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SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 43 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

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LONG ISLAND THORACIC SURGERY, P.C.,

Plaintiff(s),

-against-

RICKY HURDLE and the ESTATE OF SIMONE GREENE a/k/a SIMONE GREENE HURDLE,

Defendant(s).

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Index No. 015328/11

Motion Seq. No.: 001
Motion Submitted: 7/16/12

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X

Plaintiffs, Long Island Thoracic Surgery, P.C., move pursuant to CPLR §§ 3025 and 3215 for an Order granting leave to amend all pleadings in this action and for a default judgement against the defendants.

Plaintiffs commenced this action to recover for the value of medical service rendered by the plaintiff to Simone Greene between January 24, 2011 and her death on February 22, 1011. On January 24, 2011, Simone Greene was admitted to Mercy hospital suffering from pneumonia. On January 26, 2011, Dr. Stewart Fox, president of Long Island Thoracic Surgery, P.C., preformed a consult on Ms. Greene at the request

of the treating physician, Abdul Majeed, M.D.. On January 31, 2011, a second examination was conducted by another physician from the plaintiff's office and on February 1, 2011 plaintiff preformed a bronchoscopy, surgical thoracoscopy with pleurodesis and the insertion of a central venous access port. Ultimately, Ms. Greene died on February 22, 2011. In March of 2011 the plaintiff began mailing itemized statements addressed to Simone Greene to the address where she had lived prior to her death. None of the bills attached to the plaintiff's motion are addressed to Mr. Hurdle, but rather, they are addressed to the decedent, Simone Greene. Plaintiffs state that defendant, Ricky Hurdle, never objected to the monthly invoices which were addressed to Simone Greene, and not the defendant, Ricky Hurdle. On August 25, 2011, the attorneys for the plaintiff sent a letter to the defendant, Ricky Hurdle, demanding payment for the medical services rendered to Simone Greene.

A plaintiff seeking a default judgment under CPLR § 3215 must present *prima facie* proof of a cause of action, and while a default admits all factual allegations of the complaint and all reasonable inferences therefrom, it does not admit legal conclusions which are reserved for the court's determination (*McGee v. Dunn,* 75 A.D.3d 624 [2d Dept. 2010]; *Green v. Dolphy Constr. Co.*, 187 A.D.2d 635 [2d Dept. 1992]; *Silberstein v. Presbyterian Hospital in the City of New York*, 96 A.D.2d 1096 [2d Dept. 1983]). Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default (*see Litvinskiy v. May Entertainment Group, Inc.*, 44 A.D.3d 627, 841 N.Y.S.2d 882 [2d Dept. 2007]; *Beaton v. Transit Facility Corp.*, 14 A.D.3d 637, 789 N.Y.S.2d 314 [2d Dept. 2005]; *Cree v. Cree*, 124 A.D.2d 538, 507

N.Y.S.2d 683 [2d Dept. 1986]; *Green v. Dolphy Constr. Co.*, 187 A.D.2d 635, 590 N.Y.S.2d 238 [2d Dept. 1992]; *Silberstein v. Presbyterian Hospital in the City of New York*, 96 A.D.2d 1096 [2d Dept. 1983]).

CPLR § 3215 (a) permits a plaintiff to seek default when the defendant has failed to appear. "On a motion for leave to enter a default judgment pursuant to CPLR § 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting plaintiff's claim, and proof of the defaulting party's default in answering or appearing" (*Atlantic Cas. Ins. Co. v. RJNJ Servs., Inc.*, 89 AD3d 649 [2d Dept. 2011]). "CPLR § 3215(f) states that upon any application for judgment by default, proof of facts constituting claim, default, and amount due are to be set forth in affidavit made by the party" (*HSBC Bank USA, N.A. v. Betts*, 67 AD3d 735, 736 [2d Dept. 2009]).

A plaintiff seeking to assert jurisdiction over a defendant "bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process" *(Gottesman v. Friedman*, 90 AD3d 608, 609 [2d Dept. 2011]). Service of process must be made in strict compliance with statutory methods for effecting personal service upon a natural person pursuant to CPLR § 308; (*id.*).

