Gonzalez v Karl Storz Endoscopy-Am., Inc.
2017 NY Slip Op 30395(U)
March 1, 2017
Supreme Court, New York County
Docket Number: 155708/16
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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WANDA IVELISSE GONZALEZ and
ALVARO JIMENEZ, JR.,

Plaintiffs,

-against-

DECISION AND ORDER
Index No. 155708/16
Mot. Seq. No. 002

KARL STORZ ENDOSCOPY-AMERICA, INC.; KARL STORZ GMBH & Co. KG, IRA MITCHELL JAFFE, D.O.; ROSH MATERNAL-FETAL MEDICINE, PLLC; NEW YORK UNIVERSITY TISCH HOSPITAL; NEW YORK UNIVERSITY LANGONE MEDICAL CENTER; and JOHN DOES (1-10) AND XYZ CORP. (1-10) (such names and corporations being fictitious),

Defendants.

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KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1-3 (Exs. A-B)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action sounding, inter alia, in medical malpractice and products liability, plaintiffs Wanda Ivelisse Gonzalez and Alvaro Jimenez, Jr. (hereinafter collectively "plaintiffs") move for a default judgment against defendant Rosh Maternal-Fetal Medicine, PLLC (hereinafter "RMFM") based on its failure to answer the verified complaint or otherwise appear in this matter, setting down the claims against RMFM for an inquest at the time of trial against the remaining defendants, along with such other relief as this Court deems just and proper. Upon a review of the papers submitted and the relevant statutes and case law, the motion, which is unopposed, is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff Wanda Ivelisse Gonzalez (hereinafter "plaintiff") alleges that, on September 9, 2014, she sustained personal injuries during a medical procedure (hereinafter "the procedure") performed by defendant Dr. Ira Mitchell Jaffe (hereinafter "Dr. Jaffe") at defendant New York University Tisch Hospital (hereinafter "NYU Tisch"), a subsidiary of defendant New York University Langone Medical Center (hereinafter "NYU Langone"). Ex. A, at par. 2. Plaintiff claims that, at the time of the procedure, Dr. Jaffe was allegedly an "agent, servant, partner, and/or employee" of RMFM, NYU Langone and NYU Tisch (Id. at pars, 18, 23), and that the negligence, malpractice and/or failure to warn by those defendants caused and/or contributed to her injuries. Id., at pars. 108-132; 155-161. She further asserts, inter alia, negligence, strict product liability, and failure to warn claims against defendants Karl Storz Endoscopy-America, Inc. (hereinafter "Storz Endoscopy") and Karl Storz GMBH & Co. KG (hereinafter "Storz GMBH"), which allegedly manufactured and distributed the medical tool used during the procedure. Ex. A, at pars. 5-14; 133-187. Plaintiff's husband, Alvaro Jimenez, Jr., asserts a claim for loss of consortium. Id., at pars. 188-192.

This action was commenced by plaintiffs' filing of a summons and verified complaint against defendants on July 8, 2016. Ex. A, at p. 1. Defendants Dr. Jaffe, NYU Tisch, NYU Langone and RMFM were served with process on July 13, 2016 and affidavits of service in connection with such process were filed with this Court on July 20, 2016. Ex. B; NYSCEF Doc. Nos. 5-8. Storz Endoscopy was served with process on July 14, 2016 and an affidavit of service relating to the same was filed with this Court on August 4, 2016. NYSCEF Doc. No. 9. By order dated November 2, 2016, this Court granted plaintiff's motion (Mot. Seq. 001) to effect alternative service on Storz GMBH, a German Company. Ex. A, at par. 8; NYSCEF Doc. No. 31. A stipulation extending the

time for such service until April 3, 2017 was filed with this Court on February 1, 2017. NYSCEF Doc. No. 32.

Plaintiffs now move for a default judgment against RMFM on the ground that it has failed to appear or otherwise answer in this action. In support of the motion, plaintiffs submit an attorney affirmation in which counsel represents that RMFM has failed to answer the verified complaint or otherwise appear; an affidavit by plaintiff setting forth the facts giving rise to the claim, the summons and verified complaint, and an affidavit of service of the summons and verified complaint.

POSITIONS OF THE PARTIES:

Plaintiff argues that it is entitled to a default judgment against RMFM since that entity was properly served with process, as well as a certificate of merit, on July 13, 2016; plaintiff's verified complaint and affidavit of merit establish a meritorious claim against RMFM; and counsel's affirmation establishes that RMFM failed to answer the complaint.

LEGAL CONCLUSIONS:

CPLR 3215(a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial..., the plaintiff may seek a default judgment against him." It is well settled that "[o]n a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing." *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011). Proof of the facts constituting the claim may be provided by plaintiff's affidavit. *See* CPLR 3215(f). Where, as here, a verified complaint has been

served, it may be used as the affidavit of facts constituting the claim and, in such case, the affidavit of default may be made by the party or the party's attorney. Id. A default in answering the complaint is deemed to be an admission of all factual statements contained in the complaint and all reasonable inferences that flow from them. *See Woodson v Mendon Leasing Corp.*, 100 NY2d 63 (2003).

Plaintiff correctly asserts that he is entitled to a default judgment against RMFM. RMFM was timely served with the summons and complaint pursuant to CPLR 311 on July 13, 2016. Ex. B. The verified complaint (Ex. A) and the affidavit of plaintiff submitted in support of the motion set forth the facts constituting the claim.[1] Finally, the affirmation of plaintiff's counsel establishes that RMFM failed to answer or otherwise appear in this matter.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by plaintiffs Wanda Ivelisse Gonzalez and Alvaro Jimenez, Jr. seeking a default judgment against defendant Rosh Maternal-Fetal Medicine, PLLC is granted; and it is further,

ORDERED that, following the filing of the note of issue, this matter is to be set down for an inquest in favor of plaintiffs Wanda Ivelisse Gonzalez and Alvaro Jimenez, Jr. assessing damages

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[1]Although the affidavit of service (Ex. B) does not specifically state that a certificate of merit was served on plaintiff in accordance with CPLR 3012-a, which requires such a certificate to be served in a medical malpractice claim (*see Tanel v Kreitzer & Vogelman*, 293 AD2d 420 (1st Dept 2002), this Court overlooks this apparently inadvertent omission since the said certificate was incorporated as page 54 of the verified complaint, which was clearly served. CPLR 2001; Exs. A and B; NYSCEF Doc. No. 2.

against defendant Rosh Maternal-Fetal Medicine, PLLC, with said inquest and assessment of damages to take place at the time of trial, or other disposition, of the remaining portion of the action; and it is further,

ORDERED that plaintiff shall serve a copy of this order on all parties which have appeared, as well as on Rosh Maternal-Fetal Medicine, PLLC, and the Trial Support Office at 60 Centre Street, Room 158; and it is further,

ORDERED that this constitutes the decision and order of the Court.

Dated: March 1, 2017

ENTER:

KATHRYN E. FREED, J.S.C.

HON. KA[illegible] N FREED
JUSTICE OF [illegible]