SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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BURTON ARONOFF, M.D.,

Plaintiff,

- v -

DEWITT REHABILITATION AND NURSING CENTER, INC., UPPER EAST SIDE REHABILITATION AND NURSING CENTER, DANIEL KELIN, M.D., NORMAN MOORE, M.D., DR. FORD, JOHN/JANE DOE, and XYZ CORPORATION (fictitious names of persons and entities presently unknown),

Defendants.

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INDEX NO. 805115/2022

MOTION DATE 08/08/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for JUDGMENT - DEFAULT.

In this action to recover damages for medical malpractice and nursing home negligence pursuant to the Public Health Law, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment on the issue of liability against the defendant Norman Moore, M.D. No party opposes the motion. The motion is granted, and an inquest on the issue of damages against Moore shall be conducted simultaneously with the trial of the action as against the remaining defendants.

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, 622 [1st Dept 2016]; *Atlantic Cas. Ins. Co. v RJNJ Services, Inc*. 89 AD3d 649, 650 [2d Dept 2011]; *see also Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 202 [2013]).

The plaintiff commenced this action on April 1, 2022 by filing a summons and complaint (*see* CPLR 304[a]). The relevant affidavit of service here established that, on April 12, 2022, the plaintiff served process upon Moore at his medical offices, located at 211 East 79th Street, New York, New York 10075, by (a) "by delivering a true copy hereof to and leaving with SCOTT MAIR ADMINISTRATIVE ASSISTANT a person of suitable age and discretion" and (b) thereafter mailing additional copies of the summons and complaint on April 13, 2022 to that address in an envelope marked "personal and confidential" and not indicating that the contents were sent by an attorney or involved a lawsuit. 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 Moore did not oppose this motion, the plaintiff made a prima facie showing that Moore was properly served with process pursuant to CPLR 308(2).

The plaintiff filed the relevant affidavit of service on April 28, 2022 and, hence, service upon Moore was deemed "complete" within the meaning of CPLR 308(2) on May 9, 2022, which was the first business day 10 days after that filing (*see* CPLR 308[2]; General Construction Law §§ 20, 25-a). Moore thus had 30 days after May 9, 2022 (*see* CPLR 3012[c]), or until June 8, 2022, 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 Moore neither answered, moved, nor appeared in a timely manner on or before June 8, 2022, and that Moore thus was in default as of June 9, 2022. The plaintiff made the instant motion on April 29, 2023 (*see* CPLR 2211) and, thus, within one year after Moore's default. The plaintiff's motion is thus timely (*see* CPLR 3215[c]).

"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]). 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]).

Generally, 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]). The complaint here is verified by the plaintiff's attorney and, hence, lacks any evidentiary value in connection with this motion for leave to enter a default judgment (*see First Franklin Fin. Corp. v Alfau,* 157 AD3d 863, 865 [2d Dept 2018]; *DLJ Mtge. Capital, Inc. v United Gen. Tit. Ins. Co.*, 128 AD3d 760, 762 [2d Dept 2015]; *Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]).

Crucially, in the context of a medical or dental malpractice action, an affidavit or affirmation of merit from an expert is required to support a CPLR 3215 motion, 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]; *Borek v Seidman*, 2023 NY Slip Op 32617[U], *4-5, 2023 WL 4846035, *3 [Sup Ct, N.Y. County, Jul. 28, 2023] [Kelley, J.]; *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 by failing to submit an expert affirmation]). 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 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]).

With respect to the proof of the facts underlying his claims, the plaintiff did, in fact, submit and rely upon on the expert affirmation of physician Ronald Jeffrey Schwartz, M.D. Dr. Schwartz noted that, prior to the plaintiff's admission to the defendant Upper East Side Rehabilitation and Nursing Center (UES RNC), the plaintiff had recently undergone a kidney transplant procedure, and had been prescribed the immuno-suppressant drug Tacrolimus. He opined that, during the plaintiff's admission at UES RNC between January 30, 2019 and

February 19, 2019, Moore, who oversaw the plaintiff's care as his attending physician, departed from good and accepted medical care by failing to monitor the plaintiff's blood sugar levels, despite the plaintiff's history of severely uncontrolled blood sugar levels. He further faulted Moore for failing to consult with an endocrinologist properly to manage the plaintiff's blood glucose levels and failing regularly to monitor "HbA1C or urine for microalbumin to further assess for signs of kidney damage from uncontrolled diabetes." In light of the nature of the plaintiff's recent surgery, Dr. Schwartz asserted that Moore departed from good and accepted practice in failing to consult with a vascular surgeon, nephrologist, infectious disease specialist, and dietician, all of which Dr. Schwartz contended was necessary to address the plaintiff's low serum albumin level and high "Braden level," which respectively made him susceptible to an increased risk for skin breakdown and impaired wound healing due to his lack of protein stores.

Dr. Schwartz explained that, during the plaintiff's admission to UES RNC, the plaintiff frequently reported his pain scale in connection with flesh sores as greater than 6 out of 10, indicating moderate to severe uncontrolled pain, and that Moore did not properly address those complaints. According to Dr. Schwartz's review of relevant medical records, the plaintiff was admitted to New York Presbyterian-Weill-Cornell Medical Center (NYPH) on February 14, 2019, with "severely uncontrolled glucose levels, with a rising WBC# and worsening left foot gangrene." Dr. Schwartz opined that "[t]his was due to the lack of close medical attention on the part of Dr. Moore." He asserted that the plaintiff "subsequently suffered extensive gangrene and necrotizing fasciitis of the left ankle requiring a left guillotine amputation due to lack of close medical attention by Dr. Moore."

Dr. Schwartz further averred that, while at UES RNC and under Moore's care, the plaintiff also developed a full-thickness right-buttock pressure wound due to the lack of proper wound care prevention on Moore's part. In addition, Dr. Schwartz opined that, as a consequence of Moore's failure to render appropriate monitoring and care while the plaintiff was at UES RNC, the plaintiff, during his subsequent hospitalization at NYPH, also developed a

Stage 2 left-buttock pressure ulcer measuring 0.5 centimeters (cm) by 1 cm by 0.1 cm, a left-toe vascular ulcer measuring 3 cm by 2 cm, with 100% slough, a left-heel vascular ulcer measuring 8 cm by 5 cm, with partial eschar and partial slough, a right-plantar heel vascular ulcer, measuring 1 cm by 4 cm, with partial slough and partial granulation, a right-lateral foot vascular ulcer, measuring 5 cm by 4 cm, with 100% eschar, and vascular ulcers on the second, third, and fourth toes of the right foot, with 100% eschar.

Dr. Schwartz's affirmation more than adequately constituted proof of the facts underlying the plaintiff's claims of medical malpractice against Moore.

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 Norman Moore, M.D., is granted, without opposition, Norman Moore, M.D., is held in default, and the court shall conduct an inquest on the issue of damages against Norman Moore, M.D., simultaneously with the trial of the action against the remaining defendants.

This constitutes the Decision and Order of the court.

10/25/2023
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**