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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MARTIN SHULMAN J.S.C. Justice

PART 1

Index Number : 401193/2012
PRINCE-BARRY, EMILEY
vs.
CENTER FOR WOMEN'S
SEQUENCE NUMBER : 001
DEFAULT JUDGMENT

INDEX NO. 401193/12

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to 4, were read on this motion to/for default judgment

Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits A-D | No(s). 1

Notice of Cross-Motion + Answering Affidavits — Exhibits A-B | No(s). 2

Replying Affidavits Ex. 1-2; Ex. A-D | No(s). 3, 4

Upon the foregoing papers, it is ordered that this motion is and cross-motion are decided in accordance with the attached decision and order.

FILED

MAR 22 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: March 15, 2013

MARTIN SHULMAN J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☒ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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EMILEY PRINCE-BARRY,

Plaintiff,

-against-

CENTER FOR WOMEN'S REPRODUCTIVE CARE AT COLUMBIA UNIVERSITY, NEW YORK PRESBYTERIAN HOSPITAL, COLUMBIA UNIVERSITY MEDICAL CENTER, JEFFREY WANG, M.D., and MARK V. SAUER, M.D.,

Defendants.

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Index No. 401193/12

Interim Order

Hon. Martin Shulman:

Motion sequence numbers 001 and 002 are consolidated for disposition.

In this medical malpractice action, plaintiff, Emiley Prince-Barry (Prince-Barry), moves pursuant to CPLR §3215 for a default judgment against defendant gynecologist, Jeff Wang, M.D. (Wang), s/h/a Jeffrey Wang, M.D. (motion seq. no. 001). Wang cross-moves for an order dismissing the complaint as to him on the ground of lack of jurisdiction. Prince-Barry also moves, pursuant to CPLR §306-b, for an order granting an extension of time in which to serve Wang with process (motion seq. no. 002).

Background

This action was commenced on November 23, 2011. The complaint, verified by Prince-Barry, alleges that, beginning on April 21, 2010, and continuing for an unspecified time thereafter, she sought treatment from Wang and codefendant, Mark V. Sauer, M.D. (Sauer), at codefendant Center for Women's Reproductive Care at Columbia University (Center), located at 1790 Broadway in Manhattan. The complaint

further alleges that the codefendants, New York Presbyterian Hospital (Presbyterian) and Columbia University Medical Center (Columbia), owned and operated the Center, and that Wang and Sauer were employed by all three entities. As to Wang, the complaint purports to state causes of action sounding in medical malpractice based on departures from standards of good and accepted medical malpractice; negligence; negligence premised on the doctrine of res ipsa loquitur; and a lack of informed consent based on unspecified treatment which Wang performed "and/or failed to perform" (Complaint, ¶ 165).

The Trustees of Columbia University in the City of New York (Trustees), who were served in December 2011, answered the complaint indicating that they were sued as the Center, a nonjural entity they owned and operated. The Trustees's answer asserted no statute of limitations or jurisdictional defenses. Presbyterian served an answer alleging that it was sued herein as New York Presbyterian Hospital and Columbia, the latter being a nonjural entity. The Trustees and Presbyterian's answers denied that Wang had been employed by Columbia, the Center or Presbyterian. The Trustees' answer alleged that Wang had been employed by the Trustees, and Presbyterian's answer (¶ 2) alleged, on information and belief, that the Trustees "employ"[1] Wang.

Wang, according to the process server's affidavit, was served by substituted service (CPLR §308 [2]) on March 1, 2012, at his Manhattan "residence," 304 West 117th Street, Apartment 2F, by service on an individual of suitable age and discretion

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[1] Presbyterian's counsel asserts that this allegation was a typographical error and should have read "employed" as to Wang and that counsel will move to amend Presbyterian's answer to correct this error.

who refused to give her name, but who was allegedly a medical assistant, with a followup mailing to the same address in an envelope marked "personal and confidential." Giampa aff. in support of motion seq. no. 001, exhibit B. The process server and/or Prince-Barry's counsel, Zachary Giampa (Giampa), obtained that address from Carion Ltd. (Carion), a website of doctors and hospitals. After Giampa received no answer from Wang, Giampa allegedly sent him a followup letter with a copy of the summons and complaint by certified mail, return receipt requested and by regular mail to an unspecified address on April 13, 2012. Whether that followup mailing was returned or what became of the return receipt is not revealed here.

