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CPLR 308(3): Substituted Service

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to the scope of the statutory language,[77] although it is agreed that the legislature did intend the notice to be available in any action.[78]

CPLR 308(3): Substituted service.

In *Huntington Utilities Fuel Corp. v. McLoughlin,*[79] an action to impose a trust on lands allegedly purchased with money taken from the plaintiffs, defendants moved to dismiss on the ground of insufficient service. They contended that substituted service was not available where the *number* of times that plaintiffs attempted personal service did not amount to "due diligence." [80] In refusing to set aside service, the court held that it would not adjudicate the question of "due diligence" where the parties disagree simply about the number of attempts at personal service which must be shown to permit the employment of substituted service.

The number of attempts necessary to constitute "due diligence" is not subject to exact determination. However, it is quite possible to foresee situations in which twenty or even thirty attempts would be insufficient.[81] Thus, the facts of each case must be examined to determine whether under the particular circumstances "due diligence" was employed, so as to permit substituted service.

In *Polansky v. Paugh,*[82] plaintiff knew that defendant had left his last known residence prior to attempted substituted service. The court, in a per curiam opinion, held that substituted service by mail was violative of due process where it appeared that prior to mailing the defendant did not reside at the stated address.

It is submitted that the court's statement should not be accepted by the practitioner as a general principle. In the enactment of CPLR 308(3), the legislature has chosen to afford a defendant greater protection [83] than that required by federal due

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[77] *Compare* 7B McKINNEY'S CPLR 305, supp. commentary 74 (1965), *with* 7B McKINNEY'S CPLR 3215, supp. commentary 155 (1965).

[78] 1965 JUDICIAL CONFERENCE REPORT, McKINNEY'S SESSION LAW NEWS A80.

[79] 45 Misc. 2d 79, 255 N.Y.S.2d 679 (Sup. Ct. Suffolk County 1965).

[80] See FIFTH REP. 266, wherein it is stated that the "due diligence" required by CPLR 308(3) is based upon "present requirements," *i.e.,* as required by the CPA. In this regard see Gurland v. D'Erbstein, 106 N.Y.S.2d 210 (Sup. Ct. 1951), wherein it was stated that substituted service is in derogation of the common-law rule that process must be personally served within the court's jurisdiction, and hence, directions pertaining to substituted service must be strictly construed and fully carried out. *Id.* at 211.

[81] *E.g., X* attempts personal service by delivery at *Y's* home each day at the same time for thirty weekdays. Each time this "attempt" is made, the plaintiff knows that the defendant will not be at home but will be at work in another city.

[82] 23 App. Div. 2d 643, 256 N.Y.S.2d 961 (1st Dep't 1965).

[83] FIFTH REP. 266.

process. This is evidenced by the fact that no mailing requirement exists for substituted service under the Federal Rules of Civil Procedure.[84] New York, on the other hand, requires mailing plus an affixation or delivery.[85] It would seem logical to assert, therefore, that if there was affixation or delivery, the fact that the mailing was made to a "last known residence" at which the defendant was known not to reside would not in itself render the entire service violative of federal due process. Rather, a violation would arise if the notice was not "reasonably calculated" [86] to give the defendant actual notice of the pendency of the action.

The practitioner should be encouraged in similar situations to take advantage of the opportunities offered under CPLR 308(4) by obtaining an order for such appropriate service as may be directed by the court. This practice would alleviate much of the concern over potential challenges to substituted service and instill confidence in the legal effectiveness of a chosen method of service.

The court, in *William Iser, Inc. v. Garnett*,[87] stated that failure to file proof of service made under CPLR 308(3) does not divest the court of jurisdiction.[88]

Under the CPA, some confusion existed as to whether a failure to file within twenty days constituted an incurable jurisdictional defect.[89] Since the CPLR eliminated this time limit, it is an indication that the legislature did not consider a failure to file to be a jurisdictional defect.[90] The defendant's attorney, therefore, should proceed bearing in mind that the requirement of filing must be met only to set the time within which the defendant must answer.

CPLR 308(4): Court ordered service.

In *Dobkin v. Chapman*,[91] plaintiff was injured in New York City when struck by an automobile owned and operated by Pennsylvania defendants. Personal service under CPLR 308(1), authorized by CPLR 313, proved unsuccessful. The same result occurred under Section 253 of the Vehicle and Traffic Law. Ul-

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[84] FED. R. CIV. P. 4(d).
[85] CPLR 308(3).
[86] Milliken v. Meyer, 311 U.S. 457, 463 (1940).
[87] 46 Misc. 2d 450, 259 N.Y.S.2d 996 (Sup. Ct. Nassau County 1965).
[88] William Iser, Inc. v. Garnett, 46 Misc. 2d 450, 451, 259 N.Y.S.2d 996 (Sup. Ct. Nassau County 1965).
[89] CPA § 231 provided that proof of substituted service must be filed within 20 days after the order for such service was granted. See, *e.g.*, Toubin v. White, 2 Misc. 2d 723, 151 N.Y.S.2d 243 (Sup. Ct. 1956).
[90] *Supra* note 87, at 452, 259 N.Y.S.2d at 998.
[91] 46 Misc. 2d 260, 259 N.Y.S.2d 733 (Sup. Ct. 1965).