

**Meyer v Harwin**

2018 NY Slip Op 30860(U)

May 1, 2018

Supreme Court, New York County

Docket Number: 805191/17

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

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GILBERT E. MEYER, JR.,

INDEX NO. 805191/17

Plaintiff,

-against-

STEVEN HARWIN, M.D., BETH ISRAEL MEDICAL  
CENTER, and MOUNT SINAI BETH ISRAEL,

Defendants.

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JOAN A. MADDEN, J.:

In this action to recover damages for medical malpractice, defendants move for an order pursuant to CPLR 3012(b) dismissing the action with prejudice due to plaintiff's failure to serve a verified complaint in response to their demand. Plaintiff opposes the motion and cross-moves for an extension of time to serve the verified complaint, which is annexed to the cross-motion, and to compel defendants to accept the complaint.

Plaintiff commenced this action on May 16, 2017, by filing a Summons with Notice. Defendants were served with the Summons with Notice on June 28, 2017, and on the same day, defendants served, by mail, a demand for a verified complaint. Pursuant to CPLR 3012(b), plaintiff had 20 days from June 28 to serve a verified complaint, i.e. until July 18, 2017. On July 20, 2017, defendants wrote plaintiff a letter demanding a verified complaint within five business days. On August 11, 2017, defendants made the instant motion to dismiss based on plaintiff's failure to timely serve a verified complaint. At plaintiff's request the return date of the motion was adjourned several times, with and without defendants' consent. On November 9, 2017, this Court issued an order directing plaintiff to file and serve opposition to defendant's

motion by December 12, 2017, which is “final for submission of plaintiff’s opposition.” On December 11, 2017, plaintiff served and filed his opposition and cross-motion. At a conference on December 12, 2017, the parties agreed to adjourn the motion to January 10, 2018, for defendants to reply.

To avoid dismissal for failure to timely serve a complaint after defendants have served a demand pursuant to CPLR 3012(b), plaintiff must demonstrate a both a reasonable excuse for the delay in serving the complaint and a meritorious cause of action. See Wimibledon Financing Master Fund, Ltd v. Weston Capital Management LLC, 150 AD3d 427 (1<sup>st</sup> Dept 2017); Aquilar v. Nassau Health Care Corp., 40 AD3d 788 (2<sup>nd</sup> Dept 2007). Where as here plaintiff asserts a claim for medical malpractice, an affidavit of merit from a physician is required. See Stolowitz v. Mount Sinai Hospital, 60 NY2d 685 (1983); Henig v. Good Samaritan Medical Center, 301 AD2d 571 (2<sup>nd</sup> Dept), lv app den, 100 NY2d 510 (2003); Elbaz v. Lieb, 269 AD2d 489 (2<sup>nd</sup> Dept), lv app den, 95 NY2d 754 (2000).

Plaintiff has sufficiently demonstrated a reasonable excuse for the delay based on his attorney’s efforts beginning in May 2017 to obtain his complete medical records from defendant Mt. Sinai, and also to retain a medical expert. Plaintiff submits letters dated May 10, August 3, and October 17, 2017 from his attorney’s office to Mt. Sinai enclosing his authorization and requesting “the entirety of your medical records relating to the care and treatment rendered to Gilbert E. Meyer.” Plaintiffs counsel submits an affirmation explaining that she also telephoned Mr. Sinai and was “advised to send another authorization.” Counsel states that on November 7, 2017, “plaintiff was finally able to speak to Ms. Yasimne Navaro, Supervisor of the Medical Records Department at Mt. Sinai,” and she “agreed to reproduce the plaintiff’s medical records.”

A copy of the fax sent to Ms. Navaro on November 7, 2017 is submitted with the cross-motion. Plaintiff counsel states that “plaintiff personally retrieved the voluminous medical records and films, on or about November 7, 2017,” and notes that “at this point, more than 180 days elapsed since our first request.”

Plaintiff’s counsel further explains that on or about May 10, 2017, an orthopedic expert was contacted to review the “minimal medical records in plaintiff’s possession, which were limited to operative notes of the surgery at issue of October 7, 2014.” Plaintiff counsel states that after retaining the expert and making “numerous attempts to contact the expert over several months to discuss the matter,” in October 2017, the “expert advised that he required the full hospital chart and films” to determine if the case had merit, and “for the first time advised that he could not render opinion in this matter because he had a conflict of interest.” Plaintiff’s counsel states that several potential experts were “immediately contacted,” and a new expert, Dr. Anthony V. Carella, an orthopedic surgeon, was retained on or about October 25, 2017, and was provided with the “minimal records in plaintiff’s possession.” Once plaintiff received the complete medical records from Mt. Sinai on November 7, 2017, Dr. Carella “needed time to review the voluminous records.” In support of his cross-motion, plaintiff submits Dr. Carella’s expert affirmation dated December 11, 2017.

Based on Dr. Carella’s expert affirmation, plaintiff has likewise sufficiently demonstrated the potential merit of his medical malpractice claim. Dr. Carella reviewed plaintiff’s “voluminous medical records,” including the records of defendants Dr. Harwin and Mount Sinai hospital. Dr. Carella opines that Dr. Harwin negligently performed plaintiff’s left hip revision surgery, which resulted in a fracturing his femur, and causing severe and permanent injuries. Dr.

Carella explains that good and accepted standards of medical care required Dr. Harwin to “take precautions to protect and avoid injury to the patient’s femur during surgery by performing an anatomical evaluation of the operative field and properly preparing the bone and properly reaming the femoral shaft.” He opines that Dr. Harwin deviated from accepted standards of medical care by failing to properly “ream and clean the femoral shaft,” which resulted in “perforating the femur” and fracturing the bone.

In opposition to the cross-motion, defendants merely argue that plaintiff fails to provide a reasonable excuse for the delay in serving the complaint.<sup>1</sup> Specifically, defendant’s counsel objects that plaintiff failed to “diligently request records from defendants,” as plaintiff’s counsel did not inform them “of any issues obtaining the plaintiff’s medical records” and did not request assistance from them in obtaining the records. Defendants also object that plaintiff’s original expert did not need a complete set of medical records to conclude that he had a conflict of interest.

Notwithstanding the foregoing objections, the Court finds that plaintiff has made an adequate showing of a reasonable excuse for the delay, so as to satisfy his burden on the cross-motion. Significantly, defendants neither object to the affidavit of merit from plaintiff’s expert, nor claim any prejudice resulting from the delay. Under these circumstances, where there is no prejudice to defendant and it is undisputed that plaintiff has a potentially meritorious cause of action, and given the strong public policy favoring the resolution of cases on the merits, plaintiff is entitled to a extension of time to serve the verified complaint. See Wimbleton Financing

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<sup>1</sup>Although defendants assert that this Court’s order required plaintiff to submit his opposition by December 5, 2017, the deadline was actually December 12, 2017, which plaintiff complied when he filed his opposition and cross-motion on December 11, 2017.

Master Fund, Ltd v. Weston Capital Management LLC, supra.

Accordingly, it is

ORDERED that defendants' motion is denied; and it is further

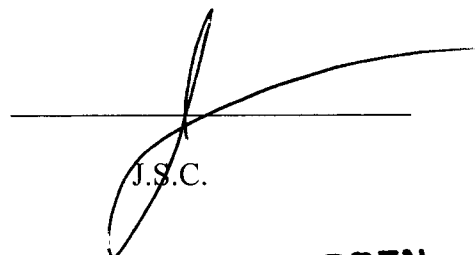
ORDERED that plaintiff's cross-motion is granted and the Verified Complaint annexed to the cross-motion as Exhibit E and e-filed as document #23, is deemed timely served and filed nunc pro tunc; and it is further

ORDERED that within 30 days from the date of this decision and order, defendants shall serve and file an answer to the verified complaint, and shall also provide plaintiff with subsequent demands; and it is further

ORDERED that the preliminary conference previously scheduled for May 17, 2018 is cancelled and changed to August 16, 2018 at 11:30 in Part 11, Room 351, 60 Centre Street.

DATED: May 1, 2018

ENTER:

A handwritten signature in black ink, appearing to read 'J.S.C.', is written over a horizontal line.

**HON. JOAN A. MADDEN  
J.S.C.**