| **Andrade v 120 Fulton Invs. LLC** |
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| 2026 NY Slip Op 31584(U) |
| April 15, 2026 |
| Supreme Court, New York County |
| Docket Number: Index No. 156501/2018 |
| Judge: Hasa A. Kingo |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. HASA A. KINGO** **PART** **65M**

***Justice***

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ADRIAN ANDRADE,

Plaintiff,

- v -

120 FULTON INVESTORS LLC,CP V TS FULTON OWNER, LLC,AND TIME SQUARE CONSTRUCTION, INC.,

Defendant.

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**INDEX NO.** 156501/2018

**MOTION DATE** N/A, N/A, N/A

**MOTION SEQ. NO.** 008 009 010

**AMENDED DECISION + ORDER ON MOTION**

CP V TS FULTON OWNER, LLC

Plaintiff,

-against-

U.S. CRANE & RIGGING, LLC

Defendant.

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Third-Party
Index No. 595374/2019

CP V TS FULTON OWNER, LLC

Plaintiff,

-against-

NYC CRANE HOIST & RIGGING LLC

Defendant.

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Second Third-Party
Index No. 595664/2021

CP V TS FULTON OWNER, LLC

Plaintiff,

-against-

STEVEN TOULIOUPOLOS, SUSAN DISTASIO, ANDREW MEROLA

Defendant.

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Third Third-Party
Index No. 596191/2025

The following e-filed documents, listed by NYSCEF document number (Motion 008) 275, 276, 277, 281, 282, 283, 284, 285

were read on this motion to/for SEVER ACTION.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 287, 288, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 289, 290, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312

were read on this motion to/for DISMISSAL.

Plaintiff Adrian Andrade ("plaintiff") moves (Motion Seq. 008) pursuant to CPLR §§ 603 and 1010 to sever and dismiss the third-party claims asserted by defendant CP VTS Fulton Owner, LLC ("CP VTS") against non-party Drs. Susan Distasio and Steven John Toulioupolos. Dr. Susan Distasio (Motion Seq. 009) and Dr. Steven Toulioupolos (Motion Seq. 010) (collectively "the Doctors") move pursuant to CPLR §§ 3211(a)(3) and (a)(7) to dismiss CP VTS's third-party complaint in its entirety. CP VTS opposes all motions.

## BACKGROUND AND PROCEDURAL HISTORY

This personal injury action arises from a January 24, 2018 construction accident at the Flushing Transit Center. Plaintiff, a construction worker, sustained injuries when an L-shaped steel component (subcontracted by CP VTS Fulton Owner, LLC but not installed by CP VTS) allegedly shifted or fell while being lifted by a spider crane. Plaintiff sued defendants 120 Fulton Investors LLC (property owner), CP VTS Fulton Owner, LLC (general contractor), Times Square Construction, Inc. (subcontractor), and others under Labor Law §§ 200, 240(1) and common-law negligence. After discovery, and long after plaintiff's note of issue was filed, CP VTS filed a third-party complaint against Dr. Distasio and Dr. Toulioupolos (the Doctors), who had provided post-accident medical care to plaintiff. CP VTS's third-party complaint alleges (1) that the Doctors rendered "inappropriate and unnecessary" treatment to plaintiff, aggravating his injuries, and (2) that CP VTS is entitled to contribution or indemnification from them.

Plaintiff now seeks to sever these third-party claims or dismiss them (since they were interposed more than six years after the accident and well after close of discovery). The Doctors each move to dismiss CP VTS's pleading, arguing (*inter alia*) that CP VTS lacks any duty from a doctor (no doctor-patient relationship or other special duty), and that its contribution claim is time-barred. CP VTS opposes, contending (among other things) that severance is not warranted, and that its claims are legally permissible and timely.

## ARGUMENTS

Plaintiff argues that CP VTS unduly delayed seeking to implead the Doctors, waiting six years since the accident and after plaintiff's claim was fully litigated, and that CP VTS has not shown any prejudice from a joint trial. Under CPLR § 603, plaintiff contends severance is appropriate "in furtherance of convenience or to avoid prejudice," especially given that the main

action (a Labor Law case) and CP VTS's malpractice/contribution claims involve wholly unrelated facts. Plaintiff further invokes CPLR § 1010, asserting the court may dismiss or sever third-party claims "to avoid prejudice" where, as here, impleader was tardy (the third-party complaint was filed long after discovery closed). Plaintiff notes CP VTS's delay (allegedly waiting until the eve of trial) and argues CP VTS had actual knowledge of any malpractice issues long before filing; severance, plaintiff claims, will prevent unfair surprise and conserve judicial resources.

