

**Hicks v Sinclair**

2023 NY Slip Op 30866(U)

March 21, 2023

Supreme Court, New York County

Docket Number: Index No. 805006/2022

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*

-----X

SANDRA HICKS,

Plaintiff,

- v -

CATHERINE SINCLAIR, M.D., HEAD & NECK SURGICAL  
GROUP, LLC, and MOUNT SINAI WEST,

Defendants.

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INDEX NO. 805006/2022

MOTION DATE 12/23/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for JUDGMENT – DEFAULT/X-MOT SANCTIONS.

In this action to recover damages for medical malpractice, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendant Catherine Sinclair, M.D. Sinclair opposes the motion and cross-moves pursuant to 22 NYCRR 130-1.1 for the imposition of sanctions. The plaintiff opposes the cross motion. The motion is denied, the cross motion is denied, and Sinclair is directed to serve an answer to the complaint on or before May 11, 2023. Inasmuch as the court concludes that Sinclair was timely and properly served with process, nunc pro tunc, pursuant to the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters (Hague Service Convention, 20 UST 361, 658 UNTS 163, TIAS 10072), the answer shall not include an affirmative defense alleging untimely or improper service of process.

The plaintiff commenced this action on January 5, 2022. She thus had 120 days, or until May 5, 2022, within which to serve process upon Sinclair (see CPLR 306-b). Although the plaintiff attempted service upon Sinclair in New York on January 14, 2022, the plaintiff was unsuccessful, since Sinclair was not domiciled in New York at that time, did not maintain her

actual place of business at the location where service was attempted, and had, since January 8, 2021, become a full-time resident of Australia. Sinclair thus moved on June 14, 2022 pursuant to CPLR 306-b and 3211(a)(8) to dismiss the complaint against her for failure timely and properly to serve process upon her. The plaintiff opposed the motion and cross-moved pursuant to CPLR 3215 for leave to enter a default judgment against Sinclair, contending that service upon her in New York was proper, or, alternatively that, if the court concluded that the New York service was improper, pursuant to CPLR 306-b for an extension of time within which properly to serve Sinclair. In her papers, however, the plaintiff did not inform the court that she also was attempting to serve Sinclair pursuant to the Hague Service Convention. In an order dated September 30, 2022 (MOT SEQ 001), the court denied Sinclair's motion to dismiss, and instead granted the plaintiff's cross motion to the extent of extending her time until February 10, 2023 to serve Sinclair in Australia pursuant to the Hague Service Convention.

In fact, unbeknownst to the court, on March 17, 2022, the plaintiff already had made a formal request to the appropriate Australian authorities in Melbourne to serve process upon Sinclair in Malvern, Victoria, Australia. On March 31, 2022, the Principal Registry of the Supreme Court of Victoria (Principal Registry) acknowledged receipt, from the plaintiff's foreign service-of-process expediter, of the summons, complaint, and the plaintiff's request. On April 5, 2022, the Sheriff's Support office for the South East Metropolitan Region of Victoria acknowledged receipt of those documents from the Principal Registry. In an affidavit of service dated May 31, 2022, a sergeant in the Sheriff's Support office attested that, on May 30, 2022, he personally delivered copies of the summons and complaint to Sinclair, and that Sinclair confirmed that she was the person named in those documents. On September 29, 2022---only one day before this court issued its order deciding motion sequence 001---the Deputy Prothonotary of the Supreme Court of Victoria certified that the service upon Sinclair complied with the Hague Service Convention. That same date, the Principal Registry apparently emailed a letter to the plaintiff's expediter in Portland, Oregon, enclosing that certificate and the

sergeant's affidavit of service. Although the plaintiff uploaded these documents to the New York State Court Electronic Filing system on September 29, 2022, the motion and cross motion pending under motion sequence 001 already had been fully submitted as of August 10, 2022, and those papers were deemed to constitute a late filing.

The plaintiff now contends that the May 31, 2022 service upon Sinclair in Australia, and Sinclair's failure to have answered the complaint in response to that service, warrants the entry of a default judgment against Sinclair. The court rejects the plaintiff's contention.

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]).

In the first instance, on May 31, 2022, when service of process was effectuated on Sinclair pursuant to the Hague Service Convention, the 120-period for service already had lapsed, and the plaintiff had yet to obtain the court's permission to extend her time for service. Hence, Sinclair was not in default at that juncture.

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]).

In the context of a medical malpractice action, an affidavit or affirmation of merit from an expert is required to support a motion for leave to enter a default judgment, 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]). In the instant action, the plaintiff alleged that the defendants, including Sinclair, committed malpractice in treating her thyroid condition and performing a thyroidectomy, issues that only an expert physician would be qualified to address. Since the plaintiff has not submitted such an affidavit or affirmation, her motion must be denied on that ground as well.

Contrary to Sinclair's contention, however, the court, in its September 30, 2022 order, did not compel the plaintiff to serve process upon Sinclair a second time pursuant to the Hague Service Convention. Rather, it directed only that Sinclair be served pursuant to the Hague Service Convention on or before February 10, 2023. In this regard, the court's directive extending the plaintiff's time to serve process regularized and ratified the May 31, 2022 service of process. Although there is no basis upon which to impose sanctions upon the plaintiff for a frivolous motion, the court, on its own motion, deems the May 31, 2022 service to fall within the ambit of the extension of time that it had granted to the plaintiff, and also extends the time for Sinclair to serve an answer to the complaint up to and including May 11, 2023. Since the court has concluded that service was proper, the answer shall not include an affirmative defense based on untimely or improper service of process.

In light of the foregoing, it is

ORDERED that the plaintiff's motion for leave to enter a default judgment is denied; and it is further,

ORDERED the cross motion of the defendant Catherine Sinclair, M.D., for the imposition of sanctions upon the plaintiff is denied; and it is further,

ORDERED that, on the court's own motion, the time for the defendant Catherine Sinclair, M.D., to serve an answer to the complaint is extended up to and including May 10,

2023, and said answer shall not include an affirmative defense based on alleged untimely or improper service of process.

This constitutes the Decision and Order of the court.

3/21/2023  
DATE

  
JOHN J. KELLEY, J.S.C.

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