

Nunez v Terence Cardinal Cooke Health Care Ctr.

2025 NY Slip Op 32355(U)

July 2, 2025

Supreme Court, New York County

Docket Number: Index No. 157561/2024

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

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

Justice

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JOSE NUNEZ, as Proposed Administrator of the Estate of
ROBERT SEPULVEDA, deceased,

Plaintiff,

INDEX NO. 157561/2024

MOTION DATE 04/11/2025

MOTION SEQ. NO. 001

- v -

TERENCE CARDINAL COOKE HEALTH CARE CENTER,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12

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

In this action to recover damages, inter alia, pursuant to Public Health Law §§ 2801-d and 2803-c for purported violations of statutes and regulations governing nursing homes, and for medical malpractice, common-law negligence, and wrongful death, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment on the issue of liability against the defendant. Although the defendant does not oppose the motion, it nonetheless is denied, without prejudice to renewal upon proper papers, as described below.

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 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]).

According to the affidavit of service that was executed by the plaintiff's process server, a copy of the summons and complaint in this action was served upon the defendant hospital and nursing home on September 12, 2024 by personal delivery, at its facility, to a woman named Tanaesha, whom the process server described as a "risk management clerk authorized to accept." The record thus reflects that the defendant, a domestic business corporation, was properly served with the summons and complaint in accordance with CPLR 311(a)(1). 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]). As relevant here,

"[p]ersonal service on a corporation may be obtained by delivering the summons and complaint to, among other people, any agent authorized by appointment or by law to receive service. Although a corporation is free to choose its own agent for receipt of process without regard to title or position, the process server is not expected to be familiar with the corporation's internal practices, and is thus entitled to rely upon the employees to identify the proper person to accept service"

(*Cellino & Barnes, P.C. v Martin, Lister & Alvarez, PLLC*, 117 AD3d 1459, 1460 [4th Dept 2014] [citations omitted]; *see Fashion Page v Zurich Ins. Co.*, 50 NY2d 265, 272 [1980]; *Schwartz v Mount Sinai Hosp.*, 135 Misc 2d 561, 563 [Sup Ct, N.Y. County 1986] [service of a summons upon a hospital records clerk, who was a supervisor authorized to accept subpoenas but not summonses, nonetheless was valid where the clerk routed the summons to the appropriate office]). Hence, the plaintiff's process server was entitled to rely on Tanaesha's representations that she was authorized to receive service on behalf of the corporation, and personal delivery of the summons and complaint to her must be deemed valid (*see Cellino & Barnes, P.C. v Martin, Lister & Alvarez, PLLC*, 117 AD3d at 1460; *see also Fashion Page v Zurich Ins. Co.*, 50 NY2d at 272; *Passeri v Tomlins*, 141 AD3d 816, 818 n [3d Dept 2016]).

Inasmuch as the defendant was served by personal delivery on September 12, 2024, it was obligated to answer, move with respect to the complaint, or otherwise appear in the action within 20 days thereof (*see CPLR 3012[a]*), that is, by October 2, 2024. The affirmation of the plaintiff's attorney established that the defendant did not do so by that date and, hence, that it

was in default as of October 3, 2024. Moreover, the plaintiff made the instant motion within one year of the default (see CPLR 3215[c]) and, thus, the motion is timely.

With respect to the proof of the facts constituting the claim, however,

“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 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]) or wrongdoing.

The complaint in this action, however, was verified only by the plaintiff's attorney and, while the affidavit of merit was sworn to by the plaintiff himself, he did not attest to any actual facts underlying the defendant's treatment and care of his proposed decedent. Rather, in completely conclusory terms, he alleged that the defendant was

"negligent, careless, and reckless in prescribing, supervising, and rendering requisite medical care, and treatment. ROBERT SEPULVEDA was caused to be injured due to the aforementioned negligence, carelessness, reckless of the Defendant. As a sole and direct result, ROBERT SEPULVEDA was rendered physically sick, sore, lame and disabled, and suffer from emotional, and other physical infirmities as a result of the foregoing,"

and that he "firmly believed" that he had a meritorious cause of action against the defendant.

He did not state what it was that actually constituted such negligence and carelessness.

Crucially, in the context of a medical malpractice action, an affidavit or affirmation of merit from an expert is required on 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]; *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]). Here, the quality and propriety of the medical services rendered to the plaintiff's proposed decedent, and whether they comported with the applicable standards of care and relevant statutes are not within the ordinary experience and knowledge of a lay person, but can only be assessed by a physician, particularly because the allegation here is that the defendant's malpractice and violation of federal, state, and local statutes, regulations, and ordinances governing nursing homes caused or contributed to the decedent's contraction of COVID-19, and his concomitant death.¹ Since the plaintiff did not submit an expert affirmation or affidavit to establish that the services rendered to his proposed decedent deviated from an established standard of care, he has failed to establish his entitlement to a default judgment.

Accordingly, it is,

¹ The court expresses no opinion as to whether this action is barred by the Emergency or Disaster Treatment Protection Act (Public Health Law former §§ 3080–3082), which conferred immunity upon hospitals and nursing homes for any malpractice committed between March 7, 2020 and April 6, 2021 in connection with their responses to the COVID-19 pandemic. Immunity from suit is a waivable defense (*Henry v New Jersey Tr. Corp.*, 39 NY3d 361, 369-372 [2023]; *Gillis v Carmel Richmond Nursing Home, Inc.*, 83 Misc 3d 1256[A], 2024 NY Slip Op 50984[U], *5, 2024 NY Misc LEXIS 3283, *13 [Sup Ct, Richmond County, Jul. 29, 2024]), as is the lack of capacity of a “proposed” administrator to prosecute an action on behalf of an estate (*see Rodriguez v River Val. Care Ctr., Inc.*, 175 AD3d 432, 433 [1st Dept 2019]; CPLR 3211[a][3], [e]). Thus, to the extent that the defendant has not yet answered or moved with respect to the complaint, it has waived these defenses for the purposes of this or any future motion to hold it in default.

ORDERED that the motion is denied, without prejudice to renewal upon proper papers, which shall include an expert affirmation or affidavit from an appropriate health-care professional, who renders an opinion that the defendant committed malpractice or violated standards of care articulated in statutes, rules, regulations, or ordinances governing the conduct of hospitals or nursing homes that proximately caused the decedent's injuries.

This constitutes the Decision and Order of the court.

JOHN J. KELLEY, J.S.C.

7/2/2025
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: