SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

----------X

JESSICA CHARLES and CHRISTOPHER CHARLES,

Plaintiffs,

- v -

DAVID GREUNER, M.D., GREUNER MEDICAL, P.C., doing business as NYC SURGICAL ASSOCIATES, DAVID GREUNER, M.D., P.C., NYC SURGICAL CARES, INC., GLENYS HERNANDEZ, MPAS, RPA-C, and ADAM M. TONIS, D.C.,

Defendants.

----------X

INDEX NO. 805501/2023

MOTION DATE 01/24/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31

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

In this action to recover damages for common-law negligence, medical malpractice based on alleged departures from good and accepted practice, lack of informed consent, negligent hiring, training, supervision, and retention of health-care employees, and loss of spousal consortium, the plaintiffs move pursuant to CPLR 3215 for leave to enter a default judgment on the issue of liability against the defendants David Greuner, M.D., Greuner Medical, P.C., doing business as NYC Surgical Associates (GMPC), and David Greuner, M.D., P.C. (DGMD) (collectively the Greuner defendants), and to proceed to inquest on the issue of damages against them. The Greuner defendants did not oppose the motion. The motion is granted to the extent that the plaintiffs are granted leave to enter a default judgment against the Greuner defendants on the issue of liability on the medical malpractice, lack of informed consent, and loss of spousal consortium causes of action, and the matter is set down for an inquest on the issue of damages against those defendants, to be held simultaneously with the trial against the remaining defendants. The motion is otherwise 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 defendants, proof of the defendants' defaults, and proof of the facts constituting the claim or claims (*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 affidavits of service filed in this action established that, on December 29, 2023, the plaintiffs served process upon DGMD by personally delivering copies of the summons, complaint, and certificate of merit to DGMD's authorized and registered agent for the service of process (*see* CPLR 311[a][1]). They further established that, on January 12, 2024, the plaintiffs served process upon GMPC by delivering two copies of the summons, complaint, and certificate of merit, and paying the appropriate fee, to the New York Secretary of State (*see* CPLR 311[a][1]; Business Corporation Law § 306). In addition, the affidavits of service demonstrate that, after making four unsuccessful attempts to personally deliver copies of the summons, complaint, and certificate of merit to Greuner at his New York residence on January 11, 2024 at 2:25 p.m., February 1, 2024 at 7:58 p.m., February 2, 2024 at 3:54 p.m., and February 10, 2024 at 6:58 p.m., the plaintiffs' process server affixed copies of those documents to Greuner's door on February 10, 2024, and mailed another copy thereof to his residence address in a properly addressed and marked envelope on February 16, 2024. Proof of that service was filed on February 27, 2024.[1] 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

[1] The plaintiffs additionally served Greuner with process at his Florida residence by the affix-and-mail method. With respect to the service of process in Florida, the plaintiffs' process server made seven attempts to personally deliver the summons, complaint, and certificate or merit to Greuner at his Florida residence between January 19, 2024 and March 1, 2024, affixed copies of those documents to Greuner's door on March 1, 2024, and mailed additional copies of those documents to that address on March 6, 2024. The plaintiffs filed proof of service with respect to that service on March 11, 2024.

2006]), and the Greuner defendants did not oppose this motion, the plaintiffs made a prima facie showing that the Greuner defendants were properly served with process pursuant to the CPLR.

In light of the dates that service of process was effectuated, DGMD was required to answer, appear, or move with respect to the complaint no later than the first business day 30 days after December 29, 2023, that is, on or before January 29, 2024, and GMPC was required to answer, appear, or move with respect to the complaint no later than the first business day 30 days after January 12, 2024, that is, on or before February 13, 2024 (*see* CPLR 3102[c]; General Construction Law § 25-a). Inasmuch as service upon Greuner was "complete" 10 days after the plaintiffs filed proof of service referable to the affix-and-mail service upon him in New York (*see* CPLR 308[4]), that is, on March 8, 2024, Greuner was required to answer, appear, or move with respect to the complaint no later than the first business day 30 days thereafter (*see* CPLR 3102[c]; General Construction Law § 25-a), that is, by April 8, 2024.[2] The affirmation of the plaintiffs' attorney established that DGMD and GMPC were timely and properly served with the additional notice required CPLR 3215(g)(4), and further established that neither Greuner nor those professional corporations answered, moved, or appeared in a timely manner. The plaintiff made the instant motion on December 6, 2024 (*see* CPLR 2211) and, thus, within one year of the Greuner defendants' defaults. The plaintiffs' 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]; *see Martinez v Reiner*, 104 AD3d 477, 478 [1st Dept 2013]; *Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]). Stated another way,

[2] If the court considers only the affix-and-mail service effectuated upon Greuner in Florida, his time to answer, appear, or move with respect to the complaint would have expired on April 22, 2024. He did not do so by that date in any event.

