

**Stero v Laasko**

2007 NY Slip Op 34513(U)

April 12, 2007

Supreme Court, New York County

Docket Number: 111583/06

Judge: Joan B. Carey

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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: Honorable Joan B. Carey  
Justice

PART 40 D

PAUL STERO,

Plaintiff,

Index No.: 1:1583/06

MOTION DATE: \_\_\_\_\_

MOTION SEQ. NO. 1

MOTION CAL. NO. \_\_\_\_\_

-v-

ULLA KRISTIINA LAASKO, M.D., LOUIS JOSEPH MORLEDGE, M.D., CONTINUUM HEALTH PARTNERS INC., MADISON MEDICAL GROUP, STEVEN SCHNEIDER, M.D. and ROBERT MARBACH,

Defendants.

**FILED RECEIVED**  
APR 20 2007  
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The following papers, 1-18, were read on this motion by plaintiff for an order granting leave, pursuant to CPLR § 3025(b), to amend the complaint, nunc pro tunc, so as to add Steven Schnieder, M.D., and Robert Marbach as defendants, to strike defendant Steven Schneider, M.D.'s ninth affirmative defense stating that the amended verified complaint was not served in accordance with CPLR § 3025 and to extend time to serve Robert Marbach, pursuant to § 306(b); and cross-motion by defendant Continuum Health Partners, Inc., to dismiss the action as asserted against it, pursuant to CPLR § 321.1.

- Notice of Motion, affirmation, accompanying exhibits
- Notice of Cross-Motion, affirmation, accompanying exhibits
- Affirmation in partial opposition to motion, accompanying exhibits
- Reply affirmation/opposition to cross-motion, accompanying exhibits
- Reply affirmation

Papers Numbered

- 1-6
- 7-12
- 13-15
- 16-17
- 18

Cross-Motion:  Yes  No

Plaintiff, Paul Stero, initially commenced the instant medical malpractice action seeking to recover damages against defendants Ulla Kristiina Laakso, M.D., Louis Joseph Morledge, M.D., Continuum Health Partners, Inc. and Madison Medical Group by the filing of a summons and complaint on or about August 18, 2006. The crux of the plaintiff's complaint is that defendants were negligent in the manner in which they administered and monitored plaintiff's lithium treatment, causing lithium toxicity and resulting injuries. Thereafter on October 13, 2006, plaintiff filed an amended complaint adding Steven Schneider, M.D., and Robert Marbach as defendants. According to plaintiff he presented to the office of Steven Schneider, M.D. on June 14, 2005, where he was examined by physician assistant Robert Marbach. Plaintiff alleges that despite the fact that he had serious neurological defects at the time of that visit, Marbach failed to consult

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with Dr. Schneider regarding his condition, failed to arrange for plaintiff to be admitted into the hospital in a timely manner, and failed to make a timely diagnosis.

Plaintiff presently moves for an order granting leave, pursuant to CPLR §3025(b), to amend the complaint, *nunc pro tunc*, so as to add Steven Schneider, M.D., and Robert Marbach as defendants. CPLR § 3025(b) sets forth that leave to amend or supplement a complaint "shall be freely given" (CPLR § 3025(b); *see also Leff v. Benihana of Tokyo*, 304 AD2d 350 [1st Dept. 2003]). In the instant action, where there exists no prejudice to the defendants, and, in fact, defendants did not submit any opposition in connection with the amendment, plaintiff may amend his complaint to add Steven Schneider, M.D., and Robert Marbach as defendants. Accordingly, that portion of plaintiff's motion seeking leave to supplement the summons and complaint, *nunc pro tunc*, so as to add Steven Schneider, M.D., and Robert Marbach as defendants is granted.

As leave has been granted, pursuant to CPLR §3025(b), to supplement the summons and complaint, *nunc pro tunc*, so as to add Steven Schneider, M.D., and Robert Marbach as defendants, defendant Steven Schneider, M.D. no longer has a basis to maintain his ninth affirmative defense, which alleges a failure by plaintiff to serve his amended verified complaint in accordance with CPLR §3025. Accordingly, Steven Schneider, M.D.'s ninth affirmative defense is stricken from his answer.

Plaintiff further seeks to extend his time to serve defendant Robert Marbach. CPLR 306-b provides that service of a summons and complaint shall be made within 120 days of filing the complaint with the clerk of the court. Where service is not made upon a defendant within the 120 day period, a plaintiff's time to serve may be extended "upon good cause shown or in the interest of justice" (*see* CPLR 306-b; *see also Leader v. Maroney, Ponzini*, 97 NY2d 95 [2001]; *Lippett v. Education Alliance*, 14 AD3d 430 [1st Dept. 2005]; *De Vries v. Metropolitan Transit Authority*, 11 AD3d 312 [1st Dept. 2004]; *Goldstein v. Columbia Presbyterian Medical Center*, 1 AD3d 188 [1st Dept. 2003]; *Wideman v. Barbel Trucking, Inc.*, 300 AD2d 184 [1st Dept. 2002]). In the instant action, although plaintiff filed the amended complaint on October 13, 2006, Robert Marbach was not served until February 24, 2007, 134 days following the filing of the complaint. According to plaintiff, on January 11, 2007, he learned that Robert Marbach currently resides in the state of Pennsylvania, and as a result, was unable to timely serve Mr. Marbach.

