

**Jenkins v Mazlin**

2022 NY Slip Op 33518(U)

October 3, 2022

Supreme Court, New York County

Docket Number: Index No. 805413/2021

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

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

*Justice*

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**INDEX NO. 805413/2021**

TAHISHA JENKINS and DANIEL HILTON-ALLEN,

**MOTION DATE 08/10/2022**

Plaintiff,

**MOTION SEQ. NO. 002**

- v -

JEFFREY A. MAZLIN, M.D., GAIL A. STEPHEN-JOHNSON, M.D., PAULINA GUTA, M.D., GARDEN OB/GYN, BETHPAGE MEDICAL PLLC, GARDEN CITY PLAZA OFFICE BASED SURGERY, P.C., MICHAEL TERRANI, M.D., FACOG, and MICHAEL TERRANI, M.D., P.C.,

**DECISION + ORDER ON MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion to/for JUDGMENT - DEFAULT.

In this action to recover damages for medical malpractice, the plaintiffs move pursuant to CPLR 3215(a) for leave to enter a default judgment on the issue of liability against the defendants Garden City Plaza Office Based Surgery, P.C. (Garden City), Michael Terrani, M.D., FACOG, and Michael Terrani, M.D., P.C. (the Terrani P.C.). Those defendants do not oppose the motion. The motion is granted, and the matter is set down for an inquest on the issue of damages, to be held concurrently with the trial against the remaining defendants who have answered the complaint or appeared in this action.

Where a plaintiff moves for leave to enter a default judgment, he or she must submit proof that the summons and complaint properly was served 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 plaintiffs commenced this action on December 22, 2021 by filing a summons and complaint (see CPLR 304[a]).

On December 30, 2022, the plaintiffs attempted to serve Garden City by delivering copies of the summons and complaint at Garden City's offices to Katherine Frankowski Zimm, who purportedly held herself out to be the chief financial officer of that professional corporation. If that service were proper, Garden City would have had 20 days to answer, appear, or move with respect to the complaint, or, if that date fell on a weekend, would have had until the first business day thereafter (see CPLR 320[a]; 3012[a]; General Construction Law §§ 20, 25-a). Hence, Garden City would have been required to answer, appear, or move on or before January 13, 2022. In any event, on January 3, 2022, the plaintiffs served Garden City with process by delivering two copies of the summons and complaint and paying the appropriate fee to the Secretary of State in Albany (see CPLR 311[a][1]; Business Corporation Law § 306). The plaintiffs thus have established that Garden City was properly served with process. Hence, even if Zimm is disqualified from being an officer of that professional corporation because she is not a physician (see Business Corporation Law § 1508[a]), and delivery to her thus was ineffective, Garden City nonetheless had 30 days from January 3, 2022 (see CPLR 320[a], 3012[c]), or until February 2, 2022, to answer, move, or otherwise appear.

On December 30, 2022, the plaintiffs attempted to serve the Terrani P.C. by delivering copies of the summons and complaint at the Terrani P.C.'s offices to a receptionist named Sasha M., who purportedly was authorized to accept service on that corporation's behalf. The affidavit of service referable to this attempt, however, does not identify Sasha M. as an officer, director, managing or general agent, cashier, or assistant cashier of the corporation, or as an agent expressly appointed by the corporation to accept service of process (see CPLR 311[a][1]). Nonetheless, on January 3, 2022, the plaintiffs served the Terrani P.C. with process

by delivering two copies of the summons and complaint and paying the appropriate fee to the Secretary of State in Albany (see *id.*; Business Corporation Law § 306). The plaintiffs thus have established that they properly served the Terrani P.C. with process, and that it was required to answer, appear, or move with respect to the complaint on or before February 2, 2022.

On December 30, 2022, the plaintiffs served Terrani, in his individual capacity, at his office by delivering a copy of the summons and complaint to Zimm, who purportedly held herself out as having authority to accept process on Terrani's behalf. The plaintiffs filed the affidavit of service with respect thereto on January 6, 2022. Although the plaintiffs filed an affidavit of service on February 15, 2022 indicating that, on February 3, 2022, they served *Terrani's professional corporation* by delivering a copy of the summons and complaint at Terrani's residence to Terrani's 18-year-old daughter, and followed up with a mailing to that residence on February 11, 2022, the affidavit of service apparently was meant to describe service pursuant to CPLR 308(2) upon Terrani, in his individual capacity, and not service upon his corporation.

If, in fact, Zimm were authorized to accept service of process on behalf of Terrani, individually (see *Cellino & Barnes, P.C. v Martin, Lister & Alvarez, PLLC*, 117 AD3d 1459, 1460 [4th Dept 2014]; see also *Fashion Page v Zurich Ins. Co.*, 50 NY2d 265, 273 [1980] [process server's reasonable belief of recipient's authority is the crucial factor]; *Passeri v Tomlins*, 141 AD3d 816, 818, n [3d Dept 2016]; *Arvanitis v Bankers Trust Co.*, 286 AD2d 273, 273 [1st Dept 2001]), he would have had to answer, appear, or move with respect to the complaint on or before January 29, 2022. If that service were not effective, the court nonetheless concludes that the deliver-and-mail service effectuated on February 3, 2022 and February 11, 2022 was, in fact, sufficient to obtain jurisdiction over Terrani pursuant to CPLR 308(2). Service was thus "completed" within the meaning of that statute on February 22, 2022, or the first business day following the 10-day period subsequent to the filing of proof of service, and Terrani had 30 days from February 22, 2022 (see CPLR 320[a]), or until March 24, 2022, to answer, appear, or move with respect to the complaint.

The affirmation of the plaintiffs' attorney established that, regardless of which date or dates Garden City, the Terrani, P.C., or Terrani were obligated to answer, appear, or move with respect to the complaint, these three defendants were in default, as none of them did so within any of the time limits described above, and, in fact, none has yet answered, appeared, or moved with respect to the complaint. In addition, with respect to the service made upon Garden City and the Terrani, P.C. by delivery to the Secretary of State, the plaintiffs' attorney has satisfied the requirements of CPLR 3215(g)(4)(i) by submitting proof that he timely made an additional mailing of the summons to the last known addresses of those corporations.

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]).

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]; *Checo v Mwando*, 2022 NY Slip Op 31223[U], 2022 NY Misc LEXIS 1865 [Sup Ct, N.Y. County, Apr. 7, 2022] [Kelley, J.]; *Charles v Wolfson*, 2019 NY Slip Op 50251[U], 62 Misc 3d 1224[A] [Sup Ct, Bronx County, Mar 6, 2019]). Here, the crux of the plaintiffs’ claim, as set forth in the affidavit of merit of the plaintiff Tahisha Jenkins, is that

“[o]n June 6, 2020 I was admitted to the maternity department at Good Samaritan Hospital located at 1000 Montauk Highway, West Islip, New York because I was in labor. When it was time to deliver my baby, it was discovered that cerclage stitching that had previously been placed was not properly, completely removed by the defendants.”

She asserted in her affidavit that, as a consequence, she was compelled to undergo an otherwise unnecessary Cesarean section surgery. More importantly, she asserted that she was

forced to undergo an additional surgery to remove the cerclage stitching. Although a medical expert might very well be needed to establish that the failure fully to remove the stitching was the reason for the Cesarean section surgery, a lay person can easily understand that letting a portion of a foreign object remain in patient's body after an unsuccessful attempt to remove it was made constitutes malpractice. A lay person can also understand why a patient would have to undergo otherwise unnecessary surgery where the object was not fully removed in the first instance. Hence, Jenkins's affidavit of merit is sufficient here to support her claims against Garden City, the Terrani P.C., and Terrani, but only to the extent that she is entitled to an inquest to assess damages in connection with the surgery to remove the cerclage stitching.

In light of the foregoing, it is

ORDERED that the plaintiffs' motion for leave to enter a default judgment on the issue of liability against the defendants Garden City Plaza Office Based Surgery, P.C., Michael Terrani, M.D., FACOG, and Michael Terrani, M.D., P.C., is granted, without opposition, and the matter is set down for an inquest to assess damages against those defendants solely in connection with those damages arising from the surgery to remove cerclage stitching, to be held concurrently with the trial against the remaining defendants who have answered the complaint or appeared in the action.

This constitutes the Decision and Order of the court.

10/3/2022  
DATE

  
JOHN J. KEENE, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	
	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE