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CPLR 308(4): Court Ordered Service

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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).

timately, plaintiff procured a CPLR 308(4) court order providing for service by ordinary mail. The court held that service by mail was permissible under CPLR 313 when read, as it must be, in conjunction with CPLR 308.

In utilizing CPLR 308(4), however, the practitioner should bear in mind the fact that due process requirements must be satisfied. Court-ordered service which technically satisfies the New York statute may be set aside for failure to fulfill federal due process requirements.[92] In order to assure the constitutionality of service, an order for publication as well as ordinary mail should be requested.

It should be noted that a request for court-ordered service by ordinary mail does not conflict with the "nail and mail" provisions of paragraph (3). In addition to a mailing under paragraph (4), such as the one in the instant case, paragraph (3) requires that the summons be nailed to the *actual* abode, place of business or dwelling. Hence, such an order as this is not an illegitimate bypassing of paragraph (3).

The problem of strict compliance with all the requirements of court-ordered service under CPLR 308(4)[93] was treated in *Sellars v. Raye*.[94] The defendant contended that if the Vehicle and Traffic Law[95] required a plaintiff to obtain a return receipt for the service mailed, and, if the court ordered service "within the ambit"[96] of this statute, then, upon failure to obtain such a receipt, the court could not sanction service by an order allowing publication in its place. The court, rejecting this contention, held that the method chosen for service under CPLR 308(4) was within its power and discretion, and stated that "service . . . accomplished in two stages pursuant to two separate orders does not render it invalid."[97]

Acknowledging that CPLR 308(4) can be employed only "where it would be futile to attempt service"[98] by another paragraph, a court, in approving the suggested method of counsel, should not be obligated to conform it to some existing non-CPLR procedure, which could also result in a "futile" attempt. Rather, the court may select from among various statutory and non-statutory sug-

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[92] See Milliken v. Meyer, 311 U.S. 457 (1940).

[93] "Personal service upon a natural person shall be made . . . .
4. in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraph one, two or three of this section."

[94] 45 Misc. 2d 859, 258 N.Y.S.2d 62 (Sup. Ct. Nassau County 1965).

[95] N.Y. VEHICLE & TRAFFIC LAW §§ 253, 254.

[96] Sellars v. Raye, 45 Misc. 2d 859, 258 N.Y.S.2d 62, 63 (Sup. Ct. Nassau County 1965).

[97] *Id.* at 862, 258 N.Y.S.2d at 64.

[98] FIFTH REP. 266.

gestions those which will form one means "reasonably calculated" [99] to apprise the defendant of the pendency of the action.

CPLR 314(1): Expanding in rem bases.

In *Chittenden v. Chittenden*,[100] an action to have a Mexican divorce decree declared invalid, the supreme court held that service by publication could be made under CPLR 314(1)[101] upon a non-resident who married the plaintiff's alleged husband following such decree.

The practitioner should note that the expanded concept of interest in the marital res found in the CPA[102] has been carried over into the CPLR. Since the plaintiff was a New York resident, this state undoubtedly had jurisdiction over the res. The husband and the wife are usually the parties deemed to have an interest in the marital res. However, it is submitted that the holding in *Chittenden* is in accord with the liberal spirit of the CPLR,[103] and is realistic under the facts of the case. Since a declaration of the invalidity of the Mexican divorce decree would re-establish the validity of the first marriage, thereby rendering the second marriage invalid, the defendant does have a very real interest in the marital res.

CPLR 320(c): Amendment.

Prior to 1965, CPLR 320(c) provided that any appearance of a defendant served without the state under CPLR 314 conferred personal jurisdiction unless an objection to jurisdiction was asserted under CPLR 3211(a) at the time of appearance. As a result of the phrase "at the time of appearance," a conflict existed between CPLR 320(c) and CPLR 3211(e) since the latter offers the option of objecting by motion or answer irrespective of whether an appearance has been made. The legislature in 1965 deleted this phrase and the conflict no longer exists.

The result is that a defendant can serve a notice of appearance without fear that he thereby forfeits his jurisdictional objection. As long as he is able thereafter to make a CPLR 3211 motion, he may, in that latter motion, include his jurisdictional objection. However, the practitioner should be aware of the danger of waiving

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[99] Milliken v. Meyer, 311 U.S. 457, 463 (1940).

[100] 46 Misc. 2d 347, 259 N.Y.S.2d 738 (Sup. Ct. Monroe County 1965).

[101] "Service may be made without the state by any person authorized by section 313 in the same manner as service is made within the state:
1. in a matrimonial action . . . ."

[102] CPA § 232.

[103] CPLR 104.