

**Weil v Peters**

2017 NY Slip Op 32570(U)

December 5, 2017

Supreme Court, New York County

Docket Number: 805021/2016

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6

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Alex Weil,

Plaintiff,

Index No.  
805021/2016

**DECISION and  
ORDER**

- against -

Mot. Seq. 001

M. Robert Peters, Advanced Cardiovascular Imaging d/b/a,  
Carnegie Hill Radiology, Bernard Kruger and Bernard  
Kruger, M.D., P.C.,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Alex Weil (“Weil”) commenced this medical malpractice action by summons and complaint on January 13, 2016 against Defendants M. Robert Peters (“Peters”), Advanced Cardiovascular Imaging d/b/a, Carnegie Hill Radiology (“ACI”), Bernard Kruger (“Kruger”) and Bernard Kruger, M.D., P.C. (“Kruger P.C.”). Weil alleges that the Defendants departed from accepted standards of medical practice when they failed to diagnose his stage IV esophageal cancer. Weil filed the note of issue on or about September 27, 2017.

Presently before the Court is Kruger and Kruger P.C.’s Order to Show Cause for an Order pursuant to CPLR 3217 (b) “So-ordering” a stipulation of discontinuance as to them only. Although Weil signed the stipulation, Peters and ACI have not. In partial opposition, Peters and ACI assert that they do not oppose the so-ordering of the stipulation, however they request that the Court preserve their Article 16 rights. Peters and ACI have not raised any cross-claims against Kruger or Kruger P.C. No reply is submitted.

CPLR 3217 (b) Standard

CPLR 3217 (b) provides that “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.” “While the determination upon such an application is generally within the sound discretion of the court, a party ordinarily cannot be compelled to litigate and, absent special circumstances, such as prejudice to adverse parties, a discontinuance should be granted.” (*Burnham Service Corp. v National Council on Compensation Ins., Inc.*, 288 AD2d 31, 32 [1st Dept 2001].) However, CPLR 3217 (b) “cannot be the basis for a dismissal motion by a party defending a claim unless the party asserting the claim consents or joins in the motion.” (*Shamley v ITT Corp.*, 67 NY2d 910, 912 [1986].)

### Article 16

CPLR 1601 provides,

“when a verdict or decision in an action or claim for personal injury is determined in favor of a claimant in action involving two or more tortfeasors jointly liable . . . and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss<sup>[1]</sup> . . .”

“The purpose of the statute was to ‘remedy the inequities created by joint and several liability on low-fault, deep pocket defendants.’” (*Chianese v Meier*, 98 NY2d 270, 275 [2002].) CPLR 1601 therefore “modifies the common-law rule of joint and several liability by making a joint tortfeasor whose share of fault is 50% or less liable for plaintiff's noneconomic loss only to the extent of that tortfeasor's share of the total noneconomic loss.” (*id.*) “In effect, low fault tortfeasors are liable only for their actual assessed share of responsibility, rather than the full amount of plaintiff's non-economic loss.” (*id.*)

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<sup>1</sup> Noneconomic losses are defined in CPLR 1600 as pain and suffering, mental anguish, loss of consortium and “other damages for non-economic loss.”

In *Belus v Southside Hosp.* (2014 NY Slip Op 51776(U), \*2 [Sup Ct, Suffolk County 2014]), defendant Scott Wodicka, M.D., moved for an order pursuant to CPLR 3217 (b) granting him a court-ordered discontinuance and dismissal of the complaint as against him. The remaining defendants submitted an affirmation in partial opposition indicating that they did not oppose the dismissal of the plaintiff's claims against Dr. Wodicka however they requested that the court reserve their rights under Article 16 of the CPLR. (*id.* at 1) The court granted the discontinuance and stated, "inasmuch as the instant motion was one for discontinuance pursuant to CPLR 3217, which is not the functional equivalent of a trial on the merits, the remaining defendants may seek to include any liability attributable to Dr. Wodicka as part of the total liability assigned to "all persons liable" for purposes of CPLR article 16." (*id.* at 2)

### Discussion

Preliminarily, CPLR 3217 (b) is a proper basis for Kruger and Kruger P.C.'s instant Order to Show Cause because plaintiff Weil signed the stipulation of discontinuance and does not oppose this motion. (*see Shamley v ITT Corp.*, 67 NY2d 910, 912 [1986].) There has been no showing of special circumstances such as prejudice to adverse parties. (*see Burnham Service Corp. v National Council on Compensation Ins., Inc.*, 288 AD2d 31, 32 [1st Dept 2001].) Indeed, Peters and ACI do not oppose the so-ordering of the stipulation and they have not raised any cross-claims against Kruger or Kruger P.C. Peters and ACI only ask that the Court preserves their rights under Article 16. Accordingly, "the remaining defendants may seek to include any liability attributable to [Kruger and Kruger P.C.] as part of the total liability assigned to "all persons liable" for purposes of CPLR article 16." (*Belus v Southside Hosp.* (2014 NY Slip Op 51776(U), \*2 [Sup Ct, Suffolk County 2014].)

Wherefore, it is hereby

ORDERED that Defendants Bernard Kruger ("Kruger") and Bernard Kruger, M.D., P.C.'s Order to Show Cause pursuant to CPLR 3217 (b) for a court-ordered discontinuance is granted; and it is further

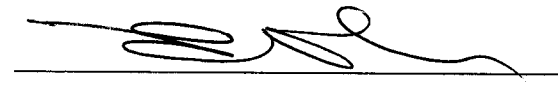
ORDERED that the instant action is severed and shall continue as against the remaining defendants; and it is further

ORDERED that the remaining defendants may seek to include any liability attributable to Defendants Bernard Kruger and Bernard Kruger, M.D., P.C. as part

of the total liability assigned to “all persons liable” for purposes of CPLR article 16.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: December 5, 2017



Eileen A. Rakower, J.S.C.