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Article 9

CPLR 311(1): Validity of Service of Process Upon Corporate Employee Updeld Based on Process Server's Reasonableness and Diligence

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by the defendant's service of a notice of appearance and demand for a complaint, the *Aversano* decision appears to evidence a trend toward a liberal construction of the statute.[61] The precise jurisdictional effect of noncompliance, however, remains uncertain. It is hoped that future assessment of the consequences of noncompliance will reflect the intentions of the draftsmen and not operate to peremptorily deprive the plaintiff of his day in court on the merits of his claim. Until the contours of new legislation are defined, however, the practitioner is well advised to include either the CPLR 305(b) notice or the complaint with his summons, even if default is not anticipated.

Carl J. Laurino, Jr.

CPLR 311(1): Validity of service of process upon corporate employee upheld based on process server's reasonableness and diligence

Under CPLR 311(1), personal service on a corporation may be effected by delivery of a summons to a corporate official or an "agent authorized by appointment" to receive process.[62] In accordance with the statute's purpose of giving the corporation notice of the commencement of a suit,[63] a liberal trend has developed to ex-

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[61] Under the CPLR the defendant's service of a notice of appearance generally will not operate as a waiver of the defendant's objections to personal jurisdiction so long as an objection to jurisdiction is made in a CPLR 3211(a)(8) motion or in the answer as provided by CPLR 3211(e). CPLR 320(b).

[62] CPLR 311 (Supp. 1980-1981) provides in pertinent part:

> Personal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows: 1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service . . . .

CPLR 311(1). The statute consolidated section 229 and parts of section 228 of the CPA and was based upon rule 4(d)(3) of the Federal Rules of Civil Procedure. SECOND REP. at 161. There was no change in substance from the CPA, SECOND REP. at 161, the main thrust of the legislation being the elimination of the previous distinctions between service of process in domestic and foreign corporations, *id.*; *see* CPLR 311(1), commentary at 254 (1972). *Compare* CPA § 228(8)-(9) *with* CPA § 229(3). Delivery of the summons to the Secretary of State, under the "agent authorized by . . . law" clause of CPLR 311(1), provides another means of obtaining personal jurisdiction. This is provided for in N.Y. BUS. CORP. LAW §§ 306, 307 (McKinney 1963 & Supp. 1980-1981). *See* note 84 *infra*.

[63] *See, e.g.*, Fashion Page, Ltd. v. Zurich Ins. Co., 50 N.Y.2d 265, 271-72, 406 N.E.2d 747, 750, 428 N.Y.S.2d 890, 893 (1980). Notice to the corporation was also the purpose of the predecessors of CPLR 311(1). Barrett v. American Tel. & Tel. Co., 138 N.Y. 491, 493, 34

pand its purview so that various lower level employees impliedly authorized to receive process may also be served.[64] In addition, based on equitable considerations courts have been willing to validate, in a few limited circumstances, service upon individuals not contemplated by the statute.[65] Recently, in *Spacial Interiors, Ltd.*

N.E. 289, 289 (1893); *see* Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 269-70, 115 N.E. 915, 918 (1917).

It should be noted that section 311 does not confer jurisdiction but only enumerates the individuals upon whom process can be served. *See* CPLR 311, commentary at 254 (1972). It is the positions of these individuals that "lead to a just presumption that notice to them will be notice to the principal," thereby binding the corporation. Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 269, 115 N.E. 915, 918 (1917) (citations omitted).

[64] Fashion Page Ltd. v. Zurich Ins. Co., 50 N.Y.2d 265, 271, 406 N.E.2d 747, 750, 428 N.Y.S.2d 890, 893 (1980); SIEGEL § 70.

The classification "agent authorized by appointment" has not been used extensively since it is only recently that the requirements, once considered the formal requirements set forth in CPLR 318, have been clarified so as to permit the creation of an agency relation by the acts or words of the employer towards his employee or a third party. *See* Fashion Page Ltd. v. Zurich Ins. Co., 50 N.Y.2d 265, 272, 406 N.E.2d 747, 751, 428 N.Y.S.2d 890, 893 (1980); Sullivan Realty Organization, Inc. v. Syart Trading Corp., 68 App. Div. 2d 756, 417 N.Y.S.2d 976 (2d Dep't 1979); *The Survey*, 54 ST. JOHN'S L. REV. 382, 389 & n.21 (1980). This analysis comports with the general rules of agency. *See* RESTATEMENT (SECOND) OF AGENCY §§ 26, 27 (1958).

The majority of litigation has involved the classification of an employee as a "managing or general agent." *See The Survey*, 54 ST. JOHN'S L. REV. 382, 385 n.3 (1980). The Court of Appeals in Taylor v. Granite State Provident Ass'n, 136 N.Y. 343, 32 N.E. 992 (1893), set out the traditional test whereby an employee must possess "general powers involving the exercise of judgment or discretion" to qualify as a managing agent. *Id.* at 346, 32 N.E. at 993. This has resulted in situations where service has been held invalid due to a strict interpretation of this standard. *Cf.* Isaf v. Pennsylvania R.R., 32 App. Div. 2d 578, 299 N.Y.S.2d 231 (3d Dep't 1969) (in freight agent's absence, acceptance of service by chief clerk held invalid since temporary assumption of duties was insufficient to confer authority). For a discussion of the *Isaf* case see *The Survey*, 44 ST. JOHN'S L. REV. 313, 327-29 (1969). In a number of cases, therefore, courts have been willing to allow exceptions to the rule so as to effectuate justice. *See* note 65 *infra*.

[65] Courts have validated service on unauthorized individuals so as to avoid inequitable results. In Green v. Morningside Heights Hous. Corp., 13 Misc. 2d 124, 177 N.Y.S.2d 760 (Sup. Ct. N.Y. County), *aff'd*, 7 App. Div. 2d 708, 180 N.Y.S.2d 104 (1st Dep't 1958), service was upheld when made on a corporate receptionist who delivered it to a managing agent since the proximity in time and space between the two deliveries was such that it could "be classified as a part of the same act." 13 Misc. 2d at 125, 177 N.Y.S.2d at 761. The Court of Appeals indicated its approval of this decision while taking note of the process server's reasonableness and diligence. McDonald v. Ames Supply Co., 22 N.Y.2d 111, 115-16, 238 N.E.2d 726, 728, 291 N.Y.S.2d 328, 332 (1968). Another equitable exception arises when the corporation or one of its employees acts in such a way "as to give rise to a waiver and estoppel." 1 WK&M ¶ 311.01; *see* Belofatto v. Marsen Realty Corp., 62 Misc. 2d 922, 310 N.Y.S.2d 191 (N.Y.C. Civ. Ct. N.Y. County 1970); Buckner v. D & E Motors, Inc., 53 Misc. 2d 382, 278 N.Y.S.2d 932 (Sup. Ct. Erie County 1967). Federal courts will not automatically dismiss service upon an unauthorized individual if proper service is still possible. 2 MOORE'S FEDERAL PRACTICE ¶ 4.22 [2] (2d ed. 1980).

v. Equitable Life Assurance Society[66] and *Bruce v. Prefco Corp.*[67] the Supreme Court, New York County, held that service upon employees concededly not authorized by statute was valid when the process server acted with due diligence in delivering the summons and reasonably believed that the person receiving service was authorized to accept it.[68]

In *Spacial Interiors* the summons and complaint were served on the secretary of one defendant and on the secretary-receptionist of another.[69] Relying on the process server's affidavit,[70] the court noted that in both instances the employees had "held themselves out as authorized to accept service."[71] After receipt, both secretaries promptly turned the process over to the defendants.[72] Similarly, in *Bruce,* a clerk-typist accepted delivery of a summons which she conveyed to the defendant's president.[73] The clerk-typist, the sole occupant of the defendant's office at the time, accepted the summons after the process server explained the purpose of his visit and inquired as to her authority to accept process.[74] In each of these cases, the supreme court denied the defendant's motion to

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Service has generally been invalidated, however, when made upon an individual not enumerated in the statute even though there was a subsequent delivery to a proper party. *See, e.g.,* McDonald v. Ames Supply Co., 22 N.Y.2d 111, 238 N.E.2d 726, 291 N.Y.S.2d 328 (1968); *see* Boser v. Burdick, 62 App. Div. 2d 1134, 404 N.Y.S.2d 187 (4th Dep't 1978). This was true with respect to the CPA also. *See* Commissioners of State Ins. Fund v. Singer Sewing Mach. Co., 281 App. Div. 867, 119 N.Y.S.2d 802 (1st Dep't 1953).

