SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY **PART** 56M

Justice

----------X

BETTY CHECO,

Plaintiff,

- v -

JOHN MWANDO, D.P.M., CENTRAL PARK AMBULATORY SURGERY, BIG APPLE FOOT & ANKLE CARE, HERALD SQUARE CHIROPRACTIC & SPORT, and JOHN MWANDO DPM, MD, LLC,

Defendants.

----------X

INDEX NO. 805440/2020

MOTION DATE 03/15/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 48, 49, 50, 51, 52, 68, 81, 82

were read on this motion to/for JUDGMENT - DEFAULT

In this action to recover damages for medical and podiatric malpractice, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendants John Mwando, D.P.M., Big Apple Foot & Ankle Care, Herald Square Chiropractic & Sport, and John Mwando DPM, MD, LLC (collectively the non-answering defendants). The non-answering defendants do not oppose the motion. The motion nonetheless is denied, without prejudice to renewal upon proper papers.

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 defendant's default, and proof of the facts constituting the claim (*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 here establish that the defendant John Mwando, D.P.M., was properly served with process pursuant to CPLR 308(2) by the delivery of a copy of the summons and complaint to a person of suitable age and discretion at his actual place of business, the timely mailing of additional copies thereof to the same address in a properly marked envelope, and there timely filing proof of service with respect thereto.

With respect to both Big Apple Foot & Ankle Care (Big Apple) and Herald Square Chiropractic & Sport (Herald Square), however, the affidavit of service describes both of those entities as corporations, and the process server asserts that he served a single receptionist at the same address as Mwando's office. Big Apple is indeed a domestic professional corporation known as Big Apple Foot and Ankle Podiatric Care, P.C. Hence, service upon it may only be effectuated by delivery of a copy of the summons and complaint to an "officer, director, managing or general agent, or cashier or to any other agent authorized by appointment or by law to receive service" or delivery of two copies to the Secretary of State pursuant to Business Corporation Law § 306 or § 307 (CPLR 311[a][1]). To the extent that Herald Square is also a corporation, the same rules apply to it. The one receptionist working for both Big Apple and Herald Square is not described by the process server as falling into any of the above categories. Hence, the plaintiff has not established proper service upon either Big Apple or Herald Square. Similarly, the plaintiff failed to establish proper service upon John Mwando, DPM, MD, LLC, a limited liability company, as the affidavit of service again indicated that the summons and complaint were delivered only to the same receptionist at the office that the LLC shares with Mwando, and not upon a member or manager of the LLC, any agent of the LLC authorized to accept process, or the Secretary of State in accordance with Limited Liability Company Law § 303 (*see* CPLR 311-a[a]).

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 affirmation of an attorney who clams no personal knowledge of the underlying facts is "utterly devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215" (*Beltre v Babu*, 32 AD3d at 723). Hence, the attorney's affirmation here is insufficient to support the plaintiff's request for leave to enter a default judgment against the non-answering defendants. Moreover, a verified complaint that is conclusory in nature and devoid of factual allegations constituting the claim is insufficient to demonstrate the requisite proof (*see Cohen v Schupler*, 51 AD3d 706, 707 [2d Dept 2008]; *Luna v Luna*, 263 AD2d 470 [2d Dept 1999]). In other words, the verified complaint must "set forth the facts constituting the alleged negligence" (*Beaton v Transit Facility Corp.*, 14 AD3d 637, 637 [2d Dept 2005]). Although the plaintiff here verified her own complaint, in the context of a medical malpractice action, generally an affidavit or affirmation of merit from an expert is required unless the matters alleged are within the ordinary experience and knowledge of a lay person (*see Fiore v Galang*, 64 NY2d 999, 1000-1001 [1985]; *Charles v Wolfson*, 2019 NY Slip Op 50251[U], 62 Misc 3d 1224[A] [Sup Ct, Bronx County, Mar 6, 2019]). The complaint here alleged malpractice in very general, conclusory, and boilerplate language, alleging only that Mwando performed surgery on the plaintiff on July 2, 2018 and July 9, 2018, and that all of the non-answering defendants departed from good and accepted practice in the course of that surgery. The complaint failed to allege what type of surgery was performed, or even general allegations of what the non-answering defendants did or did not do in the course of that surgery that constituted a departure from good and accepted medical or podiatric practice. Hence, the verified complaint was insufficient to support the plaintiff's request for leave to enter a default judgment against the non-answering defendants (*see LoGiudice v Zavarella*, 2019 NY Misc LEXIS 16235 [Sup Ct,

Suffolk County, Nov. 27, 2019]; *Charles v Wolfson*, 2019 NY Slip Op 50251[U], 62 Misc 3d 1224[A]).

Accordingly, it is

ORDERED that the motion is denied, without prejudice to renewal upon proper papers.

This constitutes the Decision and Order of the court.

4/7/2022
DATE

JOHN J. KELLEY, J.S.C.

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