SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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NACHUM BOREK,

Plaintiff,

- v -

DR. STUART SEIDMAN, DR. ELIZABETH SUBLETTE, NEW YORK PRESBYTERIAN/WEILL CORNELL MEDICAL CENTER, and PAYNE WHITNEY PSYCHIATRIC CLINIC,

Defendants.

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INDEX NO. 805351/2021

MOTION DATE 05/05/2023

MOTION SEQ. NO. 014

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 014) 338, 339, 341 were read on this motion to/for DEFAULT JUDGMENT/INQUEST.

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 Dr. Stuart Seidman, and to proceed to inquest on the issue of damages against Seidman. Seidman did not timely oppose the motion. The motion is nonetheless denied.

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]; *see also Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 202 [2013]).

The relevant affidavit of service here established that, on February 16, 2022, the plaintiff served process upon Seidman at his office, located at 617 West End Avenue, Suite 1B, New York, New York 10024, by "delivering a true copy thereof to PIERRE 'DOE' a person of suitable

age and discretion, at the actual place of business, dwelling house, or usual place of abode in the state, and mailing, as indicated below." The affidavit of service, however, did not further indicate that an additional copy of the summons and complaint was in fact mailed to any address. Nonetheless, the plaintiff's process server included the following language in the affidavit of service: "Successful Attempt; Feb 16, 2022, 3:09 pm EST at 617 WEST END AVENUE, NEW YORK, NY 10024 received by PIERRE 'DOE' (Refused last name), stated he is authorized to accept. Access to residence denied." The plaintiff filed the affidavit of service on February 24, 2022. Because the plaintiff's process server did not mail an additional copy of the summons and complaint to Seidman's "actual place of business, dwelling place, or usual place of abode" (CPLR 308[2]), the plaintiff did not effectuate "substituted service" upon Seidman pursuant to CPLR 308(2). Rather, the plaintiff in effect relies upon CPLR 308(3), which permits service upon a defendant's authorized agent. If, in fact, Pierre "Doe" were authorized to accept service of process on behalf of Seidman (*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]), Seidman would have had to answer, appear, or move with respect to the complaint no more than 30 days after the service upon Pierre "Doe" (*see* CPLR 3012[c]), that is, on or before March 18, 2022.

Inasmuch as a process server's affidavit of service is prima facie evidence of proper service (*see Johnson v Deas*, 32 AD3d 253, 254 [1st Dept 2006]), and Seidman did not oppose this motion, the plaintiff made a prima facie showing that Seidman was properly served with process pursuant to CPLR 308(3). The plaintiff's own affidavit established that Seidman neither answered, moved, nor appeared in a timely manner on or before March 18, 2022, and that Seidman thus was in default as of March 21, 2022, the first business day thereafter (*see* General Construction Law § 25-a). The plaintiff made the instant motion on March 3, 2023 (*see*

CPLR 2211) and, thus, within one year after Seidman's default. The plaintiff's motion is thus timely (*see* CPLR 3215[c]). While the court notes that Seidman has since made a motion both to vacate his default and permit him to make a late motion to dismiss the complaint against him on several grounds, including improper service of process (MOT SEQ 016), the court need not, in connection with the instant motion, address Seidman's contention that service was improper, since this motion is being denied on the ground that the plaintiff failed to present proof of facts underlying his claim against Seidman. Hence, the court simply will assume, for the purposes of this unopposed motion, that service of process was properly effectuated upon Seidman.

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 a 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]). For purposes of CPLR 3215, a complaint verified by a party may be employed as proof of the facts constituting the claim (*see* CPLR 105[u]), but only where it sets forth sufficient, detailed evidentiary facts, rather than mere conclusions (*see Celnick v Freitag*, 242 AD2d 436, 437 [1st Dept 1997]). 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]).

With respect to the proof of the facts underlying his claims, the plaintiff relied only upon his complaint, his own affidavit, and his mother's affidavit. Crucially, in the context of a medical or dental malpractice action, 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]; *Bollinger v Mark Mordechai Liechtung, DMD, P.C.*, 2023 NY Slip Op 31537[U], *5, 2023 NY Misc LEXIS 2231, *6 [Sup Ct, N.Y. County, May 5, 2023] [Kelley, J.]; *Checo v Mwando*, 2022 NY Slip Op 31223[U], *4, 2022 NY Misc LEXIS 1865, *5 [Sup Ct, N.Y. County, Apr. 7, 2022] [Kelley, J.]; *Garcia v Solomon*, 2020 NY Misc LEXIS 17635, *2 [Sup Ct, Bronx County, Jun. 19, 2020]; *Charles v Wolfson*, 62 Misc 3d 1224[A], 2019 NY Slip Op 50251[U], *1, 2019 NY Misc LEXIS 866, *3 [Sup Ct, Bronx County, Mar 6, 2019]; *see generally Burindaro v Grinberg*, 57 AD3d 932, 933 [2d Dept 2008] ["plaintiff failed to demonstrate the existence of a meritorious cause of action" in medical malpractice case]). Although a motion for leave to enter a default judgment may be granted against a health-care provider in a malpractice action where the plaintiff submits an expert affirmation or affidavit, or even a peer-review document (*see Global Liberty Ins. Co. v W. Joseph Gorum, M.D., P.C.*, 143 AD3d 768, 769-770 [2d Dept 2016]; *Diaz v Perez*, 113 AD3d 421, 421-422 [1st Dept 2014]), such a motion must be denied even where such an affidavit or affirmation is submitted, but is found to be insufficient (*see Durr v New York Community Hosp.,* 43 AD3d 388, 389 [2d Dept 2007]; *cf. Willaims v D'Angelo*, 24 AD3d 538, 539 [2d Dept 2005] [expert affirmation of merit is required to restore a medical malpractice action to the trial calendar pursuant to CPLR 3404 after it had been marked off the calendar for more than one year]; *American Tr. Ins. Co. v Excell Clinical Lab*, 2020 NY Slip Op 34123[U], *4, 2020 NY Misc LEXIS 10480, *4 [Sup Ct, N.Y. County, Dec. 10, 2020] [expert affirmation of merit is required by no-fault automobile insurer to support its request to enter default judgment declaring that it was not obligated to pay benefits to non-appearing health-care provider, where the basis for its disclaimer was that the treatment rendered by provider was not medically necessary]).

As best as the court can interpret it, the complaint here alleged malpractice in very general, conclusory, and boilerplate language, asserting, with respect to Seidman, only that he departed from good medical, psychiatric, and neurological practice either in involuntarily committing the plaintiff to the defendant Payne Whitney Psychiatric Clinic, participating in the

determination to commit the plaintiff, failing properly to diagnose the plaintiff's condition, or prescribing medication that was either contraindicated or prescribed at an improper dosage, all of which allegedly caused or contributed to the plaintiff's current psychiatric condition or deprived him of the opportunity to cure or alleviate the condition from which he was suffering at the time of the treatment. The types of departures from accepted psychiatric and neurological practice that the plaintiff alleged against Seidman are perfect examples of the classes of departures that a non-expert, lay person would be completely unqualified to assess in the absence of an expert affirmation or expert testimony. Hence, even if properly verified by the plaintiff himself, the complaint and the plaintiff's affidavit were insufficient to support the entry of a default judgment against Seidman (*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 plaintiff's motion for leave to enter a default judgment against the defendant Dr. Stuart Seidman, and proceed to inquest on the issue of damages against that defendant, is denied.

This constitutes the Decision and Order of the court.

7/28/2023
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**