[66] N.Y.L.J., Nov. 18, 1980, at 6, col. 1 (Sup. Ct. New York County).

[67] N.Y.L.J., Nov. 12, 1980, at 5, col. 1 (Sup. Ct. New York County).

[68] N.Y.L.J., Nov. 18, 1980, at 6, col. 1 (Sup. Ct. New York County); N.Y.L.J., Nov. 12, 1980, at 5, col. 1 (Sup. Ct. New York County).

[69] N.Y.L.J., Nov. 18, 1980, at 6, col. 1 (Sup. Ct. New York County). The plaintiffs, subtenants in a New York City building, brought an action to recover for water damage to their property. They charged the defendants with negligence which caused plumbing and heating pipes in their building to rupture. *Id.*

[70] Since the process server had retired and moved out of the state, he was not available to testify. *Id.* The court, therefore, had to consider his affidavit as to "the papers served, the person served, the date, the time, the address and manner of service." *Id.* The affidavit was available to the court due to the compliance with CPLR 306 which sets forth the necessary requirements for proof of service. *See* CPLR 306 (McKinney Supp. 1980-1981).

[71] N.Y.L.J., Nov. 18, 1980, at 6, col. 1 (Sup. Ct. New York County). The employees submitted affidavits, however, averring that they were not qualified to accept service. *Id.*

[72] *Id.*

[73] N.Y.L.J., Nov. 12, 1980, at 5, col. 1 (Sup. Ct. New York County). Conveyance to defendant's president took place within one-half hour of the service. *Id.* The plaintiff in the action was a tenant in a building owned by the defendant corporation. He brought a personal injury suit when a portion of a ceiling fell on him. *Id.*

[74] *Id.*

dismiss.[75]

Initially, both supreme court decisions emphasized that the statutory purpose of notice to the corporation had been fulfilled.[76] In addition, both courts relied upon the Court of Appeals decision in *Fashion Page, Ltd. v. Zurich Insurance Co.*[77] wherein the Court indicated, in dicta, that a corporate defendant will usually be estopped from claiming lack of personal jurisdiction when an employee not encompassed by the statute assumes to accept process.[78] Moreover, the *Fashion Page* Court suggested that the controlling factors in such instances are the reasonableness and due diligence of the process server.[79] Thus, in *Spacial Interiors,* Justice Ascione opined that service was valid since proper inquiry had been made and process had been served on the "person apparently in charge of defendant's office."[80] Similarly, Justice Kirschenbaum upheld

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[75] N.Y.L.J., Nov. 18, 1980, at 6, col. 1 (Sup. Ct. New York County); N.Y.L.J., Nov. 12, 1980, at 5, col. 1 (Sup. Ct. New York County). Defendants' motions for dismissal were made pursuant to CPLR 3211(a)(8) and claimed lack of personal jurisdiction over the corporation. *Id.*

[76] N.Y.L.J., Nov. 18, 1980, at 6, col. 1 (Sup. Ct. New York County); N.Y.L.J., Nov. 12, 1980, at 5, col. 1 (Sup. Ct. New York County); *see* note 63 *supra.*

[77] 50 N.Y.2d 265, 406 N.E.2d 747, 428 N.Y.S.2d 890 (1980).