The "good cause" and "interest of justice" standards are two distinct standards under which a plaintiff may seek an extension of time to effectuate service of process (*see Leader v. Maroney, Ponzini, supra*; *De Vries v. Metropolitan Transit Authority, supra*). "The legislative history indicates that the interest of justice standard is a broader standard designed 'to accommodate late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant'" (*De Vries v. Metropolitan Transit Authority, supra*, citing Bill Jacket, L. 1997 ch. 476, at 14). Unlike an extension request brought under the good cause standard, a plaintiff may be granted an extension of time to effectuate service in the interest of justice even where a plaintiff was not diligent in its initial attempts to serve the defendant within the time frame set forth in CPLR 306-b. Although it is not clear that plaintiff in the instant action can establish good cause to extend the time to effect service on defendant Robert Marbach, an extension is warranted in the interest of justice. Not only was the length in delay of service minimal, as defendant Robert Marbach was served only fourteen (14) days after the 120 statutory period, but plaintiff promptly moved for an extension of time to serve once he learned that Mr. Marbach resides in Pennsylvania. Moreover, the defendants cannot claim that they have been prejudiced in any way by plaintiff's

failure to timely serve Robert Marbach. Accordingly, that portion of plaintiff's motion seeking an extension of time to serve defendant Robert Marbach is granted.

Defendant Continuum Health Partners, Inc. (hereinafter "Continuum") presently cross-moves to dismiss the action as asserted against it, pursuant to CPLR §3211<sup>1</sup>. Continuum sets forth that its only role with respect to the plaintiff's medical treatment was to facilitate Dr. Laakso's billing. It is argued that since Continuum provided only administrative services in connection with plaintiff's care, and did not provide any medical treatment to plaintiff, it may not be held liable for the acts of Laakso. In support of its cross-motion Continuum submitted, *inter alia*, the affidavit of Continuum's General Counsel, wherein she set forth that its purpose is to provide administrative services to various area hospitals. Also stated in this affidavit is that Dr. Laakso is not employed by Continuum or any of its affiliated healthcare institutions. In opposition to this cross-motion, plaintiff argues, *inter alia*, that the statements contained in the aforementioned affidavit should not foreclose inquiry into the issue of whether Continuum may be held vicariously liable for the treatment provided to plaintiff by Dr. Laakso.

Dismissal of the complaint as against Continuum is premature as discovery relating to the relationship that existed between Continuum and Dr. Laakso at the time of the subject incident has not yet been conducted (see CPLR §3211(d)). Although Continuum has a seemingly strong defense in this action, in an abundance of caution, plaintiff should be provided an opportunity to depose a representative of Continuum, as well as Dr. Laakso, prior to the granting of a motion resulting in the dismissal of the complaint as against Continuum. Accordingly, Continuum's cross-motion is denied, without prejudice, with leave to renew, as a motion for summary judgment pursuant to CPLR §3212, upon completion of discovery on the issue of the relationship that existed between Continuum and Dr. Laakso at the time of the subject incident.

Based upon the foregoing it is:

ORDERED that that portion of plaintiff's motion seeking leave, pursuant to CPLR §3025(b), to amend the complaint, *nunc pro tunc*, so as to add Steven Schrieder, M.D., and Robert Marbach as defendants is granted, and service of same is deemed effected; and it is further,

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<sup>1</sup> Although defendant Continuum has not specifically set forth the grounds under which it moves for dismissal, it appears that it seeks dismissal, under CPLR §3211(a)(7), on the grounds that plaintiff has failed to State a Cause of Action.

ORDERED that this action shall bear the following caption:

**PAUL STERO,**

Plaintiff,

Index No.:

111583/06

-v-

**ULLA KRISTIINA LAASKO, M.D., LOUIS  
JOSEPH MORLEDGE, M.D., CONTINUUM  
HEALTH PARTNERS INC., MADISON  
MEDICAL GROUP, STEVEN SCHNEIDER,  
M.D. and ROBERT MARBACH,**

Defendants.

and it is further

ORDERED that upon service, by plaintiff, on the Clerk of the Court of a copy of this order with notice of entry, the Clerk shall amend their records to reflect such change in the caption herein, and it is further

ORDERED that a copy of this order with notice of entry shall also be served, by plaintiff, upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the amendment; and it is further

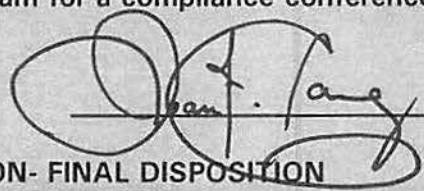
ORDERED that that portion of plaintiff's motion to strike defendant Steven Schneider, M.D.'s ninth affirmative defense stating that the amended verified complaint was not served in accordance with CPLR §3025 is granted, and defendant Steven Schneider, M.D.'s ninth affirmative defense is stricken from his answer;

ORDERED that that portion of plaintiff's motion to extend time to serve Robert Marbach, pursuant to §306(b) is granted and service is deemed effected and the aforementioned defendant shall serve his answer upon plaintiff within thirty (30) days of service of a copy of this order with notice of entry; and it is further,

ORDERED that defendant Continuum Health Partners, Inc.'s, cross-motion to dismiss the action as asserted against it, pursuant to CPLR §3211, is denied, without prejudice, with leave to renew, as a motion for summary judgment pursuant to CPLR §3212, upon completion of discovery on the issue of the relationship that existed between Continuum and Dr. Laakso at the time of the subject incident; and it is further;

ORDERED that counsel for the parties are to appear before the court on July 13 , 2007, at 100 Centre Street, Room 1306, Part 40D, at 9:30 am for a compliance conference.

Dated: 4/12/2007



J.S.C.

Check one:  FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

NON- FINAL DISPOSITION  
 REFERENCE

**FILED**  
APR 20 2007  
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