Perney v Medical One N.Y., P.C.
2020 NY Slip Op 32603(U)
August 11, 2020
Supreme Court, New York County
Docket Number: 159080/2019
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

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THIBAULT PERNEY,

Plaintiff,

- v -

MEDICAL ONE NEW YORK, P.C., ROSE MARIE PHILLIP, M.D., and JOHN DOE,

Defendants.

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INDEX NO. 159080/2019

MOTION DATE 07/30/2020

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 6, 7, 8, 9, 10, 11, and 12 (Motion 001)

were read on this motion to/for DEFAULT JUDGMENT.

In this action to recover damages for assault and battery, negligent hiring, negligent supervision, and intentional infliction of emotional distress, arising from an alleged sexual assault upon the plaintiff at a physician's office while he was under sedation, the plaintiff moves pursuant to CPLR 3215(a) for leave to enter a default judgment against the defendants Medical One New York, P.C. (the P.C.), and Rose Marie Phillip, M.D. The motion is granted, without opposition, to the extent that the plaintiff may enter a default judgment against those defendants on the issue of liability on the causes of action to recover for negligent hiring and negligent supervision, the motion is otherwise denied, and the matter is set down for an inquest on the issue of damages.

The plaintiff commenced this action on September 8, 2019 by filing a summons with notice, alleging that he sought money damages for pain and suffering and emotional distress, as well as an award of attorney's fees, based on causes of action sounding in assault and battery, negligent hiring, negligent supervision, and intentional infliction of emotional distress. On September 23, 2019, the plaintiff caused a copy of the summons with notice to be served upon

the P.C. by delivering it to a person identified as general agent of the corporation. The plaintiff caused the summons with notice to be served upon Dr. Phillip by delivering a copy thereof to a personal of suitable age and discretion at Dr. Phillip's place of business on September 23, 2019, and mailing an additional copy to that place of business on that same date in an envelope marked "personal and confidential" and not indicating that it was from an attorney or related to a lawsuit (*see* CPLR 308[2]). On October 9, 2019, the plaintiff filed proof of service in connection with the service of the summons with notice upon Dr. Phillip. On October 24, 2019, the plaintiff served additional copies of the summons with notice upon the P.C. and Dr. Phillip by regular first-class mail. The plaintiff has yet to identify or serve the "John Doe" defendant who allegedly committed the sexual assault while employed by the other two defendants.

Neither the P.C. nor Dr. Phillip served a notice of appearance or a demand for complaint. The plaintiff now moves for leave to enter a default judgment against those named defendants.

Where a plaintiff moves for leave to enter a default judgment, he or she must submit proof of service of the summons and complaint upon the defaulting defendant, proof of the facts constituting the claim, and proof of the defendant's default (*see* CPLR 3215[f]; *Woodson v Mendon Leasing Corp*., 100 NY2d 62, 70-71 [2003]; *Gray v Doyle*, 170 AD3d 969, 971 [2d Dept 2019]; *Rivera v Correction Officer L. Banks*, 135 AD3d 621 [1st Dept 2016]; *Atlantic Cas. Ins. Co. v RJNJ Services, Inc*. 89 AD3d 649 [2d Dept 2011]; *Allstate Ins. Co. v Austin*, 48 AD3d 720, 720 [2d Dept 2008]; *see also Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200 [2013]).

The affidavits of service that were filed by the plaintiff establish that the named defendants were served with process, as a process server's affidavit of service is prima facie evidence of proper service (*see Johnson v Deas*, 32 AD3d 253, 254 [1st Dept 2006]).

The plaintiff also established, through his own affidavit, that the named defendants have defaulted. The P.C. was obligated to serve a notice of appearance and/or a demand for a

complaint within 20 days of service of the summons with notice upon it, or by October 13, 2019 (*see* CPLR 320[a]; 3012[b]; *DeSiena v Maimonides Hosp. Center*, 163 AD2d 351, 351 [2d Dept 1990]; *Klein v Actors & Directors Lab.*, 95 AD2d 757, 757-758 [1st Dept 1983]). Dr. Phillip was obligated to serve a notice of appearance and/or a demand for a complaint by November 19, 2019, or within 30 days after proof of service upon her was completed, a date defined by the CPLR as 10 days after the proof service referable to her was filed (*see* CPLR 308[2]; 320[a]; 3012[b]). The plaintiff's affidavit demonstrates that those defendants did not serve a notice of appearance or a demand for a complaint, by those deadlines, nor did they seek an extension of time to do so in accordance with CPLR 320(a) and 3012(b).

