

Guerrero v New York Downtown Orthopaedic Assoc. of Manhattan
2022 NY Slip Op 34261(U)
December 9, 2022
Supreme Court, New York County
Docket Number: Index No. 805126/2018
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 56M

Justice

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ELIZABETH GUERRERO,

Plaintiff,

- v -

NEW YORK DOWNTOWN ORTHOPAEDIC ASSOCIATES
OF MANHATTAN and NEW YORK DOWNTOWN
ORTHOPAEDIC ASSOCIATES,

Defendants.

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NEW YORK DOWNTOWN ORTHOPAEDIC ASSOCIATES OF
MANHATTAN and NEW YORK DOWNTOWN ORTHOPAEDIC
ASSOCIATES,

Third-Party Plaintiffs,

-against-

ELIZABETH MELVIN, P.T., and WOJCIECH KARPINSKI,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46

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

In this action to recover damages for medical malpractice, the defendants third-party plaintiffs, New York Downtown Orthopaedic Associates of Manhattan and New York Downtown Orthopaedic Associates (hereinafter together the defendants), move pursuant to CPLR 3215 for leave to enter a default judgment on the issue of liability against the third-party defendant Wojciech Karpinski. The motion is granted, without opposition.

On April 19, 2018, the plaintiff commenced this action against the defendants, alleging that they committed medical malpractice while treating her with electrical stimulation in the course of a physical therapy regimen. The plaintiff asserted that, as a consequence of their

malpractice, she was caused to sustain burns to her upper back and neck, resulting in permanent scarring. The named defendants, which are aliases of a professional corporation known as BIK Orthopedics, P.C., answered the complaint on June 15, 2018.

On January 13, 2022, after the parties had conducted a substantial amount of discovery, the defendants commenced a third-party action against physical therapy assistant Karpinski and another third-party defendant. The third-party complaint, which was verified by the defendants' principal physician, Eli Bryk, M.D., asserted that Karpinski "provided certain physical therapy assistant services at the Third-Party Plaintiff's office pursuant to an employment relationship," and that, "from November 18, 2016 up to and including December 19, 2016," Karpinski "rendered certain physical therapy assistant services to and for the Plaintiff." The defendants further alleged that "the relevant services and/or care rendered to Elizabeth Guerrero by WOJCIECH KARPINSKI during the times mentioned herein forms the basis of the Plaintiff's Verified Complaint and action." In addition, they asserted that Karpinski "had a duty, as part of his employment with the Defendant/Third-Party Plaintiff, to the public at large, and to Elizabeth Guerrero specifically, to conform to accepted physical therapy assistant practices," and that he failed to conform to those accepted practices, by mishandling and misapplying the electrical stimulation apparatus, thus causing the plaintiff's burns. Consequently, the defendants sought to recover over against Karpinski for contribution and common-law indemnification.

The defendants caused copies of the third-party summons and complaint to be served upon Karpinski by personally delivering them to a person of suitable age and discretion at his usual place of business on January 19, 2022, and mailing additional copies to him in an appropriately marked envelope to the same address, either on that date or on January 20, 2022. They filed proof of service on January 21, 2022. After communicating on several occasions with Karpinski via email to advise him that he had yet to serve an answer to the third-party complaint, the defendants made the instant motion on September 8, 2022.

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 service effectuated upon Karpinski, as set forth in the affidavit of service, was proper, and sufficient to obtain jurisdiction over him pursuant to CPLR 308(2). Since that affidavit of service was filed on January 21, 2022, service under that statute was "completed" within the meaning thereof on January 31, 2022, or 10 days subsequent to the filing of proof of service (see *id.*), and Karpinski thus had 30 days from January 31, 2022 (see CPLR 320[a]), or until March 2, 2022, to answer, appear, or move with respect to the third-party complaint.

The affirmation of the defendants' counsel was sufficient to establish that Karpinski did not appear, or answer or move with respect the third-party complaint, on or before that date, and has yet to appear, answer, or move. Counsel has thus established Karpinski's default.

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 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, an affidavit or affirmation of merit from an expert generally 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]).

“To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff’s injury” (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]; see *Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Elias v Bash*, 54 AD3d 354, 357 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp.*, 10 AD3d 521, 522 [1st Dept 2004]). In connection with a cause of action for contribution, the court must first inquire “whether the third-party defendant owed a duty to the plaintiff which was breached and which contributed to or aggravated plaintiff’s damages” (*Rosner v Paley*, 65 NY2d 736, 738 [1985]). “[T]he breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought” (*Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]; see *Nelson v Chelsea GCA Realty, Inc.*, 18 AD3d 838, 840-841 [2d Dept 2005]; *Trump Vil. Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d 891, 896 [1st Dept 2003]), and will lie whether or not the culpable parties are allegedly liable for the injury under the same or different theories (see *Raquet v Braun*, 90 NY2d 177 [1997]), and “whether or not the party from whom contribution is sought is allegedly responsible for the injury as a concurrent, successive, independent, alternative, or even intentional tort-feasor” (*Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d at 603). Moreover, a cause of action for contribution may also be stated where it is alleged a contributing tortfeasor breached a duty owed to the defendant whom the plaintiff seeks to hold liable, even if the contributing tortfeasor owes no direct duty to the injured plaintiff (see *Raquet v Braun*, 90 NY2d at 182; *Sommer v Federal Signal Corp.*, 79 NY2d 540, 558 [1992]; *Darzimanova v Le Clere*, 122 AD3d 421, 422 [1st Dept 2014]).

As proof of the underlying facts supporting their claims, the defendants relied upon the third-party complaint, which had been verified by their principal, and thus may serve as an

affidavit (see CPLR 105[u]) Their principal also happened to be an orthopedist and, thus, was qualified to render an opinion as to the appropriate standard of care applicable to physical therapy assistants who render care under the auspices of an orthopedist. In their third-party complaint, the defendants alleged that Karpinski was involved in operating, or assisting in the operation of, the subject electrical stimulation apparatus and applying it to the plaintiff's skin. They further alleged that he departed from accepted practice applicable to physical therapy assistants who work in the offices of an orthopedist, by improperly operating and applying the apparatus, thus causing it to burn the plaintiff's skin. The allegations in the third-party complaint, as verified by Dr. Bryk, are thus sufficient to support the entry of a default judgment against Karpinski in connection with the claim for contribution, as the demonstrated that he owed a duty to the plaintiff, breached that duty, and thereby injured her.

Common-law indemnification is available to a party that has been held vicariously liable from the party who was at fault in causing a plaintiff's injuries (see *Hawthorne v South Bronx Community Corp.*, 78 NY2d 433, 437 [1991]; *Structure Tone, Inc. v Universal Servs. Group, Ltd.*, 87 AD3d 909, 911-912 [1st Dept 2011]; *Richards Plumbing & Heating Co., Inc. v Washington Group Intl., Inc.*, 59 AD3d 311, 312 [1st Dept 2009]). A hospital or other medical facility is vicariously liable for the negligence or malpractice of its employees (see *Hill v St. Clare's Hospital*, 67 NY2d 72, 79 [1986]; *Bing v Thunig*, 2 NY2d 656, 667 [1957]; *Singh v Sukhu*, 180 AD3d 837, 839 [2d Dept 2020]; *Pollicina v Misericordia Hosp. Medical Ctr.*, 158 AD2d 194, 199 [1st Dept 1990]). "Under the doctrine of respondeat superior, a corporation, including a professional services corporation, is liable for a tort committed by its employee" (*Yaniv v Taub*, 256 AD2d 273, 274 [1st Dept 1998], citing *Connell v Hayden*, 83 AD2d 30, 46 [2d Dept 1981]). As relevant here, the defendants' principal alleged in the third-party complaint that the defendants' liability to the plaintiff would arise only because they may be held vicariously liable for the negligence of Karpinski, as their employee, as opposed to any negligence of their principal. They also submitted proof that Karpinski obtained individual

insurance coverage pursuant to a malpractice insurance policy that is separate from theirs. The defendants thus submitted sufficient proof of the facts underlying their claim for common-law indemnification against Karpinski to support the entry of a default judgment.

Accordingly, it is

ORDERED that the motion is granted, and the defendants third-party plaintiffs are granted leave to enter a default judgment on the issue of liability on their causes of action for contribution and common-law indemnification against the third-party defendant Walter Karpinski; and it is further,

ORDERED that the court directs an inquest to assess the damages for which the third-party defendant Walter Karpinski shall be liable to the defendants third-party plaintiffs, to be conducted simultaneously with the trial of the main action.

This constitutes the Decision and Order of the court.



JOHN J. KELLEY, J.S.C.

12/9/2022
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE