

<b>Deluca-Smith v Spierer</b>
2019 NY Slip Op 33485(U)
November 26, 2019
Supreme Court, New York County
Docket Number: 157705/2013E
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK - PART 10

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GINA DELUCA-SMITH and SCOTT SMITH,

Plaintiffs,

- against -

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GARY SPIERER, M.D., *et al.*

Defendants.

-----X

**HON. GEORGE J. SILVER:**

This is an action sounding in allegations medical malpractice. Presently before the court is defendants PAUL GRUBE, M.D., SEAVIEW MEDICAL GROUP, P.C., SEAVIEW MEDICAL ANESTHESIA GROUP, and SI BAY VIEW MEDICAL GROUP, P.C.'s ("defendants") motion for an order pursuant to CPLR §3217(b) "so-ordering" a stipulation of discontinuance as to defendants and amending the caption by deleting defendants' respective names. Although plaintiffs GINA DELUCA-SMITH and SCOTT SMITH ("plaintiffs") and defendants have signed the subject stipulation of discontinuance, the remaining co-defendants have not signed the stipulation. In partial opposition, co-defendants GARY SPIERER, M.D., GATEWAY OBGYN ASSOCIATES, P.C., MICHAEL R. CASTELLANO, M.D., and MICHAEL R. CASTELLANO, M.D., P.C., state that they are refusing to sign the stipulation, because doing so may prejudice their rights under CPLR Article 16. This argument is advanced despite the remaining co-defendants having no cross-claims asserted

against defendants.

CPLR §3217(a)(2) provides that a party may discontinue its claim against another party by filing a stipulation of discontinuance “in writing signed by the attorneys of records for all parties.” Where a party is unwilling to sign the stipulation, the court may nevertheless order discontinuance under CPLR §3217(b). 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.”

The subject stipulation of discontinuance, signed by attorneys for plaintiffs and defendants, but not attorneys for the remaining co-defendants, constituted a release of defendants from the action within the meaning of General Obligations Law § 15--108 (see General Obligations Law § 15--303; *Tereshchenko v Lynn*, 36 AD3d 684, 685 [2d Dept 2007]; *Hanna v Ford Motor Co.*, 252 AD2d 478, 479 [2d Dept 1998]; *Killeen v Reinhardt*, 71 AD2d 851, 853 [2d Dept 1979]). Said stipulation served to relieve defendants “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]; see *Rosado v Proctor & Schwartz*, 66 NY2d 21, 24 [1985]; *Tereshchenko v Lynn*, 36 AD3d 684, 686 [2d Dept 2007]). However, any verdict in favor of plaintiffs and against the remaining co-defendants will be reduced in the amount of defendants' equitable share of the damages, if any (see General Obligations Law § 15--108 [a]; *Tereshchenko*, 36 AD3d at 686, *supra*; *Killeen*, 71

AD2d at 853, *supra*).

This court, in its sound discretion, has the authority to grant or deny an application to discontinue an action made pursuant to CPLR §3217 (b) ( *Tucker v Tucker*, 55 NY2d 378 [1982]). In the absence of special circumstances, such as prejudice to the substantial rights of other parties to the action, a motion for a voluntary discontinuance should be granted (*see Burnham Serv. Corp. v National Council on Compensation Ins.*, 288 AD2d 31, 32 [1st Dept 2001]; *Citibank v Nagrotsky*, 239 AD2d 456, 457 [2d Dept 1997]; *County of Westchester v Welton Becket Assocs.*, 102 AD2d 34 [1984], *aff'd* 66 NY2d 642 [1985]). Although CPLR §3217 (b) authorizes a voluntary discontinuance by court order on motion of “a party asserting a claim,” this provision may not 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 [1986]).

Here, since the subject stipulation has not been signed by counsel for the remaining co-defendants, CPLR §3217(a) is inapplicable. However, CPLR §3217(b) is applicable, and none of the remaining co-defendants have submitted persuasive opposition attacking the discontinuance of defendants from this matter. Rather, the remaining co-defendants that submitted partial opposition merely assert in generalities that they wish to preserve their rights under CPLR Article 16. Therefore, the request to discontinue the action as against defendants, with prejudice, is granted and the complaint is dismissed as against them. In addition, their names are

to be deleted from the caption of this action. Addressing the concerns of the remaining co-defendants, although defendants will not be liable for contribution under CPLR article 14, any verdict in plaintiffs' favor and against the remaining co-defendants will be reduced in the amount of defendants' equitable share of damages, if any (*see Tereshchenko*, 36 AD3d at 686, *supra*; *Killeen*, 71 AD2d at 853, *supra*). In addition, 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 co-defendants may seek to include any liability attributable to defendants as part of the total liability assigned to "all persons liable" for purposes of CPLR article 16 (*see Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 955 NYS2d 384 [2d Dept 2012]; *Anderson v House of Good Samaritan Hosp.*, 44 AD3d 135, 840 NYS2d 508 [4th Dept 2007]).

Accordingly, it is hereby

ORDERED that defendants' motion pursuant to CPLR §3217 (b) for a court-ordered discontinuance is granted; and it is further

ORDERED that the Clerk of the Court is directed to amend the caption by removing defendants PAUL GRUBE, M.D., SEAVIEW MEDICAL GROUP, P.C., SEAVIEW MEDICAL ANESTHESIA GROUP, and SI BAY VIEW MEDICAL GROUP, P.C.; and it is further

ORDERED that defendants' counsel is directed to serve a copy of this order, with notice of entry, and all remaining parties within 20 days of its entry; and it is

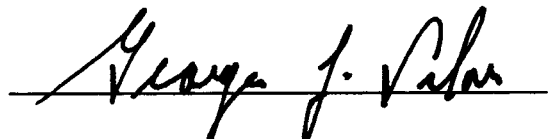
further

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

ORDERED that the remaining co-defendants may seek to include any liability attributable to defendants as part of the total liability assigned to "all persons liable" for purposes of CPLR Article 16; and it is further

ORDERED that the remaining parties are directed to appear for a conference before the court at 111 Centre Street, New York, NY, Part 10, Room 1227, on March 3, 2020 at 2:00 PM.

Dated: November 26, 2019

  
HON. GEORGE J. SILVER, J.S.C.