With respect to the proof of the facts constituting the claim,

> "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action (*see*, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27). The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts"

(*Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987]; *see Martinez v Reiner*, 104 AD3d 477, 478 [1st Dept 2013]; *Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]). Stated another way, while the "quantum of proof necessary to support an application for a default judgment is not exacting . . . some firsthand confirmation of the facts forming the basis of the claim must be proffered" (*Guzetti v City of New York*, 32 AD3d 234, 236 [1st Dept 2006]). In other words, the proof submitted must establish a prima facie case (*see id.*; *Silberstein v Presbyterian Hosp.*, 95 AD2d 773 [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" (*Green v. Dolphy Constr. Co.*, 187 AD2d 635, 636 [2d Dept 1992]; *see Walley v Leatherstocking Healthcare, LLC*, 79 AD3d 1236, 1238 [3d Dept 2010]). In moving for leave to enter a default judgment, the plaintiff must "state a viable cause of action" (*Fappiano v City of New York*, 5 AD3d 627, 628 [2d Dept 2004]). In evaluating

whether the plaintiff has fulfilled this obligation, the defendant, as the defaulting party, is "deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). The court, however, must still reach the legal conclusion that those factual allegations establish a prima facie case (*see Matter of Dyno v Rose*, 260 AD2d 694, 698 [3d Dept 1999]). Proof that the plaintiff has submitted "enough facts to enable [the] court to determine that a viable" cause of action exists (*Woodson v Mendon Leasing Corp*., 100 NY2d at 71; *see Gray v Doyle*, 170 AD3d at 971) may be established by an affidavit of a party or someone with knowledge, authenticated documentary proof, or by complaint verified by the plaintiff that sufficiently details the facts and the basis for the defendant's liability (*see* CPLR 105[u]; *Woodson v Mendon Leasing Corp*., 100 NY2d at 71; *Gray v Doyle*, 170 AD3d at 971; *Voelker v Bodum USA, Inc*., 149 AD3d 587, 587 [1st Dept 2017]; *Al Fayed v Barak*, 39 AD3d 371, 371 [1st Dept 2007]; *see also Michael v Atlas Restoration Corp*., 159 AD3d 980, 982 [2d Dept 2018]; *Zino v Joab Taxi, Inc*., 20 AD3d 521, 522 [2d Dept 2005]; *see generally Mitrani Plasterers Co., Inc. v SCG Contr. Corp*., 97 AD3d 552, 553 [2d Dept 2012]).

The plaintiff submits a detailed affidavit describing the alleged sexual assault upon him. As he explained it, on February 26, 2019, he went the offices of the P.C. and Dr. Phillip to receive certain medical treatment, and was placed under sedation. The plaintiff averred that

> "[a]t all relevant times Defendant JOHN DOE, whose legal name is unknown to me at this time, was a nurse and/or employee and/or agent of Defendants MEDICAL ONE NEW YORK P.C. and ROSE MARIE PHILLIP, M.D., working under their supervision.
>
> "On February 26, 2019, while I was sedated, Defendant JOHN DOE sexually assaulted me, inter alia by placing his hands within my pants, taking my genitals in his hands, and fondling me. I became aware of this as I awoke from sedation, at which time he was actively sexually assaulting me.
>
> "I immediately protested and caused JOHN DOE to cease his assault, for which he subsequently apologized.
>
> "I then immediately informed Defendants MEDICAL ONE NEW YORK P.C. and ROSE MARIE PHILLIP, M.D. of what had occurred."

The plaintiff does not have personal knowledge as to whether the named defendants terminated John Doe's employment, but he alleged, upon information and belief, that they did so. The plaintiff further alleged that, since these events transpired, he has suffered "severe psychological stress and physical manifestations thereof." In his affidavit, the plaintiff further alleged that the named defendants negligently hired and negligently supervised his assailant.