The affidavit of service submitted in support of the instant motion demonstrates that plaintiff attempted service of the summons and verified complaint pursuant to CPLR § 308(2). Here, the affidavit of the process server, states that he served the summons and verified complaint on the defendants Ricky Hurdle and the Estate of

Simone Greene a/k/a/ Simone Green Hurdle on November 9, 2011 at 255-17 149th Road Rosedale, New York 11422, at 6:42 am. He states that he delivered a true copy to Simone Green, a person of suitable age and discretion. He described Simone Green as a 40 - 45 year old black female, with black hair who was five foot five inches tall and weighed approximately 140-150 pounds. This seems unlikely given the fact that, according the affirmation of Stewart Fox, M.D., the president of the plaintiff Long Island Thoracic Surgery, P.C., Simone Green had died nine months earlier on February 22, 2011.

Although generally and affidavit of service will serve as *prima facie* evidence of service, this court can not over look the fact that the papers were served upon Simone Green nine months after her death (CPLR § 308[1]; *Reich v. Redley*, 96 AD3d 1038 [2d Dept. 2012]; *Tribeca Lending Corp. v. Crawford*, 79 A.D.3d 1018, 1019 [2d Dept. 2010]; *Matter of Perskin v. Bassaragh*, 73 A.D3d 1073)

Additionally, even if the court were to overlook the fact that the affidavit of service, which purports to establish service upon both Mr. Hurdle and the Estate of Simone Greene a/k/a Simone Greene Hurdle, was served upon the decedent after her death, there is no indication that the residence of Mr. Hurdle was the appropriate place to serve the "Estate of Simone Greene a/k/a/ Simone Green Hurdle". Plaintiffs have failed to establish that service was made upon a person authorized to accept service on behalf of the Estate of Simone Greene a/k/a Simone Greene Hurdle. In order for the court to obtain jurisdiction over the administrator of an estate, the administrator must be served as prescribed in CPLR article 3 (*see GMAC Mtge. Corp v. Tuck*, 299 AD2d 315

[2d Dept. 2002]; *Macomber v Cipollina*, 226 AD2d 435, 437 [2d Dept. 1996]). In light of these circumstances, the court has not acquired jurisdiction over the Estate of Simone Greene a/k/a Simone Greene Hurdle as a result of the plaintiff's failure to serve the administrator of the decedent's estate.

Furthermore, even if this court were to consider the merits of the plaintiff's default judgement motion, the motion must fail. Plaintiffs have failed to establish the basis upon which they seek a judgement against Ricky Hurdle for medical expenses incurred by Simone Greene. Initially, it is worth noting that the plaintiff's have not established that the Mr. Hurdle and Ms. Greene were ever, in fact, legally married. Moreover, even if this court were to accept the conclusory allegations made by the Stewart Fox, M.D., as to the fact that Simone Greene was legally married to Ricky Hurdle, the plaintiff has failed to make out a *prima facie* showing that Ricky Hurdle may be held liable for his wife's debt. The plaintiff has presented no writing in which he agreed to pay or to guarantee payment of her obligations, and plaintiff makes no reference to one.

Before a creditor may seek payment from a spouse the creditor must first pursue collection from the person who received the necessary goods or services. Only if the spouse who received the benefits has insufficient resources to satisfy the debt may the other spouse be liable (*see Medical Business Assocs. v Steiner*, 183 AD2d 86, 97 [2d Dept. 1992]).

The only basis for seeking payment from Mr. Hurdle, if the Estate of Simone Greene a/k/a Simone Greene Hurdle lacks the resources to pay the debt, is the common-law doctrine of necessaries. Under the common law doctrine of necessaries

a husband is required provide his wife with such "necessaries" as food, clothing, shelter, and medical care. A husband may be held liable to third parties who furnish his wife with goods or services which fall within the scope of the rule *(see Medical Business Assocs. v Steiner*, 183 AD2d 86,97-98 [2d Dept. 1992]). However, his doctrine applies only where a demonstration has been made that the plaintiff furnished treatment on the non-debtor spouse's credit, that the debtor spouse as primary obligor does not have the means to satisfy the plaintiff creditor, and that the non-debtor spouse possesses such means (*see Medical Business Assocs. v Steiner*, 183 AD2d 86,97-98 [2d Dept. 1992]; *Our Lady of Lourdes Mem. Hosp. v Frey*, 183 AD2d 994, 995 [3d Dept. 1992]; *see also, Gilberg v Lennon*, 212 AD2d 662, 663 [2d Dept. 1995]. Absolutely no evidence has been presented to make such a showing.

Plaintiff has failed to provide this court with proof of service of the summons and complaint, proof of the facts constituting plaintiff's claim, and proof of the defaulting party's default in answering or appearing and, as such, has failed to establish entitlement to a default judgement (*Atlantic Cas. Ins. Co. v. RJNJ Servs., Inc.*, 89 AD3d 649 [2d Dept. 2011]).

Turning now to the motion to amend the complaint; "A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it" (CPLR § 3025). In the matter before the court, the summons and complaint were served on November 9, 2011, the defendants have not interposed an answer and the period to do so has expired. Accordingly the plaintiff may not

amend the complaint without leave of court.

Pursuant to CPLR § 3025(b),

> "A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

Applications for leave to amend pleadings should be freely granted except when the delay in seeking leave to amend would directly cause undue prejudice or surprise to the opposing party, or when the proposed amendment is palpably insufficient or patently devoid of merit (*see* CPLR § 3025[b]; *Lucido v. Mancuso*, 49 A.D.3d 220, 222 [2d Dept. 2008]).

Since the court must examine the proposed pleading to determine the application, the proposed pleading must be provided with a motion seeking leave to amend the complaint and that a failure to do so warrants denial of the motion (see *Loehner v Simons*, 224 AD2d 591, 591 [2d Dept 1996]; *Branch v Abraham & Strauss Dept. Store*, 220 AD2d 474, 475 [2d Dept 1995]; *Goldner Trucking Corp. v Stoll Packing Corp.*, 12 AD2d 639, 640 [2d Dept 1960]). A motion to amend a pleading which does not contain a copy of the proposed amendment is fatally defective and must be denied (*see Muro-Light v Farley*, 95 AD3d 846, 847 [2d Dept 2012]; *Pollak v Moore*, 85 AD3d 578, 579 [1st Dept 2011]; *Chang v First Am. Tit. Ins. Co. of NY*, 20 AD3d 502, 502 [2d Dept 2005]; *Ferdinand v Crecca & Blair*, 5 AD3d 538, 540 [2d Dept 2004]).

Finally, this court is confounded by the fact that the plaintiff seeks to amend the complaint to change the sum due and owing from $25,138.93 to $49,463.30, while simultaneously requesting default judgement on the unserved potentially amended complaint. Even if this court were to grant the plaintiff leave to amend the complaint, a default judgement on the amended complaint served only by mail would be wholly improper given the fact that this court is not authorized to grant default judgement upon a new complaint, seeking double the original demand, in a matter where the defendant never appeared and the issue was never joined.

Accordingly, plaintiff's motions for a default judgment and to amend the complaint are hereby DENIED, and based on the foregoing, this matter will be set down for a Traverse Hearing to determine whether the plaintiffs have acquired the personal jurisdiction necessary to maintain the action at all.

This matter is referred to the Calendar Control Part (CCP) for a Traverse Hearing. Subject to the approval of the Justice there presiding and **provided note of issue has been filed by the moving plaintiff at least ten (20) days prior thereto**, this matter shall appear on the calendar of CCP for the day of September 20, 2012 at 9:30 a.m. A copy of this order shall be served on the Calendar Clerk and accompanying notice of issue when filed. **The failure to file note of issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.**

The directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, or a Court Attorney/Referee as he or she deems appropriate. In the event that the matter is referred to a Court

Attorney/Referee, such court Attorney/Referee is given the jurisdiction to hear and report all issues to the undersigned and/or to hear and resolve all issues.

Notwithstanding anything to the contrary, attorney for the movant shall serve a copy of this order, with notice of entry, on the defendants Ricky Hurdle and the Estate of Simone Greene a/k/a/ Simone Green Hurdle by regular mail and by certified mail.

This constitutes the Decision and Order of the Court.

Dated: July 20, 2012
Mineola, N.Y.

Hon. James P. McCormack, A. J. S. C.

ENTERED
JUL 27 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE