actually skin cancer. Defendants have filed their answers.

Defendants Robert G. Zingale, M.D. and Robert G. Zingale, M.D. PLLC (collectively Dr. Zingale) now move to request that the Court "so order" a stipulation of discontinuance with prejudice as to Dr. Zingale and to remove Dr. Zingale from the caption, or in the alternative, should the Court decline to grant the aforesaid relief, for an order extending the movants' time to move for summary judgment ninety (90) days from the filing of said order with notice of entry. The proposed stipulation of discontinuance as to Dr. Zingale was filed on NYSCEF on October 9, 2024 (Stipulation). The Stipulation was only signed by the attorneys for plaintiffs and Dr. Zingale, but not the other defendants. The Stipulation includes language that the defendants Mount Sinai Health System, Mount Sinai Physicians Long Island, Icahn School of Medicine at Mount Sinai, Jessica L. Caporuscio, M.D., William Martin, M.D., Christine Blaine, M.D., Christine Blaine, M.D., P.C., and Christine Blaine, M.D., P.C., d/b/a Blaine Plastic Surgery (collectively Remaining Defendants) will not assert any claims of negligence or medical malpractice against Dr. Zingale during the litigation of the action, and that "all of the named parties in the case will waive any right to a reduction of liability and damages, which might otherwise arise from said discontinuance

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pursuant to the provisions of General Obligations Law § 15-108” (NYSCEF Doc No. 68). The Stipulation also states that it is not valid unless it is signed by counsel for all parties.

Dr. Zingale argues that Stipulation signed by the attorneys for plaintiffs and Dr. Zingale, but not by the attorneys for the Remaining Defendants, constitutes a release of Dr. Zingale from the action within the meaning of General Obligations Law § 15-303, and that this Court has the authority to grant or deny an application to discontinue an action made pursuant to CPLR 3217 (b). Dr. Zingale also points out that none of the Remaining Defendants has any crossclaims against Dr. Zingale.

Defendants Mount Sinai Health System, Icahn School of Medicine at Mount Sinai s/h/a Mount Sinai Physicians Long Island, Jessica L. Caporuscio, M.D., and William Martin, M.D. (collectively Mount Sinai) filed a partial opposition to Dr. Zingale’s motion. Mount Sinai argues that the Stipulation, which contains additional language not typically included in a stipulation of discontinuance, would impermissibly preclude the rights of the Remaining Defendants under General Obligations Law § 15-108, CPLR Articles 14 and 16. Mount Sinai further contends that even though plaintiffs’ counsel has chosen to discontinue Dr. Zingale from this litigation, it is still possible that the trier of fact could find that the care he provided to the decedent deviated from the standard of care, and as such, the Remaining Defendants would be entitled to an equitable share of damages or to contribution and/or a reduction of any verdict for Dr. Zingale’s presumed liability. The answer filed by Mount Sinai asserted the affirmative defenses of CPLR Article 16 and New York General Obligations Law Section 15-108.

Defendants Christine Blaine, M.D., Christine Blaine, M.D., P.C., and Christine Blaine, M.D., P.C., d/b/a Blaine Plastic Surgery (collectively Dr. Blaine) also partially oppose the motion based on similar grounds.

With limited exceptions not applicable here, “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” (CPLR 3217 [b]; *Reid v Brown*, 165 AD3d 949, 950 [2d Dept 2018]). “[W]hether an application to discontinue an action pursuant to CPLR 3217(b) should be granted lies within the sound exercise of the court’s discretion ... and such should be entered ‘upon terms and conditions, as the court deems proper’” (*Reid*, 165 AD3d at 950, quoting *Fiacco v Engler*, 79 AD3d 1206, 1207 [3d Dept 2010]; see also *U.S. Bank Nat. Assn. v Cockfield*, 143 AD3d 889, 890 [2d Dept 2016]).

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In tort actions involving multiple defendants where a plaintiff settles with one or more defendants before trial, and proceeds to trial against the remaining defendants, General Obligations Law § 15–108 (a) permits non-settling defendants a monetary offset against the amount of a verdict (*Whalen v Kawasaki Motors Corp.*, 92 NY2d 288, 292 [1998]). Specifically, General Obligations Law § 15–108 (a) states that “[w]hen a release ... is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor’s equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest” (General Obligations Law § 15–108 [a]). Section 15-108 was generally designed to foster settlements in multiple party tort cases by prescribing the effects of the settlement and altering rules of law which were not conducive to the negotiating process (*McDermott v City of New York*, 50 NY2d 211, 219–20 [1980]).

General Obligations Law § 15–108 (b) further provides that “A release given in good faith by the injured person to one tortfeasor as provided in General Obligations Law § 15–108(a) relieves him 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]; *Ziviello v O’Boyle*, 90 AD3d 916, 917 [2d Dept 2011]). Subdivision (b) deals with the released tortfeasor and precludes a claim for contribution from being asserted against him (*McDermott*, 50 NY2d at 220). Furthermore, a tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person (General Obligation Law § 15-108 [c]).

Among the requirements for a release to fall within the ambit of General Obligations Law § 15–108 is that “the plaintiff ... receive[], as part of the agreement, monetary consideration greater than [\$1]” and “the release or covenant completely or substantially terminates the dispute between the plaintiff ... and the person who was claimed to be liable” (General Obligations Law § 15–108 [d] [1], [2]; *McCarthy v. Kerrigan*, 178 AD3d 1342, 1343 [3d Dept 2019]; *see also Nicotra v CNY Fam. Care, LLP*, 184 AD3d 1191, 1194 [4th Dept 2020]).

Here, the Remaining Defendants do not object to the discontinuance of the action against Dr. Zingale, but object to the language contained in the Stipulation, which they argue unjustly denies the Remaining Defendants’ rights under CPLR Article 14 and 16, and General Obligations

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Law § 15–108. The Court agrees with the Remaining Defendants that the language included in the Stipulation prejudices the rights of the Remaining Defendants under General Obligations Law § 15–108.

The Stipulation specifically provides that the Remaining Defendants “waive any right to a reduction of liability and damages, which might otherwise arise from said discontinuance pursuant to the provisions of General Obligations Law § 15-108” (NYSCEF Doc No. 68). However, pursuant to General Obligations Law § 15-108 (c), when a plaintiff settles an action with one defendant, the recovery against the remaining defendants shall be reduced by the amount of the settlement or by the settling tortfeasor’s equitable share of the damages, whichever is greater (*Boeke v Our Lady of Pompei Sch.*, 73 AD3d 825, 827 [2d Dept 2010]). Dr. Zingale provided no arguments or case law in support of this Court requiring the Remaining Defendants to waive their rights under General Obligations Law § 15-108, which they have asserted as affirmative defenses in their respective answers. Furthermore, such a waiver clause is not common for a stipulation of discontinuance.

The Court notes that the Remaining Defendants argue that their rights to contribution pursuant to CPLR Article 14 are also prejudiced by the language of the Stipulation. However, pursuant to General Obligations Law § 15-108 (b), the Remaining Defendants, as non-settling tortfeasors, may not seek contribution from Dr. Zingale, as the released tortfeasor (*see Ziviello v O’Boyle*, 90 AD3d 916, 917 [2d Dept 2011]; *Tereshchenko v Lynn*, 36 AD3d 684, 686 [2d Dept 2007]; *Mead v Bloom*, 94 AD2d 423, 425 [4th Dept 1983], *affd.*, 62 NY2d 788 [1984]).

Furthermore, the record fails to disclose whether the plaintiffs received monetary consideration greater than \$1, let alone, any monetary consideration for the release of Dr. Zingale from this action, so it is unclear whether General Obligations Law § 15-108 even applies (*see* General Obligations Law § 15–108 [d] [1], [2]; *McCarthy*, 178 AD3d at 1343).

Accordingly, the branches of Dr. Zingale’s motion requesting that the Court “so-order” the Stipulation filed as NYSCEF Doc No. 68 and remove Dr. Zingale from the caption are denied. Since the Remaining Defendants do not appear to object to a discontinuance against Dr. Zingale, the parties are free to agree on a stipulation of discontinuance that does not contain language that affects the rights of the Remaining Defendants under General Obligations Law § 15-108.

The branch of Dr. Zingale’s motion seeking an extension of the movants’ time to move for summary judgment is also denied. Pursuant to CPLR 3212 (a), movant has one hundred twenty

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days after the filing of the note of issue to file a summary judgment motion. Here, no note of issue has been filed yet so an extension of the time to file a summary judgment motion is unnecessary. Therefore, Dr. Zingale's motion is denied in its entirety.

The foregoing constitutes the decision and Order of the Court.

ENTER

DATE: February 3, 2025
Riverhead, NY


HON. MAUREEN T. LICCIONE, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION