Boutov v Hanson
2025 NY Slip Op 33674(U)
September 26, 2025
Supreme Court, New York County
Docket Number: Index No. 805320/2024
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY**, ***Justice*** — **PART** **IAS MOTION 56EFM**

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ALEXANDER A. BOUTOV and OLGA BOUTOV,

Plaintiffs,

- v -

MATTHEW B. HANSON, M.D., BILLY YANG, M.D., and UNIVERSITY PHYSICIANS OF BROOKLYN, INC.,

Defendants.

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INDEX NO. 805320/2024

MOTION DATE 07/11/2025

MOTION SEQ. NO. 001

DECISION AND ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for LEAVE TO ENTER DEFAULT JUDGMENT.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice, lack of informed consent, and loss of spousal consortium, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment on the issue of liability against the defendant University Physicians of Brooklyn, Inc. (UPB). Although UPB does not oppose the motion, the motion is denied, albeit without prejudice to renewal upon proper papers that include an expert affirmation or affidavit from a physician.

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]).

According to the relevant affidavit of service that was executed and filed by the plaintiffs' process server, a copy of the summons and complaint in this action was served upon UPB on

November 19, 2024 at 185 Montague Street, 5th Floor, Brooklyn, New York 11201, by personally delivering those papers to Nadine John. In the affidavit of service, the process server attested that Ms. John had confirmed to him that she was authorized to accept service of process on behalf of UBP. Where a plaintiff submits proof that a corporate employee has represented to a process server that he or she was authorized to accept process on behalf of the corporate defendant, service of process is deemed properly to have been made upon that corporation pursuant to CPLR 311 (*see Cellino & Barnes, P.C. v Martin, Lister & Alvarez, PLLC,* 117 AD3d 1459, 1460 [4th Dept 2014]; *see also Fashion Page v Zurich Ins. Co.,* 50 NY2d 265, 273 [1980] [process server's reasonable belief of recipient's authority is the crucial factor]; *Passeri v Tomlins*, 141 AD3d 816, 818, n [3d Dept 2016]; *Arvanitis v Bankers Trust Co*., 286 AD2d 273, 273 [1st Dept 2001]). The record thus reflects that UPB, a domestic professional corporation, was properly served with the summons and complaint in accordance with CPLR 311(a). 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 UPB was properly served with process via personal delivery on November 19, 2024, it was obligated to answer, move with respect to the complaint, or otherwise appear in the action within 20 days thereafter (*see* CPLR 3012[a]), that is, by December 9, 2024 (*see* General Construction Law § 20). The affirmation of the plaintiffs' attorney established that UPB did not do so by December 9, 2024, and, hence, that it was in default as of December 10, 2024. Moreover, the plaintiffs made the instant motion within one year of that 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 a 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 plaintiffs' attorney. Moreover, while the plaintiff Alexander A. Boutov submitted his own affidavit, he did not attest to any actual facts underlying the treatment and care that UBP rendered to him, except for general allegations that, from May18, 2023 through January 25, 2024, he received otolaryngology services from the defendants Matthew B. Hanson, M.D., and Bill Yang, M.D., which resulted in complete hearing loss in his left ear, and that UPB was vicariously liable for the malpractice committed by those physicians. He incorporated by reference the similar allegations that he set forth in the complaint that had been verified by his attorney.

Boutov, however, was not qualified to provide full proof of such facts as they apply to the malpractice and lack of informed consent causes of action. 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 Boutov, and whether Hanson and Yang comported with the applicable standards of care in rendering them, are not within the ordinary experience and knowledge of a lay person, but can only be assessed by a physician. This is so because the primary allegations made by the plaintiffs here are that UPB's liability arose from the malpractice of otolaryngologists Hanson and Yang in rendering treatment to Boutov. The court notes that the plaintiffs made no specific allegations as to the nature and extent of that treatment, the examinations and diagnostic testing that the defendants performed, the evaluations of any test results that they conducted, the procedures that they performed, and the medications that they administered, or any medical basis for the claim that any departures in these respects caused or contributed to Boutov's loss of hearing. Even had the plaintiffs made such allegations, a physician's affirmation or affidavit nonetheless is required to establish the facts underlying the medical malpractice cause of action.

In addition, an expert affirmation is required to establish the qualitative insufficiency of the consent that a defendant healthcare provider obtained from a patient in connection with a particular invasive procedure (*see* CPLR 4401-a; *Gardner v Wider*, 32 AD3d 728, 730 [1st Dept 2006]; *King v Jordan*, 265 AD2d 619, 620 [3d Dept 1999]; *Hylick v Halweil*, 112 AD2d 400, 401 [2d Dept 1985]).

Since the plaintiffs did not submit an expert affirmation or affidavit to establish that the services rendered by Hanson and Yang deviated from an established standard of care, or that the consent obtained by Hanson or Yang on behalf of UPB was qualitatively insufficient, the plaintiffs have failed to establish their entitlement to a default judgment against UPB.

Accordingly, it is,

ORDERED that the plaintiffs' motion is denied, without prejudice to renewal upon proper papers, which shall include an expert affirmation or affidavit from an appropriate healthcare

professional, who shall render a sufficiently detailed opinion explaining in what manner the defendants Matthew B. Hanson, M.D., and Billy Yang, M.D., committed malpractice that proximately caused the injuries claimed by the plaintiffs here and/or that the consent that those defendants obtained from the Alexander A. Boutov for an invasive procedure was qualitatively insufficient, and that such failure to obtain fully informed consent caused or contributed to the injuries of the plaintiff Alexander A. Boutov.

This constitutes the Decision and Order of the court.

9/26/2025
DATE

JOHN J. KELLEY, J.S.C.

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