

Jeffrey v Hazel the Beauty RN, LLC

2024 NY Slip Op 32117(U)

June 21, 2024

Supreme Court, New York County

Docket Number: Index No. 805445/2023

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

-----X

JUANITA JEFFREY

Plaintiff,

- v -

HAZEL THE BEAUTY RN, LLC,

Defendant.

-----X

INDEX NO. 805445/2023

MOTION DATE 03/12/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8 were read on this motion to/for JUDGMENT - DEFAULT.

In this action to recover damages for professional nursing malpractice and negligent hiring, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendant, and to proceed to inquest on the issue of damages against it. The defendant did not timely oppose the motion. The motion nonetheless is denied, albeit without prejudice to renewal upon proper papers.

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, 651 [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 November 9, 2023, the plaintiff served process upon the defendant, a limited liability company, by delivering a copy of the summons and complaint at the defendant's place of business to a man identified as Shawn

“Doe,” who allegedly represented to the plaintiff’s process server that he was a manager authorized to accept service of process on behalf of the defendant (see CPLR 311-a[a][iii] [agent authorized by appointment to receive service]). To the extent that service upon Shawn “Doe” is deemed valid, the defendant was required to answer, appear, or move with respect to the complaint no more than 20 days thereafter (see CPLR 3102[a]), that is, on or before November 29, 2023. 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 the defendant did not oppose this motion, the plaintiff made a prima facie showing that the defendant was properly served with process pursuant to CPLR 311-a(a)(iii).

The affirmation of the plaintiff’s attorney established that the defendant neither answered, moved, nor appeared in a timely manner on or before November 29, 2023, and that the defendant thus was in default as of November 30, 2023. The plaintiff made the instant motion on February 12, 2024 (see CPLR 2211) and, thus, within one year after the defendant’s default. The plaintiff’s motion is thus timely (see CPLR 3215[c]).

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] [emphasis added]; 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]). 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]). “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 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 her claims, the plaintiff relied only upon her attorney’s affirmation and her complaint, which was verified only by her attorney “[A] pleading verified by an attorney pursuant to CPLR 3020(d)(3),” and not by someone with personal knowledge of the facts, “is insufficient to establish its merits” (*DLJ Mtge. Capital, Inc. v United Gen. Tit. Ins. Co.*, 128 AD3d 760, 762 [2d Dept 2015], quoting *Triangle Props. #2, LLC v Narang*, 73 AD3d 1030, 1032 [2d Dept 2010]; see *First Franklin Fin. Corp. v Alfau*, 157 AD3d 863, 865 [2d Dept 2018]). Moreover, the affirmation of an attorney who claims no personal knowledge of the underlying facts is “utterly devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215” (*Beltre v Babu*, 32 AD3d at 723). Hence, the plaintiff’s submissions are insufficient to support her motion, as they did not constitute proof of the facts underlying her claims against the defendant.

Crucially, and in any event, in the context of a malpractice action based upon alleged departures from good and accepted professional practice, 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]).

The complaint here alleged malpractice in very general, conclusory, and boilerplate language. Specifically, it alleged that the defendant was a limited liability company that held itself out as a providing professional registered nursing services, that its agents, servants and/or employees failed safely and properly to utilize an ADVATx machine in the provision of laser-based skin treatment services, that the failure to safely and properly utilize that machine constituted nursing malpractice and that, as a proximate result of that malpractice, the plaintiff sustained burns to her face. Expert testimony is required where a plaintiff seeks to establish that a nurse deviated from accepted standards of professional practice, and a plaintiff may not rely solely on “common knowledge” where the relevant issue is whether a nurse properly exercised professional skill and judgment (see *De Leon v Hospital of Albert Einstein Coll. of Medicine*, 164 AD2d 743, 748 [1st Dept 1991]). Critically, the nature of the departures from good and accepted practice, in the context of the type of skin care treatment that the plaintiff

alleged here, provides a perfect example of the class 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 the complaint were properly verified by the plaintiff herself, or she submitted the content of her attorney's affirmation in her own affidavit, the complaint and such an affidavit would be insufficient to support the entry of a default judgment against the defendant in connection with the malpractice cause of action premised upon alleged departures from accepted practice (*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]).

Moreover, even if the plaintiff had personally verified her complaint or submitted her own affidavit, she did not submit facts establishing that the defendant "knew, or should have known," of its employees' "propensity for the sort of conduct which caused [her] injury" (*Sheila C. v Povich*, 11 AD3d 120, 129-130 [1st Dept 2004]; *see Kuhfeldt v New York Presbyterian/Weill Cornell Med. Ctr.*, 205 AD3d 480, 481-482 [1st Dept 2022]). Hence, her submissions did not support her request for leave to enter a default judgment against the defendant on her negligent hiring and retention cause of action.

The plaintiff also asserted a cause of action to recover for malpractice based upon the defendant's alleged provision of professional nursing services despite its failure to obtain a license from the New York State Department of Education (DOE) to provide such services. CPLR 4504(d) provides that,

"in any action for damages for personal injuries or death against a person not authorized to practice medicine under article 131 of the education law for any act or acts constituting the practice of medicine, when such act or acts were a competent producing proximate or contributing cause of such injuries or death, the fact that such person practiced medicine without being so authorized shall be deemed prima facie evidence of negligence."

In malpractice actions, claims of nursing malpractice essentially are treated identically to medical malpractice claims (*see generally Carter v Isabella Geriatric Ctr., Inc.*, 71 AD3d 443, 444 [1st Dept 2010]; *Rosen v John J. Foley Skilled Nursing Facility*, 45 AD3d 558, 559 [2d Dept

2007]). The court thus concludes that a cause of action to recover damages for nursing malpractice may be premised upon CPLR 4504(d), and that the cause of action may be established even in the absence of an expert affirmation. Nonetheless, the court notes that proof that a professional health-care provider is “unlicensed” does not constitute dispositive evidence that he or she was not “authorized” to provide relevant health-care services within the meaning of that statute (*see Ellenberger v Pena*, 88 AD2d 373, 377 [2d Dept 1982]). In any event, inasmuch as the plaintiff’s attorney does not have personal knowledge as to whether the defendant or any of its employees or agents is, in fact, licensed, and has presented no documentary evidence that the DOE has not licensed the defendant, its employees, or agents, such as a printout of a computer license search that yielded negative results, the plaintiff has failed to submit proof of the facts underlying her malpractice cause of action premised upon CPLR 4504(d).

Accordingly, it is,

ORDERED that the plaintiff’s motion for leave to enter a default judgment against the defendant, and to proceed to inquest against the defendant on the issue of damages, is denied, without prejudice to renewal upon proper papers.

This constitutes the Decision and Order of the court.

6/21/2024

DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE