

**Kleinser v Astarita**

2008 NY Slip Op 33288(U)

December 4, 2008

Supreme Court, New York County

Docket Number: 116844/06

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHÉ, J.S.C.

PART \_\_\_\_\_

Index Number : 116844/2006  
**KLEINSER, DALE**  
vs.  
**ASTARITA, MARK**  
SEQUENCE NUMBER : 005  
AMEND SUPPLEMENT PLEADINGS

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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

this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**FILED**

DEC 09 2008

COUNTY CLERK'S OFFICE  
NEW YORK

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

Dated: 12/4/08

J.S.C.

Check one:  FINAL DISPOSITION

**JUDITH J. GISCHÉ, J.S.C.**  
 NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----X  
Dale Kleinser,

Plaintiffs,

-against-

Mark Astarita, Brian Graifman,  
Martin Kaplan, Gusrae Kaplan &  
Bruno, Cirino Bruno, Robert Perez,  
Lawrence Nusbaum and  
Melvyn Falis,

Defendants.  
-----X

**DECISION/ORDER**

Index No.: 116844/06  
Seq. No.: 005

Present:  
Hon. Judith J. Gische  
J.S.C.

**FILED**

DEC 09 2008

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

**Papers**

	<b>Numbered</b>
Plt's n/m (§3025(b)) w/DK affid, exhs .....	1
Def's n/x-mot (NYCRR 130-1.1) affid, exhs .....	2
Plt's reply w/Dk affid, exhs .....	3

COUNTY CLERK'S OFFICE  
NEW YORK

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action by plaintiff *pro se*, a former client of Gusrae Kaplan & Bruno, a law firm (the "Firm"). Plaintiff claims that the Firm committed legal malpractice and that he has sustained monetary damages as a result. Plaintiff now moves to amend the complaint, pursuant to CPLR § 3025 (b), to add four (4) individual defendants, Cirino Bruno, Robert Perez, Lawrence Nusbaum and Melvin Falis (collectively herein referred to as the "proposed individual defendants"). The proposed individual defendants were attorneys of the Firm at the time the alleged malpractice occurred.

Defendants Mark Astarita, Brian Graifman, Martin Kaplan and the Firm cross-move for an order imposing sanctions and costs upon plaintiff pursuant to NYCRR 130-1.1 for frivolous motion practice.

Plaintiff previously served a supplemental summons and complaint on the proposed individual defendants without leave of court. The proposed individual defendants then sought pre-answer dismissal of this action based upon documentary evidence [CPLR § 3211 (a)(1)] and because plaintiff has failed to state a cause of action [CPLR § 3211 (a)(7)] against them. By decision and order dated April 18, 2008 (the "prior decision"), the court granted the motion to dismiss because, *inter alia*, the supplemental summons and amended complaint were not in compliance with CPLR § 3025.

### **Discussion**

In the absence of prejudice or surprise resulting directly from the delay, leave to amend a pleading is freely given, pursuant to CPLR § 3025(b). Fahey v. County of Ontario, 44 NY2d 934 (1978). Moreover, leave should be granted when the denial of the motion would create a greater prejudice than granting it. Murray v. City of New York, 43 NY2d 400 (1977); Adams Drug Co. v. Knobel, 129 AD2d 401 (1st Dept 1987). However, an order allowing the amendment should not be granted without considering the validity of the claim sought to be asserted. Thus, "the sufficiency or meritoriousness of a proposed pleading or matter" should be resolved at the outset "to obviate the possibility of needless time consuming litigation." Sharapata v. Town of Islip, 82 AD2d 350, 362 *aff'd* 56 NY2d 332 (1982). Plaintiff is required to show that his new claims have a colorable basis (NAB Construction Corp. v. Metropolitan Transportation Authority, 167 AD2d 301 [1st

Dept 1990]).

Insofar as is relevant to the instant motion, plaintiff alleges in the proposed amended complaint the following:

Defendants, Astarita, Kaplan, Bruno, Prerez, Nusbaum and Falis, upon information and belief, were the partners of the defendant [Firm], during the relevant time period and are each individually, jointly and severally, liable for the acts and omissions of each of their partners.

Partnership Law § 26 (1) provides that all partners are "jointly and severally" liable to third parties for the wrongful acts or omissions of any partner performed while that partner was acting in the ordinary course of the partnership business (see also Ederer v. Gursky, 9 NY3d 514 [2007]). Here, affording plaintiff's allegations every favorable inference, it appears that the proposed individual partners were members of the Firm, which was a general partnership during the period of time in which its representation of plaintiff gave rise to the alleged legal malpractice. Accordingly, plaintiff has demonstrated that he has a colorable claim against the proposed individual defendants and therefore, plaintiff's motion for leave to serve a supplemental summons and amended complaint must be granted. To the extent that the result reached herein is contrary to the court's prior decision, the court has *sua sponte* looked at the issues raised herein anew and grants plaintiff's motion for leave to amend on its merits.

Defendants' cross-motion for costs and sanctions must be denied. Indeed, the instant motion cannot be found to be frivolous under 22 NYCRR 130-1.1, where plaintiff has prevailed thereon.

### **Conclusion**

In accordance herewith, it is hereby:

ORDERED plaintiff's motion to amend is granted; and it is further

ORDERED that defendants' cross-motion for costs and sanctions is denied; and  
it is further

ORDERED that plaintiff may serve the proposed Supplemental Summons and Amended Complaint (Exhibit "E") on Cirino Bruno, Robert Perez, Lawrence Nusbaum and Melvin Falis within the next 60 days. Service on appearing counsel shall be completed within 20 days.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

This constitutes the decision and order of the court.

Dated: New York, New York  
December 4, 2008

So Ordered:

  
\_\_\_\_\_  
Hon. Judith V. Gische, JSC

**FILED**  
DEC 09 2008  
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NEW YORK