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 06/01/2023

MOTION SEQ. NO. 016

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 016) 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 399, 400, 401, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 427, 428, 429

were read on this motion to/for LEAVE TO FILE.

In this action to recover damages for medical malpractice, the defendant Dr. Stuart Seidman moves pursuant to CPLR 317, 5015(a)(1), and 3012(d) for leave to vacate his defaults in answering or appearing in the action and in opposing the plaintiff's motion for leave to enter a default judgment against him. Seidman thereupon seeks leave to appear in the action and move pursuant to CPLR 3211(a)(5) and (a)(8) to dismiss the complaint against him as time-barred and for failure properly to serve him with the summons and complaint. The plaintiff opposes the motion. The motion is granted to the extent that Seidman's default in appearing in the action is vacated, he is granted leave to appear in the action and to move to dismiss the complaint insofar as asserted against him, and the complaint thereupon is dismissed against him as time-barred. The motion is otherwise denied as academic.

On November 4, 2021, the plaintiff commenced this action against Seidman, among others, alleging, in essence, that Seidman misdiagnosed his mental health condition, prescribed improper antipsychotic, antidepressant, and anxiolytic medications, or prescribed otherwise

proper medications at improper dosages, and suggested that Seidman was responsible for the plaintiff's otherwise unwarranted commission to a psychiatric care facility.

The relevant affidavit of service here established that, on February 16, 2022, the plaintiff dispatched a process server to serve process upon Seidman at his office, located at 617 West End Avenue, Suite 1B, New York, New York 10024, and that the process server alleged that he successfully effectuated service 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 relies, in effect, 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.

Seidman did not answer, move, or otherwise appear in the action by March 18, 2022, and, thus, was in default as of March 19, 2022. On March 3, 2023, and thus within one year after Seidman had defaulted (*see* CPLR 3215[a], [c]), the plaintiff moved pursuant to CPLR 3215(a) and (b) for leave to enter a default judgment against Seidman on the issue of liability and for an inquest to assess damages (MOT SEQ 014). Seidman did not timely oppose that motion. In an order dated July 28, 2023, this court, upon presuming that the service of process upon Seidman was proper, denied the plaintiff's motion on the ground that he failed to support it with an expert's affirmation or affidavit, which is required in connection with default motions in medical malpractice actions.

On May 4, 2023, Seidman made the instant motion, seeking to vacate his defaults in appearing in the action and opposing the plaintiff's default motion, and for leave to submit opposition to the motion, appear in the action, and thereupon move to dismiss the complaint insofar as asserted against him. Inasmuch as the court denied the plaintiff's motion for leave to enter a default judgment against Seidman, that branch of Seidman's motion seeking leave to oppose that motion has been rendered academic.

CPLR 5015(a)(1) provides that

> "The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of . . . excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry."

"A party seeking relief from an order or judgment on the basis of excusable default pursuant to CPLR 5015(a)(1) must provide a reasonable excuse for the failure to appear and demonstrate the merit of the cause of action or defense" (*Goldman v Cotter*, 10 AD3d 289, 291 [1st Dept 2004]; *see Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co*., 67 NY2d 138, 141 [1986]; *Toos v Leggiadro Intl., Inc.,* 114 AD3d 559, 561 [1st Dept 2014] [movant must show a "reasonable excuse and a potentially meritorious" claim or defense]; *Navarro v A. Trenkman Estate, Inc*.,

279 AD2d 257, 258 [1st Dept 2001]; *Mediavilla v Gurman*, 272 AD2d 146, 148 [1st Dept 2000]). "The determination of the sufficiency of the proffered excuse and the statement of merits rests within the sound discretion of the court" (*Goldman v Cotter*, 10 AD3d at 291; *see Navarro v A. Trenkman Estate, Inc*., 279 AD2d at 258).

Seidman alleged in his supporting affidavit that he had a reasonable excuse for failing timely to appear or answer the complaint, inasmuch as he never received a copy of the summons and complaint from Pierre "Doe." Seidman expressly denied that Pierre worked in his medical office or that he employed Pierre, but that Pierre was merely a doorman or concierge employed by the building in which his office was located. Seidman further asserted that he had never given Pierre the authority to accept legal papers on his behalf. As Seidman explained it,

> "In point of fact, I have not given the doormen authority to accept service on my behalf. Further, my office at 617 West End Avenue, Suite 1B, is on the ground floor with its own entrance on 90th Street, so there is not any reason for the doorman to deny a process server access to the building through the West End Avenue entrance. This is well known by the doormen, who routinely re-direct patients who enter through the West End Ave. entrance, to my 90th Street office entrance. The public (including patients and process servers) can directly access my office at 90th St. without passing by the doormen/concierge, who only monitor the West End Avenue entrance."

Seidman further asserted that, if a process server wished to affix a copy of legal papers on his office door, there was no one who would impede the process server's progress. He averred that, on February 16, 2022, he was in Israel, and submits proof to the court establishing his travel itinerary at that time. Seidman further explained that

> "[w]hen I returned to my New York office on February 27, 2022, the doorman did not mention to me that a process server had appeared looking for me, nor did he hand me any legal papers, and I did not find any legal papers on my desk or affixed to my 90th Street entrance. I did not receive any follow-up mailing by the process server of a summons and complaint.
>
> "Thus, I did not receive actual notice or realize that service had been attempted on me, that a new lawsuit was filed against me, or that any action was required of me.
>
> "I did not at any time willfully attempt to evade service or abandon my defense to the within matter. 'Pierre' has since confirmed that he is not authorized to accept process for me and did not do so."

Seidman also asserted that he spent a limited amount of time in his office during 2022, and did not read every piece of mail that had been delivered to his office. In this regard, however, the court notes that the process server's affidavit did not specifically indicate that he attempted a follow-up mailing to any address, despite the fact that he allegedly hand-delivered a copy of the summons to a "person of suitable age and discretion."

While a defendant's bare, conclusory, and unsupported assertion that he or she never received a copy of a summons and complaint generally is insufficient to establish a reasonable excuse for a default in the context of CPLR 5015(a)(1) (*see Gray v Goodluck-Hedge*, 208 AD3d 1221, 1223 [2d Dept 2022]), the court concludes that Seidman's explanation here was more than conclusory, as he established that he was on vacation at the time of the attempted service (*see id.*), and that the concierge in his building never gave him a copy of the summons and complaint. In any event, Seidman need not rely on CPLR 5015(a)(1), inasmuch as CPLR 317 provides that

> "[a] person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense."

There is no dispute that Seidman did not designate Pierre "Doe" as an agent for service of process in accordance with CPLR 318, which requires a notarized and acknowledged writing. Nor is there a dispute that the summons and complaint was not personally delivered to Seidman.

> "A defendant served with a summons other than by personal delivery or to an agent designated under CPLR 318 may obtain relief pursuant to CPLR 317 upon a showing that it did not receive notice of the summons in time to defend, and has a meritorious defense (*see Eugene Di Lorenzo, Inc. v A. C. Dutton Lbr. Co.,* 67 NY2d 138, 142-143, 492 NE2d 116, 501 NYS2d 8 [1986]; *New York & Presbyt. Hosp. v Allstate Ins. Co.*, 29 AD3d 968, 815 NYS2d 478 [2006]). Unlike a motion to vacate under CPLR 5015(a)(1), it is unnecessary for a defendant seeking relief under CPLR 317 to demonstrate a reasonable excuse for its default (*see Eugene Di Lorenzo, Inc. v A. C. Dutton Lbr. Co.*, 67 NY2d at 141;

> *New York & Presbyt. Hosp. v Allstate Ins. Co.,* 29 AD3d 968, 815 NYS2d 478 [2006]; *Marinoff v Natty Realty Corp.,* 17 AD3d 412, 792 NYS2d 491 [2005]; *Paul Conte Cadillac v C.A.R.S. Purch. Serv.,* 126 AD2d 621, 622, 511 NYS2d 58 [1987])"

(*Thakurdyal v 341 Scholes St., LLC*, 50 AD3d 889, 889-890 [2d Dept 2008]). Inasmuch as Seidman made the necessary showing that he did not receive notice of the summons in time to defend this action, the court must vacate Seidman's default in appearing or answering in the action, as long as he has established a potentially meritorious defense.

With respect to defenses that Seidman now asserts are potentially meritorious, he argued not only that he was not properly served with the summons and complaint, and that the court thus lacked personal jurisdiction over him (CPLR 3211[a][8]), but that the action against him was time barred (CPLR 3211[a][5]). Although CPLR 3211(e) provides that those affirmative defenses are waived if not timely raised in an answer or motion addressed to the complaint, "the waiver provisions of CPLR 3211(e) do not apply here because [Seidman] neither appeared in the proceeding nor made another motion pursuant to CPLR 3211(a) that failed to make [his] objections to personal jurisdiction" (*Government Emps. Ins. Co. v Basedow*, 28 AD3d 766, 767 [2d Dept 2006]; *see Citimortgage, Inc. v Jameson*, 140 AD3d 1493 [3rd Dept 2016] [applying same rule to defense of lack of standing]). Hence, the court considers both defenses, and concludes that the action is time-barred insofar as asserted against Seidman. It thus concludes that, upon the vacatur of Seidman's default in appearing in the action, and upon granting him leave to answer or move with respect to the complaint, his motion to dismiss the complaint insofar as asserted against him must be granted on that ground.

The plaintiff had his first appointment with Seidman on March 20, 2012, and Seidman saw him for follow-up visits on May 22, 2012, September 9, 2012, February 11, 2013, and June 24, 2013. In a letter dated December 23, 2013, Seidman wrote to the plaintiff that he was terminating their professional relationship because Seidman had concluded that the plaintiff needed to be seen more frequently by a psychiatrist, and that Seidman could not provide such

extensive services. Seidman, however, stated that, "if and when" the plaintiff decided to "continue treatment," Seidman would "forward copies of [his] current record" upon receipt of a written authorization. Seidman continued: "Be assured that I will be available to treat you until March 1, 2014. After that date, I will not be available." The plaintiff did not follow up with Seidman. Even if December 23, 2013, is considered to be the last date that Seidman treated the plaintiff for the purpose of applying the "continuous treatment" doctrine, the plaintiff did not commence this action against Seidman until November 4, 2021, almost eight years later. The court notes that, in his affidavit, Seidman also asserted that

> "[o]n approximately February 18, 2014, Mr. Borek's mother, Hannah Borek, made an appointment with me at my West End Medical Associates office under a fake name, 'Chaya Shapiro', posing as a patient. Once she revealed her true identity to me during the appointment, she attempted to discuss her son's treatment with me without any written authorization from her son. I advised her that it was impermissible under the HIPAA laws for me to share her son's treatment information. When she would not leave the office as I asked, I was unfortunately left with no other option than to call the police to have her removed."

Even if February 18, 2014 were somehow deemed to be the last date of treatment, this action was commenced more than seven years and eight months later. The same analysis would apply if the court deemed March 1, 2014---the date until which Seidman agreed to "make himself available"---as the last date of treatment. For the same reasons as this court, in its orders dated July 25, 2022 (MOT SEQ 001) and February 14, 2023 (MOT SEQ 010), determined that the action was time-barred against Seidman's co-defendants, and that he failed to establish that his insanity tolled the limitations period as to any defendant, the court concludes that the action is time-barred by the 2½-year limitations period as to Seidman as well.

Inasmuch as the court is dismissing the complaint against Seidman as time-barred, it need not address whether Seidman was properly served with process or not, and whether lack of jurisdiction constitutes a potentially meritorious defense. The court notes, in this regard, that the process server's affidavit and Seidman's affidavit diverge greatly as to whether Pierre "Doe" was authorized to accept service on Seidman's behalf in his absence, and it further notes that it

has already concluded, in its July 28, 2023 order (MOT SEQ 014) that, at the very least, the plaintiff established, prima facie, that Seidman was properly served with process.

Since the complaint has now been dismissed as against all of the defendants, it must be marked disposed.

Accordingly, it is

ORDERED that the motion of Dr. Stuart Seidman is granted to the extent that his default in appearing in the action is vacated, he is granted leave to appear in the action, he is granted leave to move to dismiss the complaint insofar as asserted against him, and, upon his appearance, the branch of his motion seeking to dismiss the complaint against him as time-barred is granted, the complaint thereupon is dismissed against him as time-barred, and the motion is otherwise denied as academic; and it is further,

ORDERED that, on the court's own motion, the action is severed against the defendant Dr. Stuart Seidman; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendant Dr. Stuart Seidman.

This constitutes the Decision and Order of the court.

9/11/2023
DATE

JOHN J. KELLEY, J.S.C.

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