

Burke v Perkins

2023 NY Slip Op 33556(U)

October 5, 2023

Supreme Court, New York County

Docket Number: Index No. 805376/2022

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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KETANYA BURKE,

Plaintiff,

- v -

ANTHONY RAY PERKINS, M.D., and NYC MEDICAL PRACTICE, P.C., doing business as GOALS AESTHETICS & PLASTIC SURGERY,

Defendants.

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INDEX NO. 805376/2022

MOTION DATE 06/23/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for JUDGMENT - DEFAULT

In this action to recover damages for medical malpractice arising from the alleged negligent performance of a plastic surgery procedure, the plaintiff moves pursuant to CPLR 3215(a) for leave to enter a default judgment on the issue of liability against the defendant Anthony Ray Perkins, M.D. Perkins does not oppose the motion. The motion is granted, and the matter is set down for an inquest on the issue of damages.

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 plaintiff commenced this action on November 30, 2022 by filing a summons and complaint (see CPLR 304[a]). The plaintiff served Perkins with process pursuant to CPLR 308(2) by personally delivering a copy of the summons and complaint to a person of suitable age and discretion at Perkins's residence on December 5, 2022, and by mailing another copy of the summons and complaint to that address on December 6, 2022. The plaintiff filed proof of service December 28, 2022 and, hence, service was deemed "complete" within the meaning of CPLR 308(2) on January 9, 2023, which was the first business day 10 days after that filing (see CPLR 308[2]; General Construction Law § 25-a). Perkins thus had 30 days after January 9, 2023 (see CPLR 3012[c]), or until February 8, 2023, within which to answer, move with respect to the complaint, or otherwise appear in the action. The affirmation of the plaintiff's attorney established that Perkins was in default as of February 9, 2023, as he did not answer, move with respect to the complaint, or otherwise appear in the action on or before February 8, 2023.

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 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]).

“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 to support a motion for leave to enter a default judgment against a physician 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]). The plaintiff established the merits of the action through the affirmation of board-certified plastic surgeon Robert M. Tornambe, M.D., who averred that, based upon his review of the plaintiff's medical records,

“there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment and practice that is the subject of the complaint, departed from acceptable professional medical standards or treatment practices, and said departures were a proximate cause of the injuries sustained by the plaintiff.”

Consequently, the plaintiff has established her entitlement to a default judgment against Perkins on the issue of liability. The court notes that the plaintiff already has discontinued the action against the other defendant in this action.

In light of the foregoing, it is

ORDERED that the plaintiff's motion for leave to enter a default judgment on the issue of liability against the defendant Anthony Ray Perkins, M.D., is granted, without opposition; and it is further,

ORDERED that the matter is set down for an inquest to assess damages before this court on December 13, 2023, at 9:30 a.m., or on any adjourned date that the court may direct, in courtroom 304 at 71 Thomas Street, New York, New York.

This constitutes the Decision and Order of the court.

JOHN J. KELLEY, J.S.C.

<u>10/5/2023</u> DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE