

**Pichardo v Bessler**

2025 NY Slip Op 33648(U)

September 25, 2025

Supreme Court, New York County

Docket Number: Index No. 805082/2024

Judge: John J. Kelley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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*

-----X

DAYANA N. PICHARDO,  
  
Plaintiff,

**INDEX NO.** 805082/2024

**MOTION DATE** 06/16/2025

**MOTION SEQ. NO.** 001

- v -

MARC BESSLER, M.D., ELIZAVETA MINKO, M.D., and  
NEW YORK PRESBYTERIAN/COLUMBIA UNIVERSITY  
IRVING MEDICAL CENTER

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for JUDGMENT – DEFAULT/X-MOTION DISMISS.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice, negligent hiring, training, supervision, and retention of healthcare personnel, and common-law negligence, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment on the issue of liability against the defendant Elizaveta Minko, M.D. Minko opposes the motion, and cross-moves pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against her on the ground that she was not properly served with process. The plaintiff opposes the cross motion. The plaintiff's motion is denied. Minko's cross motion is granted, and the complaint is dismissed insofar as asserted against her.

The plaintiff, Dayana N. Pichardo, commenced this action on March 19, 2024, alleging that, on June 23, 2023, the defendant surgeon Marc Bessler, M.D., while assisted by Minko, committed malpractice by negligently performing gastric bypass surgery upon her, specifically by improperly leaving a gastric band in her abdominal cavity after completing the procedure. As of April 3, 2025, when the plaintiff made the instant motion, Minko had yet to answer or move with respect to the complaint, or otherwise appear in the action. Inasmuch as Minko was going

to be represented by the same law firm that represented her codefendants, once the plaintiff moved for leave to enter a default judgment against her, that law firm requested, and the court so-ordered, a stipulation extending Minko's time to oppose the motion, and adjourned the return date until June 16, 2025. On June 2, 2025, Minko submitted papers in opposition to the plaintiff's motion, and cross-moved to dismiss the complaint insofar as asserted against her for lack of personal jurisdiction based on improper service of process.

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 court concludes that the plaintiff has submitted sufficient proof of the facts constituting her claim against Minko. With respect to that element of a motion for leave to enter a default judgment,

“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 Dophy 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 conclude 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.

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]). Although the plaintiff herself verified the complaint in this action, it was not sufficiently detailed to support a motion for leave to enter a default judgment against Minko. Nonetheless, in support of her motion, the plaintiff submitted her own affidavit as well. Since the primary allegation of malpractice made by the plaintiff was that “an adhesive band was negligently left in [her] abdominal cavity” and that, “[o]ver time, the band wrapped around [her] small intestine, causing significant complications,” there is no need here for an expert affirmation, since a lay person can easily understand that leaving a foreign object inside of a patient’s body after surgery constitutes malpractice (see *Jenkins v Mazlin*, 2022 NY Slip Op 33518[U], \*5-6, 2022 NY Misc LEXIS 10393, \*7-8 [Sup Ct, N.Y. County, Oct. 3, 2022] [Kelley, J.], *vacated other grounds Jenkins v Mazlin*, 2022 NY Slip Op 33790[U], 2022 NY Misc LEXIS 6648 [Sup Ct, N.Y. County, Nov. 3, 2022] [Kelley, J.]).

Nonetheless, the plaintiff failed to establish that Minko was properly served with process and, hence, that Minko ever was actually in default. According to the relevant affidavit of service, the plaintiff caused a copy of the summons and complaint to be personally delivered on June 15, 2024 to an unidentified woman at 1370 St. Nicholas Avenue, Apt 16L, New York, New York 10033, who was described by the plaintiff’s process server as Minko’s “cotenant.” The

process server further attested that he or she thereafter caused an additional copy to be mailed to Minko at that address on June 17, 2024. On June 18, 2024, the plaintiff filed the affidavit of service referable to that delivery and mailing. In an additional affidavit of service, a process server attested that, at that same address, he attempted to personally deliver copies of the summons and complaint to Minko or a person of suitable age and discretion on April 14, 2025, April 24, 2025, April 29, 2025, and April 30, 2025, affixed copies thereof on the apartment door when no one responded to him, and mailed additional copies to Minko at that address on April 30, 2025. The plaintiff filed that affidavit of service on May 7, 2025.

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]). Inasmuch as Minko purportedly was served with process via substituted service, otherwise known as "deliver-and-mail" service (see CPLR 308[2]), service upon her was putatively complete 10 days after the relevant affidavit of service was filed (see *id.*), that is, on June 28, 2024. To the extent that this substituted service was proper, Minko would have been obligated to answer, move with respect to the complaint, or otherwise appear in the action on or before the first business date 30 days thereafter (see CPLR 3012[c]), that is, by July 29, 2024 (see General Construction Law §§ 20, 25-a). The affirmation of the plaintiff's attorney established that Minko did not do so by July 29, 2024, and, hence, the plaintiff alleged that Minko was in default as of July 30, 2024. The plaintiff made the instant motion within one year of that date (see CPLR 3215[c]) and, thus, the motion is facially timely.

Crucially, however, CPLR 308(2) permits delivery of the summons

"within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend 'personal and confidential' and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete

ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law”

In opposition to the plaintiff’s motion, Minko alleged that the residence address at which the summons and complaint was personally delivered to another woman was neither her dwelling place nor usual place of abode at the time that this service was attempted. As she explained it, at all times when service was attempted upon her at the St. Nicholas Avenue address during 2024 and 2025, she was no longer living there. Specifically, she asserted that she was a general surgery resident at New York Presbyterian Hospital from June 2017 through June 2023 and that, on or about July 14, 2023---approximately 11 months prior to the first attempted service upon her at the St. Nicholas Avenue address---she already had moved from New York to San Francisco to begin a two-year acute care surgery/critical care fellowship at the University of California, San Francisco. Minko averred that, from the date of her move on July 19, 2023 until the date she executed her affirmation on May 30, 2025, she has resided at 201 27th Street, Apt 6, San Francisco, California 94131. She further asserted that, during the entirety of the time that she lived at St. Nicholas Avenue, she lived there alone, and had neither a roommate nor a cotenant, let alone a person at the premises who was authorized to accept service on her behalf. “Personal jurisdiction is not acquired absent compliance with both the delivery and mailing requirements of the statute” (*Everbank v Kelly*, 203 AD3d 138, 143 [2d Dept 2022]). Thus, even if Minko’s “last known residence” was at the St. Nicholas Avenue address, the plaintiff did not personally deliver a copy of the summons and complaint to a person of suitable age and discretion at her “actual[ ] . . . dwelling place or usual place of abode” (*id.* at 140), despite the information that the process server might have been given. Hence, the attempted service in 2024 was defective (*see id.*), and the court lacks personal jurisdiction over Minko.

Moreover, Minko attested in her affirmation that, inasmuch as she hadn’t resided at the St. Nicholas Avenue address for almost one year when service upon her was first attempted,

she never received any notice that she had been sued until the attorney who then was representing only her codefendants informed her that the plaintiff had made the instant motion. Hence, even if she technically were in default, she had a reasonable excuse for failing to answer, move, or appear in this action on or before July 29, 2024, as well as a meritorious defense premised upon lack of personal jurisdiction (see CPLR 5015[a][1], [4]).

“A request for vacatur under CPLR 5015(a)(1) may also be deemed as one pursuant to CPLR 317, however, which does not demand a reasonable excuse for the default and entitles the moving party to vacatur within a year of learning of the entry of a judgment where he or she was not personally served with process, did not receive notice of the action in time to defend and has a meritorious defense”

(*Reverse Mtge. Solutions, Inc. v Lawrence*, 200 AD3d 1146, 1147-1148 [3d Dept 2021]).

The court notes that, pursuant to CPLR 306-b, a defendant must *properly* be served within 120 days after the commencement of an action, or before the expiration of any court-approved extension of time (see *Diaz v Nasir*, 228 AD3d 572, 572-573 [1st Dept 2024]). Although the 2024 attempt at service upon Minko was made within that 120-day period, the plaintiff's further attempts in April 2025 not only were made at the incorrect address, but were made long after the 120-day period had expired, and were effectuated without court approval. Hence, the April 2025 attempts must be deemed nullities (see *Z KEY, LLC v Wright*, 2022 NY Misc LEXIS 73701, \*2 [Sup Ct, Kings County, Jun. 28, 2022]).

In light of the foregoing, the plaintiff's motion must be denied, and Minko's cross motion to dismiss the complaint insofar as asserted against her must be granted. Since, in connection with the plaintiff's claims against Minko, the two-year-and-six-month limitations period applicable to medical malpractice actions (see CPLR 214-a) will not expire until December 23, 2025, the dismissal thus is without prejudice to the commencement of a new action against Minko under a new index number within the applicable limitations period.

Accordingly, it is,

ORDERED that the plaintiff’s motion for leave to enter a default judgment on the issue of liability as against the defendant Elizaveta Minko, M.D., is denied; and it is further,

ORDERED that the motion of the defendant Elizaveta Minko, M.D., to dismiss the complaint insofar as asserted against her is granted, and the complaint is dismissed insofar as asserted against the defendant Elizaveta Minko, M.D.; and it is further,

ORDERED that, on the court’s own motion, the action is severed as against the defendant Elizaveta Minko, M.D.; and it is further,

ORDERED that the Clerk of the court is directed to enter judgment dismissing the complaint insofar as asserted against the defendant Elizaveta Minko, M.D.

This constitutes the Decision and Order of the court.

9/25/2025  
DATE

  
JOHN J. KELLEY, J.S.C.

MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/>	<input type="checkbox"/>	REFERENCE
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	<input type="checkbox"/>	REFERENCE
CROSS MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/>	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	<input type="checkbox"/>	REFERENCE