The Parties' Applications

In mid-November 2012 plaintiff served the instant motion for a default judgment against Wang, relying on the verified complaint, Prince-Barry's affidavit, the process server's affidavit and a copy of the Carion listing of Wang's purported address and phone number. Prince-Barry takes the position that, irrespective of the reference to Wang's residence in the process server's affidavit, Wang was served at his place of business. Wang opposes this motion and cross-moves to dismiss the action as to him, claiming that he never worked or lived at the 117th Street address or had any connection thereto and never received any mail related to this case. Wang contends he had no notice of this action until after plaintiff moved for a default judgment and codefendants' counsel, as a courtesy, informed him of the action and motion. Wang asserts that Prince-Barry's reliance on a hearsay page on the Carion website is inadequate to demonstrate that Wang ever had any connection to the 117th Street address. Wang's attorney reveals that she phoned the number listed by Carion as

Wang's, and that someone answered, indicating that it was an anesthesia office or department, i.e., not a gynecologist's office, and that when she subsequently phoned that number, she discovered that it was unrelated to the address listed by Carion. Wang maintains that, even if he had been properly served, Prince-Barry would not be entitled to a default judgment because her supporting affidavit is insufficient to show the merit of her claims and because she has not established through an expert's affidavit or other evidence that her action has merit.

In response, Giampa urges that the process server's affidavit and the Carion website address demonstrate that Wang was properly served, adding that the medical assistant stated that Wang worked at that office (*see* Giampa aff. in support of motion seq. no. 002, ¶ 12), an assertion which is not set forth in the process server's affidavit. Giampa, evidently in an attempt to show that service can be good as long as service is delivered to any building used by the target's employer, even if the target never worked there, states that the 117th Street address is a medical office used by doctors affiliated with Columbia, the same medical entity which Wang's counsel admitted was his employer. Giampa aff. in support of motion seq. no 001, ¶ 3. Giampa also urges that Wang was "effectively served," because the codefendants, as his employers, were united in interest with him and that, therefore, he should have answered the complaint because he was on notice of the action. *Id.*, ¶¶ 6-7.

Plaintiff claims that an expert's affidavit is unnecessary to obtain a default judgment and that she has adequately demonstrated the merits of her claims. In this regard, she relies on her affidavit in which she states that Wang, a fertility specialist, treated her for "certain medical conditions, including the performance of in vitro

fertilization (IVF);" failed to properly inform her that, because of unspecified "treatment and procedures," which Wang either performed or failed to perform, she faced an increased risk of miscarriage due to her uterine myomas; and failed to inform her of unspecified alternative treatment and procedures. Prince-Barry aff. in support of default judgment motion. Prince-Barry claims that she suffered unspecified injuries, "[a]s a result of this incident." *Id.*, ¶ 4. She further relies on Giampa's reply affirmation in which he alleges that the action is meritorious because he signed a certificate of merit after consulting with an obstetrician/gynecologist. Giampa contends that Prince-Barry underwent IVF with large myomas which "could act adversely to the fertility process," that "defendants" failed to inform Prince-Barry of potential adverse reactions and that Prince-Barry "had uterine hemorrhaging due to the adverse reaction of the uterine myomas with the IVF treatment, she obtained hemorrhaging, uterine scarring, uterine affixation to her bowels, subsequent surgery to repair the uterus and miscarriage." Giampa reply aff., 5.

In reply, Wang claims that he has no affiliation with or knowledge of Carion and never gave it any address, including the 117th Street address, or ever held himself out as having that address. Wang's counsel asserts that Giampa has set forth no evidence showing that the 117th Street address was actually occupied as the medical office of other Columbia employees. Defense counsel adds that a website search which she conducted appears to show that the building is residential and that someone other than Wang lives there. Wang, apparently to establish a prior lack of notice, contends that he was not employed by the Trustees at the time of the purported service, having left his employment on July 31, 2011. Wang further asserts that he was never employed by

Presbyterian or by the Center, but that he did have admitting privileges at Presbyterian until July 31, 2011. Wang maintains that, even if the 117th Street address had been used as a medical office by other Columbia employees or he had prior notice of the action, neither factor would confer jurisdiction over him.

Prince-Barry separately moves for an extension of time to serve Wang for good cause shown and/or in the interest of justice. Plaintiff insists that Wang was properly served but that even if he was not, service was diligently attempted prior to the expiration of the requisite 120-day period. Giampa urges that Prince-Barry and the process server cannot be faulted for relying on the Carion database, especially since the medical assistant accepted service and the pleadings the process server mailed were never returned. Plaintiff further observes that all of the other defendants were served within the applicable two and one-half-year statute of limitations (CPLR §214-a)[2] and asserted no jurisdictional defenses. Plaintiff claims that she should be granted leave to serve Wang because the malpractice claims against him are not time-barred since they relate back to the timely service on the Trustees, who were united in interest with Wang as his employer and will be vicariously liable for any of his malpractice. Because the Trustees were timely served and had the opportunity to investigate plaintiff's claims as to Wang, Prince-Barry contends that Wang will suffer no prejudice if the motion to extend her time to serve Wang were granted, particularly since Wang and his codefendants are represented by the same counsel. Prince-Barry further contends that her motion for an extension of time to serve Wang was promptly made fewer than two weeks after receiving his opposition to her motion for a default judgment and

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[2] Prince-Barry is evidently not pressing her negligence claims against Wang.

learning that he was contesting service. Prince-Barry also urges that the aforementioned certificate of merit, her affidavit and Giampa's reply affirmation suffice to demonstrate the merits of her action.

Wang opposes the motion for an extension of time to serve him claiming that Prince-Barry did not act diligently to locate and attempt service before the statute of limitations expired and waited until there were only about 20 days left of the 120-day period for service. *See* CPLR §306-b. Wang asserts that Prince-Barry should have verified that the Carion listing was accurate. Further, Wang maintains that since the affidavit of service was internally inconsistent as to whether Wang was served at his residence or business, Prince-Barry's counsel should have investigated to see whether the address was correct. Wang's counsel also notes the absence of any proof that plaintiff's counsel sent a courtesy copy of process to Wang such as through a copy of the alleged return receipt. Additionally, Wang contends that no showing of merit through an expert's affidavit has been made to warrant an extension.

Wang asserts that because he has not been served, this action is time-barred as to him. While not disputing that the Trustees employed him and would be vicariously liable for his alleged malpractice, Wang takes the position that the case law pertaining to the relation back doctrine in amended pleadings applies and requires a showing that the plaintiff had made a mistake as to the identity of the proper parties.

Because there was no mistake as to his identity, Wang claims that the relation back doctrine is inapplicable. Since the statute of limitations has expired and he had no notice of this action or a chance to investigate Prince-Barry's claims until defense

counsel advised him that plaintiff had moved for a default judgement, Wang contends that he will be prejudiced by an extension.

Discussion

Prince-Barry's motion for a default judgment against Wang and an assessment of damages is denied, irrespective of whether Wang was properly served. "[A] defendant in default is deemed to have admitted 'all traversable allegations in the complaint, including the basic allegation of liability . . .'" *Brown v Rosedale Nurseries, Inc.*, 259 AD2d 256, 257 (1st Dept 1999) (internal citation omitted). Thus, an expert's affidavit is not required to establish entitlement to a default judgment. However, the court on a CPLR §3215 application does not simply rubber-stamp the application upon a demonstration that the party has been served and has failed to appear. *Feffer v Malpeso*, 210 AD2d 60, 61 (1st Dept 1994). A plaintiff moving for a default judgment "need only allege enough facts to enable a court to determine that a viable cause of action exists." *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 (2003). Further, "[s]ome proof of liability is ... required to satisfy the court as to the prima facie validity of the uncontested cause of action." *Feffer v Malpeso*, 210 AD2d at 61; *Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 82 AD3d 674 (1st Dept 2011). A showing of the merit of plaintiff's claims by one with first-hand knowledge, either by way of affidavit or by a pleading verified by the plaintiff, is necessary. *Francisco v Soto*, 286 AD2d 573 (1st Dept 2001).

Prince-Barry has failed to make the requisite showing "of the facts constituting the claim." CPLR §3215 (f). Specifically, the boilerplate complaint, although verified by Prince-Barry, is bereft of facts making up her causes of action, including regarding the

injuries suffered. *See Beaton v Transit Facility Corp.*, 14 AD3d 637 (2d Dept 2005). The certificate of merit, standing alone, also does not aid plaintiff since it fails to state that Prince-Barry's counsel consulted a physician, as required by CPLR §3012-a (a) (1), but merely recites that counsel consulted with a "physician/doctor/dentist/podiatrist." Giampa aff. in support of default judgment motion, exhibit C. Further, while Giampa may have corrected this defect in his reply affirmation, the certificate contains no facts but simply alleges that based on the consultation, counsel has concluded that there is a reasonable basis for commencing the action. Even if the certificate alleged facts, it would not constitute the assertion of facts by one with first-hand knowledge. In addition, plaintiff's bill of particulars as to the Center, verified only by counsel, and the portions of Giampa's reply affirmation on the treatment rendered, the lack of informed consent and injuries allegedly incurred, are unavailing. *See Triangle Props. # 2, LLC v Narang,* 73 AD3d 1030, 1032 (2d Dept 2010); *Feffer v Malpeso*, 210 AD2d at 61 (complaint verified by counsel is inadequate to support motion pursuant to CPLR §3215, because counsel lacks first-hand knowledge of facts); *see also Hazim v Winter*, 234 AD2d 422, 422 (2d Dept 1996) (complaint verified by attorney inadequate on CPLR §3215 motion because it is effectively only an attorney's affidavit).

Moreover, Prince-Barry's supporting affidavit does not allege that Wang departed from accepted medical standards in recommending or deciding to perform any particular procedure on her, but rather seems only to assert a lack of informed consent claim. However, she fails to allege facts demonstrating the necessary element that a reasonable person in plaintiff's circumstances would not have consented to the treatment if advised of the risks and benefits of, and the alternatives to, treatment which

Wang rendered. *See* Public Health Law § 2805-d (1), (3); *Anderson v Wiener*, 100 AD2d 919, 920 (2d Dept 1984). Prince-Barry even fails to state that she would not have undergone any specific fertility treatment if properly informed. Nor does she allege in her affidavit any alternative treatment she would have chosen or any particular injuries that she suffered.

In light of the foregoing, there are insufficient allegations by a person with first-hand knowledge for this court to determine that Prince-Barry has a viable cause of action. Plaintiff's motion for a default judgment must therefore be, and hereby is, denied. While leave to renew a default motion on proper papers may be granted where a plaintiff has failed to make the requisite showing of the facts constituting his/her claim (*see Hazim v Winter*, 234 AD2d at 422), it would be inappropriate to grant such leave where the issue of service is unresolved. Thus, the court now turns to Wang's cross motion to dismiss the complaint for lack of service.

"A process server's affidavit of service constitutes prima facie evidence of proper service." *Associates First Capital Corp. v Wiggins*, 75 AD3d 614, 614 (2d Dept 2010) (internal quotation marks and citation omitted). When "there is a sworn denial of service by the defendant, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing." *D.H. Grosvenor, Inc. v Fur Galleria, Inc.*, 202 AD2d 548, 548 (2d Dept 1994); *see also Poree v Bynum*, 56 AD3d 261 (1st Dept 2008).

Irrespective of whether Wang received notice of this action or whether the 117th Street was a business staffed by employees of his former employer, if Wang was never properly served, the court lacks jurisdiction over him. *Krisilas v Mount Sinai Hosp.*, 63

AD3d 887, 889 (2d Dept 2009). Although the process server's affidavit indicated that service was made at Wang's residence, it appears from the references to the medical assistant at the 117th Street address and the envelope sent to Wang at that address and marked "personal and confidential" that the process server attempted to serve Wang pursuant to CPLR §308 (2) at his purported place of business. In any event, Wang's denial that he ever had any connection to that address or held it out as his address requires that the issue of whether he was served pursuant to CPLR §308 (2) be referred to the Special Referee Clerk for designation of a Special Referee to conduct a traverse hearing, and to hear and report, with recommendations. In view of the necessity for a hearing on service, the final determination of whether Prince-Barry should be granted leave to renew her motion for a default judgment and Wang's cross motion to dismiss for lack of jurisdiction must be held in abeyance.

Turning to Prince-Barry's motion for an extension of time to serve Wang, CPLR §306-b provides that, if a defendant is not served within 120 days of the commencement of the action, the court must dismiss the action without prejudice, or may extend the time for service "upon good cause shown or in the interest of justice." The legislature in promulgating this statute provided the courts with two bases upon which to extend a plaintiff's time to serve a defendant. *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 (2001). The first basis, upon good cause shown, requires a showing of "reasonable diligence" in attempting service. *Id.* The second basis, in the interest of justice, does not mandate a showing of reasonable diligence, but does require "a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties." *Id.* at 105. The interest of justice

ground is a broader standard which permits late service necessitated by "mistake, confusion, or oversight, so long as there is no prejudice to defendant." *Id.* (internal quotation marks and citation omitted). Among the factors which a court may consider in determining whether to exercise its discretion and grant an extension in the interest of justice are the plaintiff's diligence, the expiration of the statute of limitations, the merits of the action, the length of delay in service, how promptly plaintiff sought the extension of time to serve and whether the defendant will be prejudiced. *Id.* at 105-106. No single factor is controlling. *Id.* at 106.

Because CPLR §306-b applies where the defendant has not been served, and since the question of whether Wang has been served has not yet been resolved, the issue of whether to extend Prince-Barry's time to serve will be held in abeyance pending the traverse hearing and a determination by this court on the issue of service. *See e.g. Colon v Bailey*, 26 AD3d 454 (2d Dept 2006). Also, the traverse hearing may shed additional light on the issue of Prince-Barry's promptness in seeking an extension of time to serve Wang, particularly if the question of whether the April 13, 2012 followup mailing and its return receipt were returned and, if so, whether they bore any notations, are explored.

For all of the foregoing reasons, it is

ORDERED that Emiley Prince-Barry's motion for a default judgment against Jeffrey Wang, M.D. is denied; and it is further

ORDERED that the issue of whether Jeffrey Wang, M.D. was properly served pursuant to CPLR §308 (2) is referred to the office of the Special Referee Clerk for assignment to a Special Referee to hear and report with recommendations, except that,

in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR §4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the final determination of: the issue of whether Emiley Prince-Barry shall be given leave to renew her motion for a default judgment; Jeffrey Wang, M.D.'s cross motion for an order dismissing this action as to him; and Emiley Prince-Barry's motion for an order extending her time to serve Jeffrey Wang, M.D. shall be held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[3] upon the Special Referee Clerk in Rm. 119 M at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for plaintiff and Wang.

Dated: New York, New York
March 15, 2013

Hon. Martin Shulman, J.S.C.

[3] Copies are available in Rm. 119 M at 60 Centre Street, and on the Court's website.