The requisite elements of a cause of action for battery are bodily contact, made with intent, and offensive in nature (*see Cerilli v Kezis*, 16 AD3d 363, 364 [2d Dept 2005]; *Siegell v Herricks Union Free School Dist.*, 7 AD3d 607, 609 [2d Dept 2004]). The intent required for battery is "intent to cause a bodily contact that a reasonable person would find offensive" (*Jeffreys v Griffin*, 1 NY3d 34, 41, n 2 [2003] [internal quotation marks omitted]). Although the plaintiff made a prima facie showing that John Doe committed a battery upon him, he has yet to identify John Doe or serve him with process. Hence, he is not entitled to enter a default judgment against John Doe on that cause of action. Moreover, where an assailant allegedly commits a sexual battery such as the one alleged here, the conduct is clearly beyond the scope of his employment, outside the foreseeable performance of his duties, and motivated by private concerns unrelated to any conduct in furtherance of the named defendants' business. The assailant's employers thus cannot be held liable for John Doe's batter under the theory of respondeat superior, even though they are in default (*see Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932 [1999]; *Villongco v Tompkins Sq. Bagels,* 155 AD3d 589, 590 [1st Dept 2017]; *Conde v Yeshiva Univ.*, 16 AD3d 185, 187 [1st Dept 2005]; *Dykes v McRoberts Protective Agency, Inc.*, 256 AD2d 2, 3 [1st Dept 1998]).

The plaintiff, however, has submitted proof of the facts underlying his causes of action against the P.C. and Dr. Phillip to recover for negligent hiring and negligent supervision. Generally, a victim of a battery, including a sexual battery, may recover under these theories by showing that an employer failed to use reasonable care in hiring, retaining, and supervising the

employee, insofar that it was reasonably foreseeable that the employee may have had a propensity to engage in such tortious or criminal activity (*see Judith M. v Sisters of Charity Hosp*., 93 NY2d at 933; *N. X. v Cabrini Med. Ctr.*, 280 AD2d 34, 40 [1st Dept 2001]; *Rodriguez v United Transp. Co*., 246 AD2d 178, 181 [1st Dept 1998]). The Court of Appeals has also suggested that a victim of a sexual battery committed in the course of medical diagnosis, treatment, and care may, upon the submission of sufficient proof, recover under the theory that the medical provider failed to satisfy the appropriate standard of care, as set forth in a regulation or accepted industry practice (*see Diaz v N.Y. Downtown Hosp*., 99 NY2d 542 [2002]). The plaintiff essentially alleges in his affidavit that the named defendants knew or should have known of John Doe's propensities to commit sexual battery, but nonetheless hired him and failed to assure that he did not commit such tortious and criminal acts.

Consequently, the plaintiff is entitled to enter a default judgment against the P.C. and Dr. Phillip on the issue of liability on the causes of action to recover for negligent hiring and supervision, and an inquest shall be scheduled to assess damages.

Although the P.C. and Dr. Phillip are deemed to have admitted all factual allegations against them and the reasonable inferences that flow therefrom (*see Woodson v Mendon Leasing Corp*., 100 NY2d at 71; *Rokina Opt. Co. v Camera King,* 63 NY2d 728, 730 [1984]; *HSBC Bank USA, N.A. v Simms*, 163 AD3d 930, 932-933 [1st Dept 2018]; *Nationstar Mtge., LLC v Hilpertshauser*, 156 AD3d 1052, 1053 [3d Dept 2017]), if and when the named defendants file a notice of appearance, they are entitled to notice of the inquest, "to appear and cross-examine the plaintiff's witnesses, and to offer testimony upon the question of damages" (*Yeboah v Gains Serv. Leasing*, 250 AD2d 453, 453 [1st Dept 1998]; *see Reynolds Secur., Inc. v Underwriters Bank & Trust Co.*, 44 NY2d 568, 572 [1978]; *Santiago v Siega*, 255 AD2d 307 [2d Dept 1998]). In the court's discretion, however, it directs the plaintiff to serve a copy of this order with notice of entry upon the named defendants by regular, first-class mail.

Accordingly, it is

ORDERED that the plaintiff's motion is granted, without opposition, to the extent that he is granted leave to enter a default judgment against the defendants Medical One New York, P.C., and Rose Marie Phillip, M.D., on the issue of liability on the causes of action to recover for negligent hiring and supervision; and it is further,

ORDERED that the matter is set down for an inquest to assess damages before this court on October 28, 2020, at 9:30 a.m., or on any adjourned date fixed by the court, at 71 Thomas Street, Room 311, New York, New York, or via Skype for Business should the court so direct; and it is further,

ORDERED that the plaintiff shall serve a copy of this order, with notice of entry, upon the defendants Medical One New York, P.C., and Rose Marie Phillip, M.D., by regular first-class mail within 15 days of the entry of this order.

This constitutes the Decision and Order of the court.

8/11/2020
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[X]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**