

Deltoro v Cavin

2020 NY Slip Op 35347(U)

December 10, 2020

Supreme Court, Bronx County

Docket Number: Index No. 20892/20

Judge: Joseph E. Capella

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This opinion is uncorrected and not selected for official publication.

**NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 23**

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

-----X
**VICTORIA DELTORO AS ADMINISTRATOR OF
THE ESTATE OF CHARLES DELTORO, DECEASED
and VICTORIA DELTORO INDIVIDUALLY,**

Plaintiff,

- against -

**LILIAN CAVIN, M.D., and EAGLE RADIOLOGY,
PLLC,**

Defendants.
-----X

Case Disposed
Settle Order
Schedule Appearance

Index #: 20892/20
DECISION/ORDER

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A large heart shape with a slash through it.
Below it, "# 001" is written.

Present:
Hon. Joseph E. Capella
J.S.C.

The following papers numbered 1 to 3 read on this motion, noticed on June 15, 2020, and duly submitted on September 28, 2020.

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1
NOTICE OF CROSS MOTION AND AFFIDAVIT	2
REPLY AFFIDAVIT AND EXHIBITS	3

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

Defendant, Lilian Cavin, M.D., seeks dismissal of the instant action pursuant to CPLR 3211(a)(4), alleging that there is currently pending an identical action against Dr. Cavin under index number 25827/19. In opposition, plaintiff does not dispute that she commenced the aforementioned identical action in 2019. Instead, plaintiff argues that the earlier action is not pending against Dr. Cavin in that personal jurisdiction was not obtained over Dr. Cavin. Plaintiff also cross-moves to dismiss the defendants' fourth affirmative defense alleging lack of jurisdiction, and to consolidate the two actions.

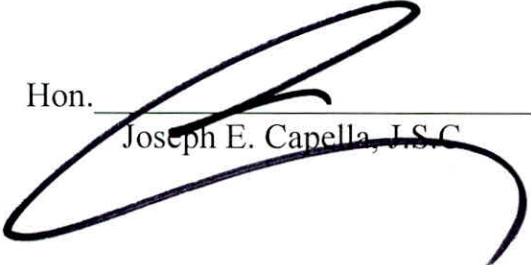
In the initial action (25827/19), plaintiff moved for a default judgment against Dr.

Cavin for failing to appear or answer (CPLR § 3215), which Dr. Cavin successfully opposed based on lack of personal jurisdiction, resulting in a decision dated December 11, 2019, denying plaintiff's default motion. Given the Court's December 11, 2019- decision that personal jurisdiction was not obtained over Dr. Cavin in the earlier action, and that no pre-answer motion or cross-motion was made by Dr. Cavin seeking an order of dismissal of the earlier action based on same, the Court finds that the earlier action is not pending against Dr. Cavin. As such, Dr. Cavin cannot rely upon the earlier action as a basis for her instant CPLR 3211(a)(4) motion (*see Kokoletsos v Semon*, 176 AD2d 786 [2nd Dept 1991]), and therefore, her motion is denied accordingly.

There still remains plaintiff's cross-motion to dismiss the fourth affirmative defense (personal jurisdiction) raised in the separate answers interposed by each defendant, and to consolidate the two actions. According to plaintiff, a review of the affidavit of service establishes that Dr. Cavin was properly served in "that service was made upon Wylie Cavin, Dr. Cavin's husband, a person of suitable age at Dr. Cavin's usual place of abode." (CPLR § 308.) Defendants' reply papers do not address the allegation by plaintiff that Dr. Cavin's fourth affirmative defense for lack of personal jurisdiction should be dismissed, and/or whether service upon Dr. Cavin was proper. Therefore, that portion of plaintiff's cross-motion seeking dismissal of Dr. Cavin's fourth affirmative defense for lack of personal jurisdiction is granted. On the other hand, the reply papers oppose plaintiff's request to dismiss the fourth affirmative defense by Eagle

Radiology, PLLC (Eagle), and challenges service upon Eagle. This issue was denied without prejudice to renew by this Court in a decision dated November 27, 2020, whereby the Court found that the parties needed to first address the issue of agency, the companion issue associated with serving a foreign corporation pursuant to CPLR § 311(a)(1), and whether the Texas Secretary of State was served in a manner consistent with New York law (CPLR § 313) before personal jurisdiction upon Eagle could be resolved. Therefore, that portion of the instant cross-motion by Eagle regarding same is likewise denied without prejudice to renew. Eagle is directed to serve a copy of this decision/order with notice of entry by first class mail upon all sides within 20 days of receipt of copy of same. This constitutes the decision and order of this court.

12/10/20
 Dated

Hon. 
 Joseph E. Capella, J.S.C.