

**Francione-Nicacci v Winthrop Univ. Hosp.**

2018 NY Slip Op 34405(U)

April 26, 2018

Supreme Court, Nassau County

Docket Number: Index No. 605015/15

Judge: James P. McCormack

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Short Form Order

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack  
Justice of the Supreme Court

TERESA FRANCIONE-NICACCI, as  
Administrator of the Estate of MARY  
FRANCIONE, deceased,

Plaintiff(s),

-against-

WINTHROP UNIVERSITY HOSPITAL,  
TOWNHOUSE CENTER FOR  
REHABILITATION AND NURSING,  
TOWNHOUSE OPERATING COMPANY,  
LLC., CENTRAL ISLAND HEALTHCARE  
AND OZONE ACQUISITION, LLC,

Defendant(s).

TRIAL/IAS, PART 23  
NASSAU COUNTY

Index No. 605015/15

Motion Seq. No.: 001 & 002  
Motions Submitted: 3/14/18

The following papers read on this motion:

Notices of Motion/Supporting Exhibits.....XX  
Affirmation in Opposition.....X

Defendants, Central Island Healthcare (CIH) and Ozone Acquisition, LLC. (Ozone), move this court for an order (Motion Seq. 001) pursuant to CPLR §3212 for summary judgment dismissing the complaint against them. CIH and Ozone further move for an order (Motion Seq. 002) pursuant CPLR § 3217(b), “So Ordering” a stipulation entered into by Plaintiff, Teresa Francione-Niacci (Teresa), as Administrator of the Estate of Mary Francione (Mary), deceased, discontinuing the action against CIH and Ozone. There is no opposition to the summary judgment motion. Defendant, Winthrop University Hospital (Winthrop), partially opposes the CPLR § 3217(b) motion. Neither Plaintiff nor any of the other Defendants oppose the CPLR §3217(b) motion. As a decision regarding the “so-ordered” stipulation may render the summary judgment motion moot, the court will address Motion Seq. 002 first.

Plaintiff commenced this medical malpractice action by summons and complaint dated July 31, 2015. Issue was joined by service of an answer by Winthrop dated August 31, 2015. Defendants Townhouse Center for Rehabilitation and Nursing and Townhouse Operating Company, LLC interposed an answer dated September 2, 2015. CIH and Ozone submitted an answer dated October 20, 2015. The case certified ready for trial on June 29, 2017, and a note of issue was filed on August 7, 2017.

On January 3, 2018, Plaintiff’s counsel executed a Stipulation of Discontinuance with prejudice as to CIH and Ozone. CIH and Ozone’s counsel requested that counsel for the remaining co-Defendants, sign the Stipulation of Discontinuance, and they refused. The remaining Defendants have not interposed cross-claims against CIH and Ozone.

The determination of a motion for leave to voluntarily discontinue an action

pursuant to CPLR § 3217(b), rests within the sound discretion of the court (*see Tucker v. Tucker*, NY2d 378, 383 [1982]). In absence of special circumstances, such as prejudice to a substantial right of the defendant, or other consequences, a motion for voluntary discontinuance should be granted (*see Tucker v. Tucker*, 55 NY2d 378 [1982]; *Expedite Video Conferencing Services, Inc. v. Botello*, 67 AD3d 961 [2<sup>nd</sup> Dept. 2009]).

Herein, Winthrop opposes the discontinuance to the extent that their statutory rights would be impacted. The court, having reviewed the stipulation, sees no prejudice to Winthrop. However, by so-ordering the stipulation the court does not intend to impact the rights of the remaining Defendants, and to the extent that it can be read to impact their rights, those portions of the stipulation may be disregarded. Should a subsequent court find a conflict between this order and the stipulation of discontinuance, this order shall prevail. There being no showing of prejudice or special circumstances, CIH and Ozone's motion pursuant to CPLR 3217(b) will be granted (*see Citibank v. Nagrotsky*, 239 AD2d 456 [2<sup>nd</sup> Dept. 1997]).

Accordingly, it is hereby

**ORDERED**, that CIH and Ozone's motion (Motion Seq. 002) pursuant to CPLR §3217(b) to so-order a stipulation discontinuing the action against CIH and Ozone is GRANTED; and it is further

**ORDERED**, that CIH and Ozone's motion for summary judgment (Motion Seq. 001) is DENIED as moot.

Further, the caption should be amended as follows:

\_\_\_\_\_  
**TERESA FRANCIONE-NICACCI, as  
Administrator of the Estate of  
MARY FRANCIONE, deceased,**

**Index No. 605015/15**

**Plaintiff(s),**

**-against-**

**WINTHROP UNIVERSITY HOSPITAL,  
TOWNHOUSE CENTER FOR  
REHABILITATION AND NURSING, and  
TOWNHOUSE OPERATING COMPANY, LLC.,**

**Defendant(s).**

\_\_\_\_\_  
This constitutes the Decision and Order of this Court.

Dated: April 26, 2018  
Mineola, N.Y.

  
\_\_\_\_\_  
Hon. James P. McCormack, J. S. C.

**ENTERED**

**APR 30 2018**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**