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]).

In the context of a medical 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]). Importantly, 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]), unless the affidavit or affirmation that was submitted 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 their claims, the plaintiffs submitted the complaint, which was verified by their attorney, their attorney's affirmation, the affidavit of the plaintiff Jessica Charles (the patient), and the expert affirmation of board-certified vascular surgeon Richard Green, M.D. The court concludes that the facts alleged by the patient, and the expert affirmation submitted by Dr. Green constituted sufficient proof of the facts underlying the medical malpractice, lack of informed consent, and loss of spousal consortium causes of action.

In their complaint, the plaintiffs alleged that the Greuner defendants were liable for both common-law negligence and medical malpractice in connection with their treatment of the patient's lipedema. Specifically, they alleged that the patient began treating with the Greuner defendants on or about May 31, 2022, when she was informed that she needed a venogram test to assess whether she was a candidate for liposuction, and that Greuner performed a venogram on or about October 25, 2022, at which time he placed one or more venous stents without her prior knowledge or consent. They averred that, on or about November 8, 2022, he performed a venogram with arteriovenous malformation ablation on the patient, and that, on or about November 29, 2022, he performed a venogram with the placement of additional stents. The plaintiffs alleged that these procedures were contraindicated and were improperly performed in any event, causing the stents to migrate which, in turn, required the patient to undergo corrective surgery at Westchester Medical Center in December 2023. They further alleged that the Greuner defendants also negligently failed timely and properly to treat an infection that the patient developed following the surgical placement of the stents, failed timely

and appropriately to recognize the migration of the stents, and failed to recommend timely follow-up treatment with other appropriate medical providers.

The complaint also asserted causes of action to recover against the Greuner defendants for lack of informed consent and negligent hiring, training, supervision, and retention of health-care employees, as well as a claim by the patient's husband to recover for loss of services.

In her own affidavit, the patient reiterated the dates that she treated with the Greuner defendants, the medical recommendations that Greuner made to her, and the procedures that he performed upon her. Initially, she asserted that she

> "was excessively billed for these procedures including: $3,376.00 for 'Diagnostic Services' on May 31, 2022; $66,659.00 for 'Surgery' purportedly performed on September 20, 2022; $185,615.00 for 'Surgery' performed on November 8, 2022; $88,0325.50 for 'Surgery' performed on November 29, 2022; and $1,923.95 for 'Diagnostic Services' performed on December 1, 2022. This billing was not only excessive, but for procedures, care, treatment, and/or services that were not indicated under standards of good and accepted medical practice."

The patient further asserted that she had to undergo painful corrective surgery after the stent that Greuner placed had migrated.

In his expert affirmation, Dr. Green asserted that he had significant experience treating lipedema, and that he had reviewed the patient's medical records. He opined that the Greuner defendants "departed from the accepted standard of care in rendering care and treatment to Mrs. Charles as their patient from on or about May 31, 2022, to on or about November 29, 2022, and prior and subsequent thereto." After reiterating the history of the patient's consultations with the Greuner defendants, Greuner's recommendations to the patient, and the nature of the procedures that Greuner performed upon the patient, Dr. Green stated that, on or about November 9, 2023, a computed tomography angiography (CTA) revealed that the patient's stents had migrated from their initial point of placement to her main right and left pulmonary arteries, while this same imaging reflected no evidence of venous pathology. Hence, he concluded that "there was never any proof that this procedure–the venogram stenting--was ever medically indicated for Mrs. Charles." He further explained that inappropriately sized stents can

move when they are improperly placed in the venous system as the system expands and contracts and that, consequently, their migration here revealed that the stents placed by Greuner were negligently sized and placed. Hence, Dr. Green concluded that the Greuner defendants departed from good and accepted practice "by performing a medically unnecessary procedure that was not indicated for Mrs. Charles. Defaulting Defendants further breached their duty of care by negligently sizing the stents that they placed which led to their migration." He further opined that these departures caused or contributed to the patient's claimed injuries, including the need for additional surgery.

"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 Foster-Sturrup v Long,* 95 AD3d 726, 727 [1st Dept 2012]; *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]). A medical malpractice cause of action may be premised upon a claim that those departures caused or allowed the plaintiff's condition to worsen, and thus deprived him or her of an opportunity for a cure or a better outcome (*see Mortensen v Memorial Hosp.*, 105 AD2d 151, 156, 159 [1st Dept 1984]; *Kallenberg v Beth Israel Hosp.*, 45 AD2d 177, 178 [1st Dept 1974], *affd no op.* 37 NY2d 719 [1975]). The court concludes that the plaintiffs have submitted sufficient proof of the facts supporting these elements of their medical malpractice cause of action. Moreover, where a physician working for a professional corporation renders medical care to a patient "within the scope of his or her employment" for that corporation, the corporation may be held vicariously liable for the negligence of the physician (*Petruzzi v Purow*, 180 AD3d 1083, 1084-1085 [2d Dept 2020]). There is no dispute that Greuner was the principal employee of both GMPC and DGMD. Hence, the plaintiffs are entitled to enter a default judgment on the issue of liability against the Greuner defendants in connection with their medical malpractice cause of action.

For a statutory claim of lack of informed consent to be actionable, a defendant must have engaged in a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d[2]), where "'[the] showing of qualitative insufficiency of the consent [is] required to be supported by expert medical testimony'" (*King v Jordan*, 265 AD2d at 260, quoting *Hylick v Halweil*, 112 AD2d 400, 401 [2d Dept 1985]; *see* CPLR 4401-a; *Gardner v Wider*, 32 AD3d 728, 730 [1st Dept 2006]). Here, the patient alleged that the placement of stents was performed without her knowledge or consent. Dr. Green, in his affirmation, alleged that the medical records did not indicate that there was any information provided to the patient prior to Greuner's performance of those procedures, that there was no signed consent form in the records, and that, hence, the Greuner defendants did not obtain the patient's fully informed consent. He also asserted that all of the Greuner defendants' wrongdoing, including their failure to obtain the patient's consent, caused or contributed to her injuries. The court concludes that the plaintiffs submitted sufficient proof of the facts underlying their lack of informed consent cause of action insofar as asserted against the Greuner defendants and that, hence, they are entitled to enter a default judgment against those defendants on the issue of liability on that cause of action.

Since the court is granting the plaintiffs leave to enter a default judgment on the issue of liability against the Greuner defendants in connection with the medical malpractice and lack of informed consent causes of action, it must also grant them leave to enter a default judgment against those defendants on the issue of liability on the loss of consortium cause of action asserted by the patient's husband, as this is a derivative claim arising from those substantive causes of action asserted by the patient (*see generally Clarke v City of New York*, 82 AD3d 1143, 1144 [2d Dept 2011]; *Kaisman v Hernandez*, 61 AD3d 565, 566 [1st Dept 2009]).

"Conduct may be deemed malpractice, rather than negligence, when it 'constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician'" (*Scott v Uljanov*, 74 NY2d 673, 674, 675 [1989], quoting *Bleiler v Bodnar*,

65 NY2d 65, 72 [1985]). "When the duty arises from the physician-patient relationship or is substantially related to medical treatment, the breach gives rise to an action sounding in medical malpractice, not simple negligence" (*Mendelson v Clarkstown Med. Assoc*., 271 AD2d 584, 584, [2d Dept 2000]; *see Bleiler v Bodnar*, 65 NY2d at 72; *Morales v Carcione*, 48 AD3d 648, 649 [2d Dept 2008]; *Levinson v Health S. Manhattan*, 17 AD3d 247, 247 [1st Dept 2005]). Here, the plaintiffs alleged no facts giving rise to an independent claim sounding in common-law negligence. Rather, all their claims of breach of duty sounded only in medical malpractice. Hence, that branch of the motion seeking leave to enter a default judgment against the Greuner defendants on the issue of liability on the common-law negligence cause of action must be denied, since that cause of action is duplicative of the medical malpractice cause of action (*see Cebularz v Samadi*, 2019 NY Slip Op 31260[U], *5, 2019 NY Misc LEXIS 2242, *5 [Sup Ct, Kings County, Apr. 24, 2019]).

To establish a cause of action to recover for negligent hiring, supervision, training, and retention of health-care personnel, a plaintiff must demonstrate that the defendants either "knew, or should have known," of their employees' "propensity for the sort of conduct which caused the [patient's] injury" (*Sheila C. v Povich*, 11 AD3d 120, 129-130 [1st Dept 2004]; *see Kuhfeldt v New York Presbyt./Weill Cornell Med. Ctr*., 205 AD3d 480, 481-482 [1st Dept 2022]). Since the plaintiffs adduced no facts with respect to whether the Greuner defendants knew or should have known of the propensity of their physicians' assistants, nurses, or health-care employees, other than Greuner himself, to commit acts of malpractice, there is no basis upon which the court can grant that branch of their motion seeking leave to enter a default judgment on the issue of liability against those defendants on that cause of action.

In light of the foregoing, it is,

ORDERED that the plaintiffs' motion is granted to the extent that they are granted leave to enter a default judgment on the issue of liability on their medical malpractice, lack of informed consent, and loss of spousal consortium causes of action insofar as asserted against the

defendants David Greuner, M.D., Greuner Medical, P.C., doing business as NYC Surgical Associates, and David Greuner, M.D., P.C., the matter is set down for an inquest on the issue of damages against those defendants, to be held simultaneously with the trial against the remaining defendants, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

4/3/2025
DATE

JOHN J. KELLEY, J.S.C.

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