SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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MELBA DURAN, by her Proposed Administrator, ANGELA NUNEZ

Plaintiff,

- v -

ISABELLA GERIATRIC CENTER, INC.,

Defendant.

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INDEX NO. 805282/2021

MOTION DATE 11/01/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11 were read on this motion to/for JUDGMENT - DEFAULT.

In this action to recover damages for violation of Public Health Law §§ 2801-d and 2803-c, negligence, medical malpractice, and gross negligence, arising from a patient's fall at a nursing home, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendant. The defendant does not oppose the motion. The motion is granted to the extent that the plaintiff is granted leave to enter a default judgment against the defendant on the issue of liability on the Public Health Law cause of action, the motion is otherwise denied, and the matter is set down for an inquest on damages as set forth herein.

The plaintiff commenced this action on September 14, 2021 (*see* CPLR 304[a]). On September 27, 2021, the plaintiff caused two copies of the summons and complaint to be served upon the defendant corporation by delivering them to the Secretary of State and paying the applicable fee. On September 29, 2021, the plaintiff caused an additional copy of the summons and complaint to be served upon the defendant by delivering it to a person named Christophante at the defendant's offices, and thereafter filed an affidavit of service attesting that Christophante was authorized to accept process on behalf of the defendant. On March 16, 2022, the plaintiff dispatched yet another copy of the summons and complaint to the defendant

by first class mail to its last known address. The defendant has yet to answer or move with respect to the complaint or otherwise appear in the 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 service effectuated upon the defendant, as described in the two affidavits of service that were submitted by the plaintiff, was proper, and was sufficient to obtain jurisdiction over it pursuant to CPLR 311(a)(1), which authorizes service of process upon a domestic business corporation by, among other methods, personal delivery to an agent authorized by appointment or personal delivery of two copies of the summons and complaint to the Secretary of State in accordance with Business Corporation Law § 306. To the extent that the plaintiff is relying upon the personal delivery of process to Christophante, the defendant had 20 days after service to answer, move, or appear (*see* CPLR 3012[a]), or until October 19, 2021. To the extent that the plaintiff is relying upon the delivery of process to the Secretary of State, the defendant had 30 days after service to answer, move, or appear (*see* CPLR 3012[c]), or until October 27, 2021. To obtain a default judgment against the defendant based on service upon the Secretary of State, the plaintiff also must satisfy the requirement that "an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment" (CPLR 3215[g][4][i]). The plaintiff's attorney has provided an appropriate affirmation attesting that this mailing was timely made.

The affirmation of the plaintiff's counsel also was sufficient to establish that the defendant did not appear, answer, or move with respect the complaint on or before either October 19, 2021 or October 27, 2021, and has yet to appear, answer, or move. Counsel thus has established the defendant'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, still must 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]).

Public Health Law § 2801-d(1) provides, in relevant part, that "[a]ny residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined, shall be liable to said patient for injuries suffered as a result of said deprivation." That subsection defines "right or benefit" as a

> "right or benefit created or established for the well-being of the patient by the terms of any contract, by any *state statute*, code, rule or regulation or by any applicable *federal* statute, *code, rule or regulation*, where noncompliance by said facility with such statute, code, rule or regulation has not been expressly authorized by the appropriate governmental authority"

(*id.* [emphasis added]). Where a plaintiff alleges a deprivation of such right or benefit, the subsection further makes the nursing home's compliance with the relevant contract, statute, code, rule, or regulation an affirmative defense, so that the burden of proof is on the nursing home to prove compliance. The statute goes on to provide that

> "unless there is a finding that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient, compensatory damages shall be assessed in an amount sufficient to compensate such patient for such injury, but in no event less than twenty-five percent of the daily per-patient rate of payment established for the residential health care facility under section twenty-eight hundred seven of this article or, in the case of a residential health care facility not having such an established rate, the average daily total charges per patient for said facility, for each day that such injury exists."

(Public Health Law § 2801-d[2]). The statute also permits a patient's legal representative to prosecute such an action to recover damages (*see* Public Health Law § 2801-d[4-a]).

Public Health Law § 2803-c is a state statute that defines numerous rights of nursing home patients and articulates general duties and standards of care applicable to nursing home operators. As relevant here, it includes the "the right to receive adequate and appropriate medical care" (Public Health Law § 2803-c[3][e]). 42 CFR Part 483.25 is a set of federal regulations that governs nursing home operations Those regulations require a nursing home to "[e]nsure that a resident's environment remains free of accident hazards" (42 CFR. 483.25[h][1]) and to "[c]are for its residents in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of life" (42 CFR 483.15). The plaintiff alleged that the defendant violated or failed to comply with the requirements of those regulatory provisions, as well as 42 CFR 415.11-12, 483.25, 483.25(a), 483.25(c), 483.25(e), and 483.25(h), and various provisions of chapter 10 of the New York Codes, Rules and Regulations.

To establish common-law negligence, a plaintiff must prove that the defendant owed him or her a duty of care and breached that duty, and that the breach proximately caused his or her injuries (*see Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]). New York courts have long held that "'landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition'" (*Maheshwari v City of New York*, 2 NY3d 288, 294 [2004] quoting *Tagle v Jakob*, 97 NY2d 165, 168 [2001]; *see Basso v Miller,* 40 NY2d 233, 241 [1976]; *Beck v J.J.A Holding Corp.,* 12 AD3d 238, 240 [1st Dept 2004]; *see generally 532 Madison Ave. Gourmet Foods, Inc. v Finlandia Ctr., Inc.*, 96 NY2d 280. 290 [2001]). To sustain a common-law negligence claim for an injury resulting from a dangerous premises condition, a plaintiff must demonstrate that an owner or other responsible entity either created the allegedly dangerous condition or had actual or constructive notice of it (s*ee Early v Hilton Hotels Corp.*, 73 AD3d 559, 560-561 [1st Dept 2010]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the

accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986] [citations omitted]). As the Appellate Division, First Department, has explained, however:

> "We do not agree . . .that plaintiffs *had to establish actual or constructive notice* of the hazard that caused the slip and fall, on their motion for entry of a default judgment, because a defendant in default is deemed to have admitted 'all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff's conclusion as to damages'"

(*Brown v Rosedale Nurseries, Inc.*, 259 AD2d 256, 257 [1st Dept 1999] [emphasis added]).

Here, however, the plaintiff did not allege that the defendant maintained its premises in a dangerous or hazardous condition. Rather, she alleged that the defendant committed negligence in failing to deploy sufficient personnel, failing properly to train them, and failing to supervise the plaintiff by leaving her unattended despite their knowledge that she could not walk without assistance. An action sounds in ordinary negligence when jurors can utilize their common everyday experiences to determine the allegations of a lack of due care (*see Rabinovich v Maimonides Med. Ctr.*, 179 AD3d 88, 93 [2d Dept 2019]). Conversely, the issues of whether the plaintiff's mother needed additional monitoring or supervision, and whether she was at risk of falling due to her medical condition, involved the exercise of medical judgments beyond the common knowledge of ordinary persons (*see id.*). Hence, the claims that the plaintiff characterizes as sounding in common-law negligence actually sound in medical malpractice (*see id.*; *Jeter v New York Presbyt. Hosp.*, 172 AD3d 1338, 1340 [2d Dept 2019]; *Martuscello v Jensen*, 134 AD3d 4, 12 [3d Dept 2015] ["The assessment of a patient's risk of falling as a result of his or her medical condition, and the patient's consequent need for assistance, protective equipment or supervision, are medical determinations that sound in malpractice]; *Smee v Sisters of Charity Hosp. of Buffalo*, 210 AD2d 966, 967 [4th Dept 1994]).

"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 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]).

Gross negligence consists of "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (*Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823-824 [1993]; *Ambac Assur. UK Ltd. v J.P. Morgan Inv. Mgt., Inc.*, 88 AD3d 1, 8 [1st Dept 2011]). Gross negligence thus is "different in kind as well as degree" from ordinary negligence (*Sutton Park Dev. Corp. Trading Co. v. Guerin & Guerin Agency*, 297 AD2d 430, 431 [3d Dept 2002]; *Green v Holmes Protection of N.Y.*, 216 AD2d 178, 178-179 [1st Dept 1995]). The element of culpability is, in gross negligence, magnified to a high degree as compared with that present in ordinary negligence (*see Sharick v Marvin,* 1 AD2d 284, 286-287 [3d Dept 1956]). Gross negligence thus can be defined as conduct of an aggravated character that discloses a failure to exercise any diligence whatsoever (*see Civil Service Employees Assn, Inc. v Public Employment Relations Bd.*, 132 AD2d 430, 435 [3d Dept 1987]). Conclusory allegations of gross negligence, however, are insufficient to state a cause of action (*see Mancuso v. Rubin*, 52 AD3d 580, 583 [2d Dept 2008]; *Porter v Forest Hills Care Center, LLC*, 2018 NY Slip Op 33439[U], 2018 WL 6976728 [Sup Ct, Queens County, Nov. 28, 2018]). Where a plaintiff fails to allege any facts whatsoever describing any type of behavior beyond ordinary negligence, the plaintiff cannot be said to have fulfilled the pleading requirements applicable to claims of gross negligence (*see Mancuso v Rubin,* 52 AD3d at 583; *see also Gold v Park Ave. Extended Care Ctr. Corp.*, 90 AD3d 833, 834 [2d Dept 2011]; *Baker v Andover*

Assoc. Mgt. Corp., 2009 NY Slip Op 52788[U], *26, 30 Misc 3d 1218[A] [Sup Ct, Westchester County, Nov. 3, 2009] [Scheinkman, J.]).

As proof of the facts constituting the claim, the plaintiff submitted her own affidavit. In her affidavit, the plaintiff essentially attested to the allegations set forth in the complaint. Specifically, she asserted that the defendant owned and managed a nursing home facility at 505 Audubon Avenue in Manhattan, that on June 4, 2019, her deceased mother, who had been a resident at the defendant's facility since July 7, 2018, slipped and fell while she was left unattended, and that her mother sustained personal injuries as a consequence of her fall, including a fractured femur. The plaintiff further alleged that the defendant owed her mother a statutory duty of care and that it breached said duty by failing to adhere to the standards applicable to the operation of nursing homes, as articulated in Public Health Law § 2803-c, 42 CFR part 285, and NYCRR chapter 10, by leaving her unattended and permitting her to attempt to stand up and walk without assistance, despite knowledge that she could not walk without assistance. The plaintiff thus presented proof of her claim that the defendant deprived her mother of a right or benefit established for her well-being, as set forth in federal and state codes (*see Cortez v Terrence Cardinal Cooke Health Ctr.*, 199 AD3d 450, 451 [1st Dept 2021]).

The plaintiff, however, failed to present proof of the facts underlying her negligence cause of action, as the allegations purportedly constituting that cause of action, which were based on the impropriety of the defendant's staffing decisions, actually sounded in medical malpractice, as they are not within the ordinary experience and knowledge of a lay person (*see Muniz v American Red Cross,* 141 AD2d 386 [1st Dept 1988]). Hence, the plaintiff was required to submit an expert affirmation or affidavit supporting both her purported common-law negligence cause of action as well as her medical malpractice cause of action. Since she did not do so, she is not entitled to a default judgment on either of those two causes of action.

The plaintiff also is not entitled to a default judgment on the gross negligence cause of action. The failure to provide adequate supervision, without more, does not rise to the level of

reckless disregard necessary to support a cause of action to recover for gross negligence (*see Domoroski v Smithtown Ctr. for Rehabilitation & Nursing Care*, 2011 NY Slip Op 30997[U], *5, 2011 NY Misc LEXIS 1794, *12-13 [Sup Ct, Suffolk County, Mar. 31, 2011]).

The court notes that the plaintiff commenced this action as the "proposed administrator" of her mother's estate. She thus lacks capacity to prosecute this personal injury "survival" action to recover for conscious pain and suffering on behalf of the estate of a decedent (*see Carrick v Central Gen. Hosp.*, 51 NY2d 242, 246 [1980]; *Rodriguez v River Val. Care Ctr., Inc.*, 175 AD3d 432, 433 [1st Dept 2019]; *Richards v Lourdes Hosp.*, 58 AD3d 927, 927-928 [3d Dept 2009]; *Stroble v Townhouse Operating Co.*, 2019 NY Misc LEXIS 18865 [Sup Ct, Nassau County, Dec. 16, 2019]; *Fleisher v Ballon Stoll Bader & Nadler, P.C.*, 2015 NY Slip Op 31855[U], *5, 2015 NY Misc LEXIS 3625, *6 [Sup Ct, N.Y. County, Oct. 5, 2015]). Nonetheless, since (a) lack of capacity is an affirmative defense that must be pleaded and proven by the defendant (*see Fausset v Turner Constr. Co.*, 177 AD3d 702, 702 [2d Dept 2019]; *Matter of Tomarken v State of New York*, 100 AD3d 1072, 1074 [3d Dept 2012]; *Guiffrida v Storico Dev., LLC*, 60 AD3d 1286, 1287 [4th Dept 2009]), (b) the affirmative defense is waived unless raised by the defendant in an answer or in timely motion to dismiss the complaint on that ground (see CPLR 3211[a][3]; [e]), and (c) the defendant has neither answered nor made a timely motion, that affirmative defense has been waived at this juncture, and the plaintiff may proceed to inquest. The court further, notes, however, that the plaintiff must obtain letters of administration before she may enter any judgment in this action.

Accordingly, it is

ORDERED that the plaintiff's motion is granted, without opposition, to the extent that she is granted leave to enter a default judgment on the issue of liability against the defendant on the first cause of action, which alleged violations of Public Health Law §§ 2801-d and 2803-c, and the motion is otherwise denied; and it is further,

ORDERED that the plaintiff shall file a note of issue for a nonjury trial and, upon said filing, the matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to conduct an inquest on the issue of damages and to hear and report to the court on the issue of damages; and it is further,

ORDERED that, if applicable, counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further,

ORDERED that the parties shall appear for the reference inquest and hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further,

ORDERED that the hearing on inquest will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further,

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further,

ORDERED that the plaintiff shall serve a copy of this order, with notice of entry, upon the defendant, by regular first-class mail, within 15 days of the entry of this order.

This constitutes the Decision and Order of the Court.

2/15/2023
DATE

JOHN J. KELLEY, J.S.C.

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