

Ferenczi v Grayson

2026 NY Slip Op 31995(U)

May 8, 2026

Supreme Court, New York County

Docket Number: Index No. 805046/2024

Judge: Hasa A. Kingo

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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. HASA A. KINGO PART 65M

Justice

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DIANE FERENCZI,

Plaintiff,

- v -

DOUGLAS K. GRAYSON, JENNIFER M. PETERSON,
ELANA S. ROSENBERG, AMNEH KADDOUR, OMNI EYE
SURGERY OF NEW YORK, P.C., OMNI EYE SERVICES
OF NEW JERSEY, INC., RETINAL AMBULATORY CENTER
OF NEW YORK, INC.

Defendant.

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INDEX NO. 805046/2024
MOTION DATE 04/30/2026
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 47, 48, 49, 50, 51, 52, 53, 54, 55, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this motion to DISCONTINUE.

Defendant Elana S. Rosenberg, M.D. (“Dr Rosenberg”) moves, pursuant to CPLR § 3217(b), for an order discontinuing this action with prejudice as against her, so-ordering the stipulation of discontinuance executed by plaintiff as to Dr. Rosenberg, amending the caption to delete Dr. Rosenberg as a named defendant, and granting such other and further relief as the court deems just and proper. The motion is granted to the extent set forth below.

BACKGROUND AND PROCEDURAL HISTORY

This medical malpractice action arises from allegations concerning plaintiff Diane Ferenczi’s (“plaintiff”) postoperative ophthalmologic care following cataract surgery performed on or about January 25, 2022. Plaintiff commenced this action by filing a summons and complaint on February 15, 2024, naming, among others, Dr. Rosenberg as a defendant. Dr. Rosenberg interposed an answer on April 19, 2024. The moving papers represent that no co-defendant asserted any cross-claim against Dr. Rosenberg.

In support of the motion, Dr. Rosenberg submits her affidavit, in which she states that she is a physician licensed to practice medicine in New York and that she was an anterior segment eye surgeon at Omni Eye Services of New York, Inc. during the relevant period. Dr. Rosenberg avers that she does not recall ever treating plaintiff, that she reviewed the medical records and physician schedules for the relevant time period, and that those records confirm she was never scheduled to see plaintiff. She further states that she did not render care or treatment to plaintiff, did not interact with plaintiff, did not author any chart notes concerning plaintiff, did not communicate with any provider about plaintiff’s care, and did not consult regarding plaintiff’s treatment.

Plaintiff agreed to discontinue the action against Dr. Rosenberg and executed a stipulation of discontinuance with prejudice. Counsel for Dr. Rosenberg then sought the signatures of the remaining parties. The motion papers state that counsel for defendants Jennifer M. Peterson, O.D. and Amneh Kaddour, O.D. declined to execute the stipulation because they wished to preserve their clients' rights under CPLR article 16. Dr. Rosenberg therefore moves by court order pursuant to CPLR § 3217(b).

ARGUMENT

Dr. Rosenberg argues that CPLR § 3217 permits discontinuance by court order where, as here, the plaintiff has agreed to discontinue against a defendant but one or more parties will not execute the stipulation required by CPLR § 3217(a)(2). She contends that plaintiff's consent is demonstrated by plaintiff's execution of the stipulation of discontinuance and that no co-defendant will be prejudiced because no co-defendant has asserted any cross-claim against her. Dr. Rosenberg further argues that she should not remain burdened by the continued defense of an action in which plaintiff no longer seeks to pursue claims against her, particularly where her affidavit establishes that she did not treat plaintiff, consult regarding plaintiff, communicate about plaintiff's care, or otherwise participate in the care at issue.

The non-signing co-defendants' stated concern, as described in the moving papers, is the preservation of CPLR article 16 rights. The record before the Court does not reflect any substantive opposition establishing that discontinuance with prejudice as against Dr. Rosenberg would extinguish any pleaded claim for affirmative relief against her, nor does it reflect any cross-claim asserted against her by any co-defendant.

DISCUSSION

CPLR § 3217 recognizes that a plaintiff may voluntarily discontinue an action without court order in limited circumstances, including by filing a stipulation signed by the attorneys of record for all parties, but where such a stipulation cannot be obtained, discontinuance may be granted only by order of the court and upon such terms and conditions as the court deems proper (CPLR § 3217[a][2], [b]; *Tucker v Tucker*, 55 NY2d 378, 383 [1982]; *Shamley v ITT Corp.*, 67 NY2d 910, 911 [1986]). The statute vests the court with discretion to determine whether discontinuance should be allowed and on what terms, and that discretion is to be exercised in a manner that prevents legal prejudice to an adverse party while recognizing that a plaintiff ordinarily should not be compelled to continue litigating against a party whom plaintiff no longer wishes to pursue (*Tucker*, 55 NY2d at 383; *Shamley*, 67 NY2d at 911).

Courts have repeatedly instructed that a motion for voluntary discontinuance should generally be granted unless the party opposing discontinuance demonstrates special circumstances, such as prejudice to a substantial right, improper manipulation of the forum, evasion of an adverse determination, or other concrete legal prejudice beyond the ordinary consequences of being required to defend remaining claims (*Expedite Video Conferencing Servs., Inc. v Botello*, 67 AD3d 961, 961 [2d Dept 2009]; *Wells Fargo Bank, N.A. v Fisch*, 103 AD3d 622, 622 [2d Dept 2013]). Mere reluctance to consent, standing alone, is not a sufficient basis to deny discontinuance where

no legally cognizable prejudice has been shown (*Tucker*, 55 NY2d at 383; *Shamley*, 67 NY2d at 911).

Measured against these principles, the record supports discontinuance with prejudice as against Dr. Rosenberg. Plaintiff has agreed to discontinue the action against Dr. Rosenberg, and plaintiff's consent is evidenced by the executed stipulation annexed to the motion. No party has demonstrated that discontinuance would deprive it of any pending cross-claim or independent cause of action against Dr. Rosenberg. To the contrary, the moving papers state that no co-defendant asserted cross-claims against Dr. Rosenberg. Where no cross-claims exist, discontinuance of plaintiff's direct claims against one defendant does not adjudicate any affirmative claim belonging to a co-defendant, because there is no such pleaded claim before the court to preserve or extinguish.

The co-defendants' apparent concern regarding CPLR article 16 does not warrant denial of the motion on this record. CPLR article 16 addresses limitation of joint liability for noneconomic loss and, where applicable, permits consideration of equitable shares of culpability subject to the statutory framework and its exceptions (CPLR § 1601; *Rangolan v County of Nassau*, 96 NY2d 42, 46 [2001]; *Chianese v Meier*, 98 NY2d 270, 275 [2002]). A defendant's generalized desire to preserve article 16 arguments at trial does not, without more, require that a plaintiff continue to litigate direct claims against a defendant whom plaintiff has agreed to dismiss with prejudice. The proper treatment of any article 16 issue, including whether and how a remaining defendant may seek apportionment against a nonparty or former party, is a matter governed by CPLR article 16, the pleadings, the proof, and any timely trial applications. It is not a basis, on this record, to compel plaintiff and Dr. Rosenberg to remain in active litigation where plaintiff has discontinued the claims against her and no cross-claims have been asserted.

Nor does the record suggest any gamesmanship, surprise, or evasion of an imminent adverse determination. Dr. Rosenberg has submitted an affidavit explaining that she did not treat plaintiff, did not participate in plaintiff's care, did not consult regarding plaintiff, did not communicate with providers regarding plaintiff, and did not author any records concerning plaintiff. While the court need not reach the ultimate merits of any malpractice claim against Dr. Rosenberg to resolve this CPLR § 3217(b) motion, her affidavit reinforces the practical and equitable basis for permitting discontinuance where plaintiff has already elected not to proceed against her. Courts are not required to keep a party in litigation merely to preserve another party's perceived tactical advantage, particularly where no pleaded cross-claim or concrete legal prejudice is identified (*Tucker*, 55 NY2d at 383; *Shamley*, 67 NY2d at 911).

Accordingly, the branch of the motion seeking discontinuance with prejudice as against Dr. Rosenberg is granted. The branch of the motion seeking to so-order the stipulation of discontinuance is granted to the extent that the court grants discontinuance by this order pursuant to CPLR §3217(b). The caption shall be amended to delete Dr. Rosenberg as a defendant. The request for costs is denied, as the record does not establish that any party's refusal to execute the stipulation was frivolous, sanctionable, or otherwise sufficient to justify an award of costs in the court's discretion.

Accordingly, it is hereby

ORDERED that the motion of defendant Elana S. Rosenberg, M.D. is granted to the extent that this action is discontinued with prejudice as against defendant Elana S. Rosenberg, M.D.; and it is further

ORDERED that the action is severed and shall continue as against the remaining defendants; and it is further

ORDERED that the caption is amended to delete Elana S. Rosenberg, M.D. as a defendant; and it is further

ORDERED that the amended caption shall read as follows:

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

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DIANE FERENCZI,

Plaintiff,

-against-

DOUGLAS K. GRAYSON, JENNIFER M. PETERSON,
AMNEH KADDOUR, OMNI EYE SURGERY OF NEW
YORK, P.C., OMNI EYE SERVICES OF NEW JERSEY,
INC., and RETINAL AMBULATORY SURGERY
CENTER OF NEW YORK, INC.,

Defendants.

-----X
; and it is further

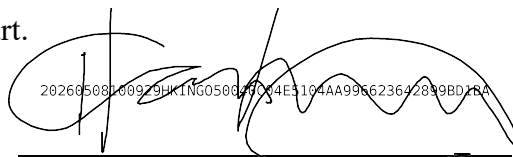
ORDERED that counsel for Dr. Rosenberg shall serve a copy of this decision and order with notice of entry upon all parties and upon the Clerk of the Court, who shall amend the caption accordingly; and it is further

ORDERED that the branch of the motion seeking costs is denied; and it is further

ORDERED that the remaining parties shall appear for all previously scheduled conferences and comply with all existing discovery and scheduling orders unless otherwise directed by the court.

This constitutes the decision and order of the court.

5/8/2026
DATE


HASA A. KINGO, J.S.C.

CHECK ONE:

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CASE DISPOSED

GRANTED

DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: