

**Deltoro v Cavin**

2020 NY Slip Op 35348(U)

November 27, 2020

Supreme Court, Bronx County

Docket Number: Index No. 20892/20

Judge: Joseph E. Capella

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

Case Disposed   
Settle Order   
Schedule Appearance

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

Index #: 20892/20  
**DECISION/ORDER**

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

Plaintiff,

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

- against -

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

Defendants.

-----X  
The following papers numbered 1 to 2 read on this motion, noticed on July 27, 2020, and duly submitted on September 28, 2020.

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1
ANSWERING AFFIDAVIT AND EXHIBITS	2
REPLY AFFIDAVIT AND EXHIBITS	--
MEMO OF LAW	--

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

Defendant, Eagle Radiology, PLLC (Eagle), a Texas corporation that is not authorized to do business in New York, seeks dismissal of the instant action based on an alleged lack of personal jurisdiction. (CPLR § 3211(a)(8).) Eagle correctly points out that service was not done in strict compliance with Business Corporation Law (BCL) § 307 in that the New York State Secretary of State was not served. In opposition, plaintiff alleges that service was made pursuant to CPLR § 311(a)(1) in that service of process was made upon the Texas Secretary of State, as an agent authorized to accept service by appointment or by law. It is true that besides BCL § 307, service of process on a foreign

corporation doing business in this State without authorization may be completed by delivering to a managing or general agent or to any other agent authorized by appointment or by law to receive service. (*Wert v Black & Decker*, 246 AD2d 773 [3<sup>rd</sup> Dept 1998].) A plaintiff's decision not to utilize the more straightforward procedures of BCL § 307, either exclusively or in conjunction with CPLR § 311(a)(7), and instead exclusively take on the uncertainties associated with serving a foreign corporation pursuant to CPLR § 311(a)(1), can prove to be a challenging option. Here, the first question to be resolved is whether the Texas Secretary of State was an agent authorized to accept service. If the answer is yes, then it must still be determined whether the Texas Secretary of State was served in a manner consistent with New York law (CPLR § 313).

According to plaintiff, "Texas Business Organizations Code (BOC) § 5.251 permits service upon the Texas Secretary of State where service upon the entity directly cannot be accomplished with reasonable diligence." Texas BOC § 5.251 provides that the "secretary of state is an agent of an entity for purposes of service of process . . . if (1) the entity is a filing entity or a foreign filing entity and (A) the entity fails to appoint or does not maintain a registered agent in this state; or (B) the registered agent of the entity cannot with reasonable diligence be found at the registered office of the entity; or (2) the entity is a foreign filing entity and: (A) the entity's registration to do business under this code is revoked; or (B) the entity transacts business in this state without being registered as required by Chapter 9 (Foreign Entities)." Plaintiff's reliance upon this Texas statute

does not help to resolve whether the Texas Secretary of State was an agent authorized to accept service because the statute itself first requires a determination of whether Eagle is a filing entity or a foreign filing entity. The motion and the opposition papers do not resolve this first issue of agency, nor do they address the companion issue associated with serving a foreign corporation pursuant to CPLR § 311(a)(1), and that is whether the Texas Secretary of State was served in a manner consistent with New York law. (CPLR § 313.) Therefore, based on the aforementioned, the instant motion by Eagle is denied without prejudice to renew. Plaintiff 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.

\_\_\_\_ 11/27/20 \_\_\_\_\_  
Dated

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