CP VTS, by contrast, argues that severance would unfairly deprive it of its cross-claims. CP VTS contends the Doctors' treatment is directly relevant to plaintiff's damages and thus intertwined with the accident. CP VTS also asserts its claims were timely and prudent: it only learned of the relevant facts after reviewing medical records and deposing plaintiff's doctors. With respect to the motions to dismiss, CP VTS disputes that it has no standing or duty. It argues there is no categorical bar to impleading a treating physician, and that the third-party complaint does not just allege an "overtreatment" theory but seeks contribution because the Doctors allegedly created additional harm. CP VTS contends the Doctors' objections (no doctor-patient relationship) are misplaced because *Davis v South Nassau Communities Hosp.*, 26 NY3d 563 (2015), recognized certain third-party duties. Finally, CP VTS argues its contribution claim is timely: contribution accrues at judgment, and since the underlying case is unresolved, no statute of limitations has run.

In reply, the Doctors emphasize that under settled law they owe no duty to CP VTS (a non-patient), so CP VTS's malpractice claim fails as a matter of law. They argue *Davis*'s narrow rule (duty to warn others of dangerous medication) is inapposite. The Doctors also note that, even if a duty existed, CP VTS's contribution claim would be barred by the six-year limitation for claims not otherwise specified (CPLR § 213[1]). They seek dismissal of all CP VTS claims.

## DISCUSSION

### A. Severance of Third-Party Claims (Plaintiff's Motion Seq. 008)

Under CPLR § 603, *"[i]n furtherance of convenience or to avoid prejudice"* a court "may order a separate trial of any claim or issue" (emphasis added). Whether to sever is a matter of judicial discretion, to be exercised sparingly. The moving party bears the burden of showing it would be prejudiced by keeping the claims together, or that convenience warrants separate trials. The court should deny severance if common issues of law or fact exist and if judicial economy favors a single trial. Conversely, severance is appropriate where the claims arise from distinct events with no overlapping issues.

Here, CP VTS's third-party claims (medical malpractice and contribution arising from post-accident treatment) are entirely unrelated to the facts of the construction accident at issue in plaintiff's Labor Law claim. The accident involved a structural failure while hoisting an *L*-shaped steel component; CP VTS's claims turn on alleged malpractice in a medical facility weeks later. There are no material common facts or legal theories. Indeed, the Appellate Division, First Department, has approved severance in analogous circumstances. For example, in *High Definition MRI, P.C. v Mapfre Ins. Co. of N.Y.*, 148 AD3d 470, 471 (1st Dept 2017), the court granted severance where dozens of *unrelated* no-fault claims (against a surety) involved no common issues, citing *Radiology Resource Network, P.C. v. Fireman's Fund Ins. Co*., 12 AD3d 185 (1st

Dept 2004). Likewise, *Radiology Resource Network* held that unrelated claims not sharing factual or legal issues require or permit severance (*id*.). Here too, the medical issues (e.g., standard of care for surgery or dosage of pain medication) are wholly distinct from the crane accident (e.g., sufficiency of fall protection under Labor Law § 240[1]). No overlap in witnesses, evidence, or law appears. In light of that, the interests of judicial economy and consistency point to separate proceedings.[1]

Moreover, plaintiff has shown potential prejudice if the third-party claims remain. CP VTS filed its third-party complaint years after discovery closed (indeed, after plaintiff's bill of particulars was served and depositions completed). Defendants had no notice of these claims during most of the action and would be forced to litigate new, unrelated claims without meaningful preparation. Courts have recognized that such undue delay warrants severance or dismissal under CPLR § 1010. CPLR § 1010 permits dismissal or separate trial of a third-party claim "to avoid prejudice" when impleader would unduly delay the main action. This statutory "safety valve" is triggered especially where a third-party plaintiff has "knowingly and deliberately delayed" commencing the third-party action. Here CP VTS waited nearly six years after the accident (and two years after the court set this case for trial) before impleading the Doctors. It offers no satisfactory explanation for the delay; indeed, CP VTS's own submissions suggest it had knowledge of the alleged medical issues long before. In *Morales v. 88th Ave. Owner, LLC*, 244 AD3d 1098 (2d Dept 2025), the Appellate Division, Second Department, held that a four-year voluntary delay in filing a tardy third-party complaint warranted dismissal under CPLR § 1010. The same principles apply here. Plaintiff is entitled either to a separate trial of CP VTS's third-party claims or to have those claims dismissed without prejudice so that CP VTS may pursue them in a separate action, thereby avoiding any prejudice to the pending trial.

For these reasons, plaintiff's motion to sever and dismiss the third-party claims is granted. The third-party complaint is severed from this action. In accordance with CPLR §§ 603 and 1010, CP VTS's third-party claims against Drs. Distasio and Toulioupolos are dismissed. The court finds that dismissal rather than separate trial is just, given CP VTS's egregious delay.

**B. Distasio's Motion to Dismiss (Motion Seq. 009)**

Dr. Distasio seeks dismissal of CP VTS's third-party complaint under CPLR § 3211(a)(3) and (a)(7). The court addresses the key arguments.

First, as a threshold matter, Dr. Distasio contends CP VTS lacks standing because CP VTS is neither the patient nor in privity with any patient. This is effectively a challenge to duty and merits. It is settled that "the sine qua non of a medical malpractice claim is the existence of a doctor–patient relationship," which gives rise to any duty (*Fox v. Marshall*, 88 AD3d 131, 138 [2d Dept 2011]). Absent such a relationship or other special circumstances, a physician owes no duty of care to third parties. As the Court of Appeals has made clear, and the Appellate Division, Second Department has since reiterated, where an injured party is not a patient of the defendant physicians, the pleaded facts do not establish the existence of a duty of care owed by those physicians to that individual (*McNulty v. City of New York*, 100 NY2d 227 [2003]; *Baker v. Inamdar*, 99 AD3d 742,

[1] By contrast, in *Luckey v. City of New York*, 177 AD3d 460, 460 (1st Dept 2019), the court affirmed denial of severance when common facts linked claims.

744 [2d Dept 2012]). Here, CP VTS does not claim any doctor–patient relationship (indeed, CP VTS is a company, not a person), nor does it claim any special relationship (e.g. familial or contractual) with the Doctors. CP VTS's theory is that the Doctors negligently treated Plaintiff and thus CP VTS is entitled to contribution, but without a doctor–patient relationship any duty to plaintiff – and hence any liability – is absent.

The Court of Appeals decision in *Davis v. South Nassau Communities Hosp.*, 26 NY3d 563 (2015), does recognize a narrow third-party duty: medical providers who medicate a patient and then release her into traffic owe a duty to foreseeable victims of impaired driving. *Davis* held that warning a patient about drug side effects creates a foreseeable public peril, imposing a duty to identifiable motorists. But *Davis* turned on its unique facts – administering powerful sedatives without warning, immediately before the patient drove off and caused a motor-vehicle accident. The Court stressed its decision was limited and reiterated that any expansion of duty must be approached cautiously. Here, CP VTS makes no allegation analogous to *Davis*. The Doctors did not knowingly create a public danger; they simply treated Plaintiff's injuries. Plaintiff's injuries (and any supposed "exacerbation" by treatment) do not remotely involve the kind of immediate peril to third parties that *Davis* contemplated. Absent *Davis*-type facts, the prevailing rule remains that a doctor's duty is ordinarily to her patient only. CP VTS has not alleged any basis to shift that rule. Under *Purdy v. Public Adm'r of County of Westchester*, 72 NY2d 1, 8–9 (1988) (quoted in *Davis*) and related cases, New York courts reject a general duty to third persons absent a special relationship. No such relationship or special circumstance has been alleged here. Accordingly, CP VTS's claims of malpractice or negligence against Dr. Distasio fail for lack of duty.

Second, Dr. Distasio argues CP VTS's contribution claim is untimely. Contribution claims are derivative of an underlying liability and are governed by CPLR § 1403; the general limitation is six years for an action "for which no specific statute of limitations is prescribed." Even if CP VTS had a cognizable claim, a contribution claim accrues at the time the party seeking contribution would first become liable (typically upon payment of a judgment or settlement). Here, CP VTS filed its cross-claim well over six years after the accident and apparently without any final adjudication against it. Thus, by the Doctors' calculation under CPLR § 213(1), the six-year period has long passed.[2] In any event, if CP VTS has no underlying malpractice liability (as above), there is nothing to contribute toward. Contribution lies only if joint liability exists; without an underlying obligation, no cause of action for contribution arises. Under all standards, CP VTS's contribution claim cannot survive.

Because CP VTS's third-party claims fail as a matter of law (no duty, no underlying liability, and in any event untimely), Dr. Distasio's motion is granted. The third-party complaint is dismissed as against Dr. Distasio in its entirety, with prejudice as to reassertion in this action.[3]

**C. Toulioupolos's Motion to Dismiss (Motion Seq. 010)**

[2] To the extent CP VTS argues the limitations did not start running until judgment, that would only beg the question – CP VTS would still need to show it even had a liability or judgment before a contribution claim could accrue.

[3] CP VTS may attempt to raise any cognizable claims against the Doctors in a separate action, subject to any statute of limitations defense in that forum.

Dr. Steven John Toulioupolos's motion presents the same arguments and legal issues as Dr. Distasio's. For the reasons discussed, CP VTS's third-party complaint fails against him as well. CP VTS alleges no duty owed by Dr. Toulioupolos to anyone other than his actual patient (plaintiff), and no special relationship to impose one. CP VTS's malpractice claim against Dr. Toulioupolos is therefore deficient. Its contribution claim likewise lacks a valid basis and is time-barred.

In short, CP VTS has pled neither a legal malpractice claim nor any viable contribution claim against Dr. Toulioupolos. Accordingly, Dr. Toulioupolos's motion is granted, and CP VTS's third-party complaint is dismissed as to him with prejudice in this action.

For the foregoing reasons, Plaintiff's motion (Seq. 008) is granted. CP VTS's third-party claims against Drs. Distasio, Toulioupolos, and Merola are severed and dismissed (CPLR §§ 603, 1010). Defendants Dr. Distasio's and Dr. Toulioupolos's motions (Seqs. 009–010) are likewise granted. CP VTS's third-party complaint is dismissed in its entirety with respect to both Doctors, with prejudice, for failure to state any legally cognizable claim. It is therefore

ORDERED, that the motion of Plaintiff ADRIAN ANDRADE (Motion Seq. 008) to sever the third third-party action asserted against STEVEN TOULIOUPOLOS, SUSAN DISTASIO, and ANDREW MEROLA is granted, and the third third-party claims asserted by CP VTS against third third-party defendants STEVEN TOULIOUPOLOS, SUSAN DISTASIO, and ANDREW MEROLA are severed from the main action and dismissed; and it is further

ORDERED, that the motions of third third-party defendants SUSAN DISTASIO (Motion Seq. 009) and STEVEN TOULIOUPOLOS (Motion Seq. 010) to dismiss are granted in their entirety, and the third third-party complaint of CP VTS against SUSAN DISTASIO and STEVEN TOULIOUPOLOS is dismissed in its entirety, with prejudice; and it is further

ORDERED, that by virtue of the foregoing, the entire third third-party action commenced by CP VTS is dismissed in its entirety as against third third-party defendants STEVEN TOULIOUPOLOS, SUSAN DISTASIO, and ANDREW MEROLA, and no claims asserted by CP VTS against any of those defendants shall remain pending in this action; and it is further

ORDERED, that service of a copy of this decision and order with notice of entry shall be made upon all parties within twenty (20) days of entry; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of third third-party defendants STEVEN TOULIOUPOLOS, SUSAN DISTASIO, and ANDREW MEROLA, and against third third-party plaintiff CP VTS, dismissing the third third-party complaint asserted by CP VTS against STEVEN TOULIOUPOLOS, SUSAN DISTASIO, and ANDREW MEROLA in its entirety, with costs and disbursements to those defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED, that the parties shall appear for an IN-PERSON Settlement Conference on April 22, 2026, at 11:30 a.m., in Room 308, 80 Centre Street, New York, New York 10013; and it is further

ORDERED, that the plaintiff and the insurance carriers must be present in person at the settlement conference. No exceptions shall be permitted; and it is further

ORDERED, that all attorneys appearing at the conference must be fully familiar with the facts of the case, the applicable law governing the claims and defenses, and comparable case values sustained by the Appellate Division; and it is further

ORDERED, that all attorneys must be:

1. Authorized to enter into substantive and procedural stipulations on behalf of their clients;
2. Authorized to enter into a disposition of the case; and
3. Prepared to schedule a firm trial date, pursuant to 22 NYCRR § 202.72 (b); and it is further

ORDERED, that prior to the conference, counsel shall consult their schedules, as well as those of their clients and anticipated witnesses, so that a firm trial date may be set if the matter does not resolve; and it is further

ORDERED, that each party shall prepare a short memorandum, to be emailed to the court no less than three (3) days prior to the conference, setting forth the following information:

1. The last demand and offer;
2. A brief description of the case, and any affirmative defenses anticipated to be raised at trial;
3. A statement listing the major injuries alleged;
4. The number and specialty of all expert witnesses that the party intends to call at trial;
5. A brief analysis of appellate cases, including citations, in which an appellate court discussed the sustained value of similar injuries (non-economic damages); and it is further

ORDERED, that counsel shall provide the court with business cards, each including the attorney's cell phone number and the name of the client represented; and it is further

ORDERED, that if this matter has been discontinued or settled prior to the scheduled conference date, counsel shall promptly notify the court and file an appropriate stipulation of discontinuance or stipulation of settlement.

This constitutes the decision and order of the court.

4/15/2026
DATE

HASA A. KINGO, J.S.C.

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