SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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JOHN BOLLINGER,

Plaintiff,

- v -

MARC MORDECAI LIECHTUNG, DMD, P.C., Individually and doing business as MANHATTAN DENTAL ARTS, MARC MORDECAI LIECHTUNG, DMD, Individually and doing business as MANHATTAN DENTAL ARTS, NICOLE FARBER, DDS, and DANIEL MOEZINIA, DDS,

Defendants.

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INDEX NO. 805333/2022

MOTION DATE 02/10/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15

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

In this action to recover damages for dental malpractice, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment against all of the defendants. He has withdrawn the motion as to the defendant Daniel Moezinia, DDS. The remaining defendants do not oppose the motion. The motion nonetheless is denied, albeit without prejudice to renewal upon proper papers in connection with the branch of the motion seeking leave to enter a default judgment against the defendants other than Moezinia.

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 (*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]; *Allstate Ins. Co. v Austin*, 48 AD3d 720,

720 [2d Dept 2008]; *see also Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 202 [2013]).

The affidavits of service here established that, on October 25, 2022, the plaintiff served process upon the defendants Marc Mordecai Liechtung, DMD, P.C., individually and doing business as Manhattan Dental Arts (the PC), pursuant to CPLR 311(a)(1), and Marc Mordecai Liechtung, DMD, individually and doing business as Manhattan Dental Arts (Liechtung), pursuant to both CPLR 308(1) and 308(2), at those defendants' offices, located at 1995 Broadway, Suite 200, New York, New York 10023.

The plaintiff's process server checked off pre-printed boxes on the applicable affidavit of service indicating that service was effectuated upon Liechtung "[b]y personally delivering to and leaving [the summons and complaint] with said individual, and that he knew the person so served to be the person mentioned and described in said writ (sic)." Nonetheless, in the same affidavit, as well as in a separate affidavit, the process server also checked off the box indicating that Liechtung was served "[b]y delivering a true copy thereof to and leaving with a person of suitable age and discretion, the said premises being the defendants/respondents (place of business) within the State of New York," while failing to check off the box indicating that the process server "completed said service . . . by mailing a copy of the above named process by First Class Mail addressed to the defendant/witness to the above address of service" With respect to the PC, the process server checked off the box indicating that he served process upon that corporation "[b]y delivering to and leaving with John Doe, refuse to give name, and that he knew the person so served to be the Managing Agent of the corporation, and authorized to accept service," although, in the very same line, he indicated that the managing agent was "Daujia Souvenir-Office Manager."

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 2006]), the court concludes that the PC was properly served with process pursuant to CPLR 311(a)(1), that Liechtung was properly

served with process pursuant to CPLR 308(1), and that each had 20 days after October 25, 2022, or until November 14, 2022, within which to answer or move with respect to the complaint or otherwise appear in the action. The affirmation of the plaintiff's attorney established that neither the PC nor Liechtung answered, moved, or appeared in a timely manner on or before November 14, 2022, and that they thus both were in default as of November 15, 2022.

The affidavit of service referable to service of process upon the defendant Nicole Farber, DDS, indicated that, on November 10, 2022, the plaintiff's process server delivered a copy of the summons and complaint to a person of suitable age and discretion at Farber's place of business, located at 158 West 83rd St, Apt. 5F, New York, New York 10024. Although the process server checked off the box on that affidavit referable to service upon a person of suitable age and discretion, he did not check off the box indicating that he thereafter mailed a copy of the summons and complaint to Farber's place of business in an appropriately marked envelope. Since "[j]urisdiction is not acquired pursuant to CPLR 308 (2) unless both the delivery and mailing requirements have been strictly complied with" (*CitiMortgage, Inc. v Twersky*, 153 AD3d 1230, 1232 [2d Dept 2017] [quotation marks and citations omitted]), the plaintiff has not established that Farber was properly served with process, or that Farber may thus be held in default for failure to answer or move with respect to the complaint, or otherwise appear in the action. Consequently, when the plaintiff made the instant motion on January 26, 2023, Farber was not in default. The motion thus must be denied as to Farber on that ground, regardless of the sufficiency of the plaintiff's proof of the facts constituting the claim.

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, 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 detailed 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]).

With respect to the proof of the facts underlying the his claims, the plaintiff relied only upon his attorney's affirmation and his complaint, which was verified only by his attorney "'[A] pleading verified by an attorney pursuant to CPLR 3020(d)(3), [and not by someone with personal knowledge of the facts,] is insufficient to establish its merits'" (*DLJ Mtge. Capital, Inc. v United Gen. Tit. Ins. Co.*, 128 AD3d 760, 762 [2d Dept 2015], quoting *Triangle Props. #2, LLC v Narang*, 73 AD3d 1030, 1032 [2d Dept 2010]; *see First Franklin Fin. Corp. v Alfau*, 157 AD3d 863, 865 [2d Dept 2018]). Moreover, the affirmation of an attorney who clams no personal knowledge of the underlying facts is "utterly devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215" (*Beltre v Babu*, 32 AD3d at 723). Hence, the plaintiff's submissions are insufficient to support his motion as against any of the defendants, as they did not constitute proof of the facts underlying his claims against them.

In any event, in the context of a medical or dental malpractice action, generally 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]; *Checo v Mwando*, 2022 NY Slip Op 31223[U], 2022 NY Misc LEXIS 1865 [Sup Ct, N.Y. County, Apr. 7, 2022] [Kelley, J.]; *Charles v Wolfson*, 2019 NY Slip Op 50251[U], 62 Misc 3d 1224[A] [Sup Ct, Bronx County, Mar 6, 2019]). The complaint here alleged

malpractice in very general, conclusory, and boilerplate language, alleging only that, from August 28, 2021 through July 12, 2022, all of the defendants departed from good dental care. The complaint provided no specifics or particulars as to how any of the defendants departed from good and accepted practice. Hence, even if properly verified by the plaintiff himself, the complaint was insufficient to support his request for leave to enter a default judgment against any defendant (*see LoGiudice v Zavarella*, 2019 NY Misc LEXIS 16235 [Sup Ct, Suffolk County, Nov. 27, 2019]; *Charles v Wolfson*, 2019 NY Slip Op 50251[U], 62 Misc 3d 1224[A]).

Accordingly, it is

ORDERED that the motion is denied as withdrawn with respect to the plaintiff's request for relief against the defendant Daniel Moezinia, DDS, and denied without prejudice to renewal upon proper papers, with respect to the plaintiff's request for relief against the defendants Marc Mordecai Liechtung, DMD, P.C., individually and doing business as Manhattan Dental Arts, Marc Mordecai Liechtung, DMD, individually and doing business as Manhattan Dental Arts, and Nicole Farber, DDS.

This constitutes the Decision and Order of the court.

5/2/2023
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