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# CPLR 308(4): Four Attempts to Serve the Defendant Personally During Business Hours Does Not Constitute Due Diligence

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the contrary, the Court maintained that actual notice should be irrelevant since the common-law exception to the applicability of the statutory extension is based upon the theory that no prior action was commenced if service was bad.[77] Yet, in allowing the plaintiff in *George* an extension under CPLR 205(a), the Court seems to have relied upon the fact that the summons, although defective, fully apprised the defendant of the pending suit.[78] It is suggested that the applicability of CPLR 205(a) should not hinge on the nature of the defect in the prior action, nor on whether the first action was "commenced." Rather, it is submitted that actual notice and vigorous prosecution of the first claim should suffice to invoke the statute.[79]

*Frank F. Coulom, Jr.*

## ARTICLE 3 — JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

### *CPLR 308(4): Four attempts to serve the defendant personally during business hours does not constitute due diligence*

CPLR 308(4) permits substituted service of a summons upon a natural person where the preferred methods, personal service or delivery "to a person of suitable age and discretion" at the defendant's business or dwelling place and mailing to his last known

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[77] 47 N.Y.2d at 178, 390 N.E.2d at 1161, 417 N.Y.S.2d at 236. The Court noted the "actual notice" rationale was inconsistent with its decision in Smalley v. Hutcheon, 296 N.Y. 68, 70 N.E.2d 161 (1946). 47 N.Y.2d at 178, 390 N.E.2d at 1161, 417 N.Y.S.2d at 236. In *Smalley*, the plaintiffs commenced a negligence action in an Illinois state court against the personal representative of the alleged tortfeasor for injuries suffered in an Illinois car accident. 296 N.Y. at 70, 70 N.E.2d at 161. Attempting to effect service pursuant to Illinois' nonresident motorist statute, the plaintiffs served the Secretary of State of Illinois and mailed a copy to the administrator of the deceased defendant. *Id.* at 70-71, 70 N.E.2d at 161-62. That action was dismissed because Illinois' nonresident motorist statute did not authorize service of process on the personal representative of a nonresident motorist in an action against the motorist's estate. *Id.* at 71, 70 N.E.2d at 162. After the Illinois 2-year statute of limitations had expired, the plaintiffs brought suit against the administrator in a New York court. *Id.* From these facts, it appears that the defendant-administrator had actual knowledge of the claim against his intestate. Nevertheless, the Court of Appeals, on the basis of its decision in Erickson v. Macy, 236 N.Y. 412, 140 N.E. 938 (1928), held that a similar extension provided by the laws of Illinois did not apply because "no action [had been] commenced" in Illinois. 296 N.Y. at 73, 70 N.E.2d at 163.

[78] *See* 47 N.Y.2d at 177-78, 390 N.E.2d at 1160, 417 N.Y.S.2d at 236.

[79] *See* Gaines v. City of New York, 215 N.Y. 533, 539, 109 N.E. 594, 596 (1915); notes 43, 62 & 76 *supra*.

residence, "cannot be made with due diligence."[80] Under this method of service, commonly known as "nailing and mailing," it has not been clear what will satisfy the due diligence requirement.[81]

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[80] CPLR 308 (Supp. 1979-1980) provides in pertinent part:

> Personal service upon a natural person shall be made by any of the following methods:
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> 1. by delivering the summons within the state to the person to be served; or
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> 2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by mailing the summons to the person to be served at his last known residence . . .; or
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> . . . .
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> 4. where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by mailing the summons to such person at his last known residence . . . .

*Id.*

Prior to its amendment in 1970, CPLR 308 required diligent attempts to serve the defendant personally before the plaintiff could use the nail and mail (currently CPLR 308(4)) or delivery and mail (currently CPLR 308(2)) provisions. Ch. 3, § 308, [1962] N.Y. Laws 616 (McKinney). The difficulties encountered in complying with the original due diligence test led process servers to falsify their affidavits of service. EIGHTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1970), *in* SIXTEENTH ANN. REP. N.Y. JUD. CONFERENCE A38 (1971) [hereinafter cited as N.Y. JUD. CONF.]; *accord* SIEGEL § 71. To eliminate this problem, often referred to as "sewer service," *id.*, the legislature eased the service requirements by authorizing delivery and mail without prior diligent efforts to effect personal service. CPLR 308(2) (Supp. 1978-1979); *see* N.Y. JUD. CONF., *supra;* SIEGEL § 71. Thus, substituted service by nailing and mailing is permitted as an alternative when the other two methods cannot be made with due diligence. CPLR 308(4) (Supp. 1979-1980); *see* CPLR 308, commentary at 208 (1972); SIEGEL § 74; 1 WK&M ¶ 308.14. Accordingly, where a person of suitable age and discretion is at the defendant's home or business place when service is attempted, nail and mail service is invalid. *See* Weinberg v. Hillbrae Builders, Inc., 58 App. Div. 2d 546, 396 N.Y.S.2d 9 (1st Dep't 1977); Levin v. McGovern, 53 App. Div. 2d 1042, 386 N.Y.S.2d 168 (4th Dep't 1976).

[81] *See* SIEGEL § 74. Professor Siegel notes that the determination of what constitutes due diligence "is a sui generis test." *Id.* at 79. To meet the due diligence requirement, the process server's affidavit must contain detailed information concerning his efforts to effect service under CPLR 308(1) and (2) so that the court can determine whether the requirement was met. *E.g.*, Jones v. King, 24 App. Div. 2d 430, 260 N.Y.S.2d 666 (1st Dep't 1965) (per curiam); Goldner v. Reiss, 64 Misc. 2d 785, 786, 315 N.Y.S.2d 644, 646 (N.Y. Civ. Ct. N.Y. County 1970). The process server's affidavit must specify the time and days service was attempted in order to permit the defendant an opportunity to impeach the process server's credibility. Blatz v. Benschine, 53 Misc. 2d 352, 353, 278 N.Y.S.2d 533, 535 (Sup. Ct. Queens County 1967). As a general rule, one commentator has opined that a "few visits on different occasions and at different times to both residence and place of business, if known," would satisfy the requirement. SIEGEL § 74, at 80 (citing O'Connor v. O'Connor, 52 Misc. 2d 950, 277 N.Y.S.2d 424 (Sup. Ct. Suffolk County 1967)); *cf.* Feinstein v. Bergner, No. 387, slip op. (New York Ct. App. Oct. 23, 1979) (two attempts to effectuate service at defendant's home not reversible as matter of law); Cherney v. DeRosa, 61 App. Div. 931, 403 N.Y.S.2d 35 (1st Dep't 1978) (three attempts on different days and times during business hours at defendant's place of business sufficient); Huntington Utils. Fuel Corp. v. McLoughlin, 45 Misc. 2d 79, 255 N.Y.S.2d 679 (Sup. Ct. Suffolk County 1965) (no particular number of efforts required). *See*

Recently, in *Barnes v. City of New York*,[82] the Appellate Division, Second Department, held that notwithstanding several unsuccessful efforts to effect service at the defendants' residence during business hours, the due diligence rule requires an attempt to serve the defendant either before or after working hours or at his place of business.[83]

In *Barnes*, a personal injury action, a process server made four unsuccessful attempts on weekdays between the hours of 8:20 a.m. and 5:10 p.m. to serve the defendants personally at their home.[84] The process server also questioned a neighbor who confirmed that the address was correct but stated that she knew nothing about the defendants' whereabouts.[85] Without attempting to locate the defendants' actual place of business, the process server attached two copies of the summons to the defendants' door and mailed a copy to the same address.[86] The defendants raised lack of in personam jurisdiction as a defense in their answer and later successfully moved to dismiss the complaint in Supreme Court, Kings County, for improper service.[87]

On appeal, the Appellate Division, Second Department, affirmed in a memorandum opinion,[88] stating that the defendants' absence during working hours should have suggested to the process server that they were working people.[89] Accordingly, it was determined that the four attempts to effect personal service and the inquiry of the defendants' neighbor did not constitute diligent efforts

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*generally* Tuerkheimer, *Service of Process in New York City: A Proposed End to Unregulated Criminality*, 72 COLUM. L. REV. 847 (1972).

It should be noted that although actual notice is sufficient to satisfy due process, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), jurisdiction will be lacking unless there has been full compliance with the CPLR service of process provisions, *see* Feinstein v. Bergner, No. 387, slip op. at 3 (New York Ct. App. Oct. 23, 1979); Mittelman v. Mittelman, 45 Misc. 2d 445, 448, 252 N.Y.S.2d 86, 89 (Sup. Ct. Queens County 1965); CPLR 308, commentary at 209 (1972).

[82] 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).

[83] *Id.*, 416 N.Y.S.2d at 54.

[84] *Id.*, 416 N.Y.S.2d at 53. The process server's affidavit asserted that he had attempted to serve a summons on the defendants at their residence on a Wednesday at 10:00 a.m., a Thursday at 5:10 p.m., a Friday at 1:00 p.m., and a Tuesday at 8:20 a.m. *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*, at 581, 416 N.Y.S.2d at 54 (Martuscello, J., dissenting). Since the statute of limitations had expired when the motion was made, *see* CPLR 214(5), the action could not be reinstituted since it would be untimely. *See* note 102 and accompanying text *infra*.

[88] Justices Mollen, Gulotta and Shapiro comprised the majority, while Justice Martuscello wrote a dissenting opinion in which Justice Hopkins concurred.

[89] 70 App. Div. 2d at 580, 416 N.Y.S.2d at 53.

as required by the statute.[90] Under the facts presented, the *Barnes* court concluded that due diligence necessitated additional attempts to serve the defendants before or after business hours or at their place of business.[91]

Authoring the dissenting opinion, Justice Martuscello declared that the "novel and extremely harsh rule"[92] adopted by the majority was unsupported by case law[93] and contrary to the intent of the legislature.[94] The dissent reasoned that retrospective application of the newly created majority rule to "a closely balanced fact situation" unjustly worked to defeat the plaintiff's cause of action.[95] Justice Martuscello proposed that the plaintiff's attorney be permitted to "rely on serious attempts to make direct personal service" without fear of later being held to have failed the due diligence test.[96]

The *Barnes* holding that four unsuccessful attempts to serve the defendants at their residence did not constitute due diligence appears to go beyond the guidelines enunciated by other courts.[97] Previously, a process server did not have to try serving a defendant in the evening or on weekends or make diligent efforts to locate his place of business and serve him there.[98] The imposition of this rule

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[90] *Id.*, 416 N.Y.S.2d at 53-54. *See generally* note 84 *supra.*

[91] *Id.* at 580, 416 N.Y.S.2d at 54.

[92] *Id.* at 581, 416 N.Y.S.2d at 54 (Martuscello, J., dissenting).

[93] *Id.*, 416 N.Y.S.2d at 54-55 (Martuscello, J., dissenting). Justice Martuscello maintained that the majority's reliance upon Jones v. King, 24 App. Div. 2d 430, 260 N.Y.S.2d 666 (1st Dep't 1965) (per curiam), was inapplicable, reasoning that *Jones* turned on the inadequacy of the plaintiff's affidavit of service, an issue not present in *Barnes.* 70 App. Div. 2d at 581, 416 N.Y.S.2d at 55 (Martuscello, J., dissenting).

[94] 70 App. Div. 2d at 581, 416 N.Y.S.2d at 54 (Martuscello, J., dissenting). The dissent argued that the allegations of the process server, which were accepted by the lower court, established that the service was "sufficient to give the defendants proper notice of the contents of the summons." *Id.* (Martuscello, J., dissenting). Justice Martuscello opined that the legislature did not intend the statute to require additional inquiries concerning the defendant's place of business or other attempts at personal service in the early morning or late night. *Id.* (Martuscello, J., dissenting).

[95] *Id.* (Martuscello, J., dissenting).

[96] *Id.* at 581, 416 N.Y.S.2d at 55 (Martuscello, J., dissenting). Justice Martuscello was concerned with the unfair results of retroactively applying a judicially created standard of due diligence, the harshness of which was never intended by the legislature. *Id.*, 416 N.Y.S.2d at 54-55 (Martuscello, J., dissenting).

[97] *E.g.*, O'Connor v. O'Connor, 52 Misc. 2d 950, 277 N.Y.S.2d 424 (Sup. Ct. Suffolk County 1967); Huntington Utils. Fuel Corp. v. McLoughlin, 45 Misc. 2d 79, 255 N.Y.S.2d 679 (Sup. Ct. Suffolk County 1965); *see* note 81 *supra.*

[98] *See* note 81 *supra.*

In addition to due diligence, the legislature placed certain safeguards into the amended statute to prevent abuses of its provisions. CPLR 308 requires the plaintiff to file proof of service where service is made by either delivering and mailing or nailing and mailing. CPLR 308(2), (4) (1979-1980); *see* N.Y. JUD. CONF., *supra* note 80, at A38. The purpose of the proof

in *Barnes*, however, would seem to encourage falsifying affidavits of service, otherwise known as "sewer service," an evil which the legislature sought to eliminate by amending CPLR 308.[99] While delivery and mail in the first instance has facilitated service, the due diligence requirements of the preferred methods of service now appear more difficult to observe than before the amendment was adopted.[100] Indeed, the *Barnes* standard seems to indicate that the process server's affidavit must show that personal service or delivery and mail service was impracticable. Since a strict construction of due diligence implicitly frustrates the intent of the legislature to eliminate "sewer service,"[101] it is submitted that serious efforts to comply with CPLR 308 (1) and (2) would be sufficient to warrant nail and mail service.

Moreover, retroactive application of a newly devised rule can cause harsh consequences, a point well illustrated in *Barnes* where the statute of limitations had expired.[102] Although CPLR 205(a) generally allows a plaintiff to institute an action within 6 months after the termination of the original suit,[103] it has been found not to apply when dismissal is due to a lack of in personam jurisdiction caused by defective service of process.[104] Without this protection, a

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of service is to provide the courts with sufficient information to determine whether the service complied with the statute. *See, e.g.*, Jones v. King, 24 App. Div. 2d 430, 430, 260 N.Y.S.2d 666, 666-67 (1st Dep't 1965) (per curiam); note 81 *supra*.

[99] N.Y. JUD. CONF., *supra* note 80, at A38; SIEGEL § 71. Sewer service is discussed in note 80 *supra*. Because the 1970 Judicial Conference saw due diligence as a principle cause of "sewer service," N.Y. JUD. CONF., *supra* note 80, at A38, it seems unlikely that a stricter standard would have been favored.

[100] At the time CPLR 308 was amended, attempts on various days and times seemed to satisfy due diligence. *See* notes 81, 97 and accompanying text *supra*. Under the *Barnes* decision, however, due diligence requires additional efforts to serve the defendant after business hours, on weekends, or at the defendant's business place when known. *See* note 91 and accompanying text *supra*. An attorney who believes due diligence is met but is unsure because of this shifting standard, which now seems to require greater efforts, might consider moving for court-ordered service under 308(5), claiming that service under subsection (4) is "impracticable." CPLR 308(5) (Supp. 1979-1980).

[101] N.Y. JUD. CONF., *supra* note 80, at A38; *see* notes 98, 99 and accompanying text *supra*.

[102] 70 App. Div. 2d at 581, 416 N.Y.S.2d at 54.

[103] CPLR 205(a) provides in pertinent part:

> If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction . . . within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action.

CPLR 205(a) (Supp. 1979-1980).

[104] *See* George v. Mt. Sinai Hosp., 47 N.Y.2d 170, 178, 390 N.E.2d 1156, 1160-61, 417 N.Y.S.2d 231, 236 (1979); Smalley v. Hutcheon, 296 N.Y. 68, 70 N.E.2d 161 (1946); Erickson

plaintiff's cause of action is endangered because attempts to satisfy a shifting standard will leave the plaintiff uncertain about the validity of nail and mail service.[105] Since the alternative method of nailing and mailing is reasonably calculated to apprise defendants of an action, there should be no renitence to construing due diligence liberally.[106]

*Maureen A. Glass*

## ARTICLE 31 — DISCLOSURE

### *CPLR 3101(a)(4): Pre-subpoena motion required to compel disclosure by nonparty witness*

CPLR 3101(a)(4) authorizes full disclosure of all necessary and material evidence by "any person where the court on motion determines that there are adequate special circumstances."[107] While

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v. Macy, 236 N.Y. 412, 140 N.E. 938 (1923); Knox v. Beckford, 167 Misc. 200, 3 N.Y.S.2d 718 (Albany City Ct. 1938), *aff'd per curiam*, 258 App. Div. 823, 15 N.Y.S.2d 174 (3d Dep't 1939), *aff'd per curiam*, 285 N.Y. 762, 34 N.E.2d 911 (1941). The rationale for not allowing a 6-month extension where personal jurisdiction does not exist is that if service was improper, the suit was never commenced and thus there was no prior action to which the provisions of the statute could apply. Eisenthal v. Schatzberg, 39 Misc. 2d 330, 240 N.Y.S.2d 547 (Sup. Ct. Queens County 1963). *See generally* CPLR 205(a), commentary at 196 (1972); 1 WK&M ¶ 205.11. One commentator, however, maintains that if the defect is technical only and the defendant receives actual notice, the 6-month extension should apply. *See* SIEGEL § 52, at 54 (citing Amato v. Svedi, 35 App. Div. 2d 672, 315 N.Y.S.2d 63 (2d Dep't 1970)). Although it was unnecessary to resolve the issue, the Court of Appeals recently pointed out that this position conflicts with its holding in the *Smalley* case. George v. Mt. Sinai Hosp., 47 N.Y.2d 170, 178, 390 N.E.2d 1156, 1160-61, 417 N.Y.S.2d 231, 236 (1979).

[105] The harsh consequences of retroactively applying a new standard of due diligence could be mitigated if the plaintiff were granted a 6-month extension under 205(a). *See generally* note 104 *supra*.

Where the plaintiff was not on notice regarding the requirements of due diligence, it is suggested that the defect could be considered "technical" so that CPLR 205(a) would apply under the facts in *Barnes*. *See id.*

[106] CPLR 308 creates a "hierarchy of alternative means of service." Dobkin v. Chapman, 21 N.Y.2d 490, 502, 236 N.E.2d 451, 457, 289 N.Y.S.2d 161, 170 (1968). Due diligence is the mechanism used to guarantee that methods which are most likely to give the defendant notice will be used in the first instance. If the preferred methods of personal delivery and delivery and mail are seriously attempted, but to no avail, nail and mail service seems to be "reasonably calculated, under all the circumstances," Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), to give the defendant notice.

[107] CPLR 3101(a)(4) provides:

> There shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:
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> . . .
>
> (4) any person where the court on motion determines that there are adequate special circumstances.