[78] *Id.* at 273-74, 406 N.E.2d at 751-52, 428 N.Y.S.2d at 894. In *Fashion Page,* the Court of Appeals upheld the validity of service made upon an executive secretary of a foreign corporation. The process server had informed a receptionist that he had to serve a summons and complaint and inquired as to whom he could see. The receptionist directed him down a hall and told him to " 'see the girl sitting down there.' " *Id.* at 269, 406 N.E.2d at 749, 428 N.Y.S.2d at 892. Upon doing this, he encountered an individual who was, in fact, the vice-president's secretary. After informing her of the purpose of his visit, he inquired as to her authority to accept service. She assured him she could take the summons and complaint. *Id.* at 270, 406 N.E.2d at 749, 428 N.Y.S.2d at 892. Upon the vice-president's return to the office, she informed him of her receipt of service. He told her to forward it to the corporation's legal department. *Id.* The Court noted that for at least 5 years she had accepted service without objection from the corporation whenever the vice president was absent from the office. *Id.*

In its holding, the Court noted the liberal criteria that should be used when making a determination of whether an agency authorized by appointment had been created. *See* note 86 *infra.* It would appear, therefore, as was pointed out by Judge Gabrielli in his concurring opinion, that under the facts of *Fashion Page,* the executive secretary was an impliedly authorized agent capable of accepting process within the meaning of CPLR 311(1). 50 N.Y.2d at 276, 406 N.E.2d at 753, 428 N.Y.S.2d at 895 (Gabrielli, J., concurring). The Court went further, however, and noted that in most office-setting situations where a process server acts reasonably and with due diligence, a corporation will be bound by service accepted by unauthorized employees who have misrepresented their power. *Id.* at 274, 406 N.E.2d at 752, 428 N.Y.S.2d at 894.

[79] *See* note 78 *supra.*

[80] N.Y.L.J., Nov. 18, 1980, at 6, col. 1 (Sup. Ct. New York County). Justice Ascione misinterpreted the facts in *Fashion Page* when he stated that the Court of Appeals had upheld service made on "a receptionist, concededly not authorized," *id.*, since the Court had

the validity of service in *Bruce* based upon the process server's due diligence and the representation of authority by the employee.[81]

It appears that the *Spacial Interiors* and *Bruce* courts properly used the reasonableness and due diligence dicta of *Fashion Page* to prevent corporate defendants from using technical deficiencies as a shield against service of process.[82] It is submitted, however, that with respect to validating service upon unauthorized individuals, the application of *Fashion Page* should be limited to situations such as those presented by *Spacial Interiors* and *Bruce* in which an employee in an office setting, upon direct inquiry, misrepresents his authority to accept service.[83] Indeed, a broader in-

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held that this receptionist had been impliedly authorized by appointment to accept service, 50 N.Y.2d at 271-72, 406 N.E.2d at 750-51, 428 N.Y.S.2d at 893.

[81] N.Y.L.J., Nov. 12, 1980, at 5, col. 1 (Sup. Ct. New York County).

[82] Both *Spacial Interiors* and *Bruce* involve an office setting where a corporate employee has misrepresented his authority to accept a summons. This appears to be the situation addressed by the *Fashion Page* dicta. *See* note 78 *supra*. *See also* Belofatto v. Marsen Realty Corp., 62 Misc. 2d 922, 924, 310 N.Y.S.2d 191, 193 (N.Y.C. Civ. Ct. N.Y. County 1970). It is possible, however, that the Court, in *Fashion Page*, was addressing its discussion about reasonableness and diligence to the situation when a summons is delivered to an employee impliedly authorized to accept service. The Court first noted the importance of the process server's ability to rely on corporate employees while discussing "alternative procedures" used by corporations. 50 N.Y.2d at 272, 406 N.E.2d at 751, 428 N.Y.S.2d at 893. Both *Spacial Interiors* and *Bruce*, therefore, may be outside the scope of the Court of Appeals decision in *Fashion Page*.

Nevertheless, it is apparent that an equitable result has been achieved in both cases. This was clearly the case in *Spacial Interiors*, wherein the defendant waited until after the statute of limitations had run to make known the alleged defects in service. N.Y.L.J., Nov. 18, 1980, at 6, col. 1 (Sup. Ct. New York County). Indeed, since the *Spacial Interiors* decision is in accord with prior decisions in which courts have been willing to apply an estoppel or waiver when the corporation or its employees act improperly, *see* Fashion Page, Ltd. v. Zurich Ins. Co., 50 N.Y.2d 265, 274-75, 406 N.E.2d 747, 752, 428 N.Y.S.2d 890, 895 (1980) (Gabrielli, J., concurring); note 65 *supra*, it is quite possible that the plaintiffs would not have gone remediless if the case law prior to *Fashion Page* had been applied. *See* note 65 *supra*.

[83] *Fashion Page's* application should be limited since the imposition of fault upon the corporation for the misrepresentations of its employees, 50 N.Y.2d at 274, 406 N.E.2d at 752, 428 N.Y.S.2d at 894, is in contradiction with the agency law upon which CPLR 311(1) must be based, *see* CPLR 311(1), commentary at 129 (McKinney Supp. 1980-1981). Although a principal may create an agency relation expressly or impliedly, *see* RESTATEMENT (SECOND) OF AGENCY § 26 (1958), he will not be bound by misrepresentations of authority by one not authorized, absent some type of estoppel caused by the circumstances, *see id.*, § 8B, or ratification of the act by the principal, *see id.*, § 82. In addition, the presence of an employee in an office should not equate with a manifestation by the employer that this individual is authorized to accept process. *See id.*, § 8. *See generally* Sullivan Realty Organization, Inc. v. Syart Trading Corp., 68 App. Div. 2d 756, 769-70, 417 N.Y.S.2d 976, 984-85 (2d Dep't 1979) (Damiani, J.P., dissenting). It has also been suggested that in redelivering the summons and complaint to the corporate official, the unauthorized employee is acting as

terpretation, placing greater emphasis on notice to the corporation than on the process server's reasonableness and diligence, would undermine the statutory scheme set forth by the legislature.[84] Clearly, service cannot be upheld when the *sole* basis for validation is notice to the corporation.[85]

Furthermore, a determination that an individual is an "agent authorized by appointment" is more easily obtainable after *Fashion Page* wherein the Court held that it is not necessary to fulfill any formal requirements in order to create this agency relationship.[86] It is suggested, therefore, that the interests of plaintiffs such as those in *Spacial Interiors* and *Bruce* could be better served if it can be shown that the corporate employee given the summons has been impliedly authorized as an agent to accept service.[87] Validity of service accompanies such a showing and elimi-

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an agent of the process server. *See* CPLR 308, commentary at 205 (1972).

[84] One reason for limiting service to those situations covered by CPLR 311(1) is to prevent the proliferation of careless service which results in unnecessary litigation. *See* Fashion Page, Ltd. v. Zurich Ins. Co., 50 N.Y.2d 265, 275, 406 N.E.2d 747, 752, 428 N.Y.S.2d 890, 895-96 (1980) (Gabrielli, J., concurring); Farrell, *Civil Practice,* 31 SYRACUSE L. REV. 15, 31-35 (1980). It would seem wise to limit the exceptions to this section to those situations where it is necessary in order to bring about a just result. Additionally, it has been held that the substituted service methods of CPLR 308 may not be used with respect to corporations. SIEGEL § 70; *see* Melendez v. Sharet Realty Corp., N.Y.L.J., Nov. 15, 1963, at 16, col. 2 (Sup. Ct. Bronx County). The hardships imposed on plaintiffs due to this strict interpretation, however, are not as great as they may first appear. A plaintiff has the option of serving process on the Secretary of State who is considered the agent of the corporation. *See* N.Y. BUS. CORP. LAW § 306 (McKinney 1963 & Supp. 1980-1981) (service of process on domestic and authorized foreign corporations); N.Y. BUS. CORP. LAW § 307 (McKinney 1963 & Supp. 1980-1981) (service of process on unauthorized foreign corporation). The advantages of this method of service include the avoidance of unnecessary litigation concerning the validity of service. *See* Farrell *supra,* at 31.

[85] *See* 50 N.Y.2d at 273, 406 N.E.2d at 751, 428 N.Y.S.2d at 894. The *Fashion Page* Court noted that basing validity of service on notice to the corporation would only encourage carelessness. *Id; see* McDonald v. Ames Supply Co., 22 N.Y.2d 111, 116, 238 N.E.2d 726, 728-29, 291 N.Y.S.2d 328, 332 (1968).

[86] 50 N.Y.2d at 272, 406 N.E.2d at 751, 428 N.Y.S.2d at 893. In *Fashion Page,* the Court of Appeals held that a corporation need not comply with the formalities of CPLR 318 in order to appoint an agent authorized to accept service. *Id.* In doing so the Court noted that this would prevent the corporation from avoiding the natural consequences of its actions. *Id.* In the area of service of process, therefore, the corporation will be bound by the common-law principles of agency and will be responsible for both the express and implied agencies created by its actions. *See* RESTATEMENT (SECOND) OF AGENCY § 26 (1958).

[87] In neither *Spacial Interiors,* N.Y.L.J., Nov. 18, 1980, at 6, col. 1 (Sup. Ct. New York County), nor *Bruce,* N.Y.L.J., Nov. 12, 1980, at 5, col. 1 (Sup. Ct. New York County), did the supreme court ascertain whether the employees had previously accepted service of process. Had the courts found such prior activity, validity of service could have been based upon an implied agency relationship. *See* note 86 *supra.*

nates a determination based upon ill-defined standards of reasonableness and due diligence.[88] In addition, service upon an individual contemplated by the statute raises a presumption of notice to the corporation.[89] The benefit of this presumption does not inure to the plaintiff who serves an unauthorized employee.[90] It seems advisable, therefore, that further expansive construction of the statute should be curtailed.[91]

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[88] CPLR 311(1) (McKinney Supp. 1980-1981). The *Fashion Page* Court noted that the determination of the reasonableness and due diligence of the process server must be made on a case-by-case basis. 50 N.Y.2d at 273, 406 N.E.2d at 751, 428 N.Y.S.2d at 894. The Court also stated that it would not be reasonable for a process server to rely on the representations of a corporate employee in all instances. *Id.* This was pointed out to be especially true if occurring outside the office setting. *Id.* The Court, however, did not specify any circumstances within the office setting where service would be invalidated on the basis of a lack of due diligence. The test remains a subjective and, therefore, nebulous one and validity of service cannot be assured. *Cf.* Barnes v. City of New York, 70 App. Div. 2d 580, 416 N.Y.S.2d 52 (2d Dep't), *appeal dismissed*, 48 N.Y.2d 630, 396 N.E.2d 475, 421 N.Y.S.2d 193 (1979) (insufficient due diligence to permit alternative service on individual even though process server visited residence on 4 separate days).

[89] A statutory presumption of notice to the corporation accompanies service upon an individual enunciated in CPLR 311(1). Fashion Page, Ltd. v. Zurich Ins. Co., 50 N.Y.2d at 272, 406 N.E.2d at 750, 428 N.Y.S.2d at 893.

[90] When service upon an unauthorized employee is upheld, validation is based upon the process server's actions and not the position of the individual receiving process. *See* note 78 *supra*. A presumption of notice to the corporation will not arise in this situation since the basis for this presumption is the position of the corporate official enunciated in CPLR 311(1). *See* note 63 *supra*.

Notice to the corporation will be a significant factor if the person upon whom service is made fails to inform the corporation and a default judgment is entered. In order to have this default judgment vacated, the corporation will have to rely on either CPLR 317 or CPLR 5015(a)(1). *See* SIEGEL § 108. To obtain relief under CPLR 317 a defendant has the burden of showing lack of knowledge. 1 WK&M ¶ 317.07. Similarly, CPLR 5015(a)(1) requires a defendant to show excusable error on his part in order to obtain relief. 5 WK&M ¶ 5015.04. In both instances, therefore, a corporate defendant will have to show that notice was never received. When service of process has complied with CPLR 311(1) the presumption of notice will have to be rebutted by the corporation. A defendant will not be forced to overcome this obstacle if service is not in accord with the statute.

[91] *See* Fashion Page, Ltd. v. Zurich Ins. Co., 50 N.Y.2d at 275, 406 N.E.2d at 753, 428 N.Y.S.2d at 895 (Gabrielli, J., concurring).