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CPLR 311(1): Secretary's Practice of Accepting Process Deemed Authorization by Appointment of Agent for Service Upon Corporation

Lois Peel Eisenstein

Division, Second Department, marked a departure from a long-standing rule of third-party practice, holding that, under CPLR 1007, a third-party claim for damages greater than the amount demanded by the plaintiff may be interposed.

It is hoped that *The Survey's* commentary on these and other decisions of special interest will serve the goal of alerting the practitioner to recent developments in diverse areas of New York practice.

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

CPLR 311(1): Secretary's practice of accepting process deemed authorization by appointment of agent for service upon corporation

To effect personal service on a corporation, CPLR 311(1) requires delivery of the summons "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."[1] Since service upon an individual not enumerated in the statute generally is invalid despite later redelivery to a proper party,[2] the

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[1] CPLR 311(1) (Supp. 1979-1980). Enacted in 1962, this subsection adopted and combined sections of the Civil Practice Act. 1 WK&M ¶ 311.01; *The Survey*, 44 ST. JOHN'S L. REV. 313, 325 (1969). The terms "officer, director, managing or general agent" were intended to simplify the phraseology of the CPA without changing its substance. *See* SECOND REP., at 161.

Section 311 does not confer jurisdiction, but merely prescribes the method of serving a corporation. CPLR 311, commentary at 254 (1972); *cf.* CPLR 302 (1972) (basis for personal jurisdiction). While pre-CPLR case law apparently authorized substituted service on corporations, *see* Lorenz-Schneider Co. v. Teamsters Local 802, 17 App. Div. 2d 842, 842 (2d Dep't 1962), CPLR 311(1) expressly requires "delivery" to the named persons and has been construed to prohibit the use of the substituted service provisions of CPLR 308(2)-308(4). *See* Melendez v. Sharet Realty Corp., N.Y.L.J., Nov. 15, 1963, at 16, col. 2 (Sup. Ct. Bronx County); SIEGEL § 70, at 76. Nevertheless, a corporation can be served validly under CPLR 311(1) by delivering process to an agent "authorized . . . by law to receive service," such as the Secretary of State, N.Y. BUS. CORP. LAW § 304 (McKinney 1972), or a registered agent for service of process, *id.* § 305; *see* SIEGEL § 70.

[2] *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); Boser v. Burdick, 62 App. Div. 2d 1134, 404 N.Y.S. 2d 187 (4th Dep't 1978); Commissioners of State Ins. Fund v. Singer Sewing Mach. Co., 281 App. Div. 867, 119 N.Y.S.2d 802 (1st Dep't 1953); Guidone v. Saint Aloysius Church, 65 Misc. 2d 1019, 319 N.Y.S.2d 572 (Sup. Ct. Cayuga County 1971). In *McDonald*, the process server left the summons with a building receptionist who was not employed by the defendant corporation. 22 N.Y.2d at 114, 238 N.E.2d at 727, 291 N.Y.S.2d at 330. Although the receptionist later redelivered the summons to a proper person, the Court held that the service was improper, relying on the general rule that service upon the wrong party is invalid notwithstanding that the papers eventually are delivered to the party to be served. *Id.* at 114-15, 238 N.E.2d at 728, 291 N.Y.S.2d at 331. The Court found that to uphold service "would encourage carelessness,

extent to which lower-level corporate employees qualify as agents for receipt of service has been a recurrent issue.[3] Recently, in *Sulli-*

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or worse, thus increasing the risk of default by parties who in fact fail to receive the summons." *Id.* at 116, 238 N.E.2d at 728-29, 291 N.Y.S.2d at 332. In an earlier lower court case, delivery to the corporation's receptionist, who gave the summons to a managing agent, was sustained since "the delivery [to the appropriate party was] so close both in time and space that it [could] be classified as a part of the same act." Green v. Morningside Heights Hous. Corp., 13 Misc. 2d 124, 125, 177 N.Y.S.2d 760, 761 (Sup. Ct. N.Y. County), *aff'd*, 7 App. Div. 2d 708, 180 N.Y.S.2d 104 (1st Dep't 1958). The *McDonald* Court approved *Green* by distinguishing it: "[T]he process server . . . acted reasonably and diligently in attempting to fulfill the statutory mandate and under circumstances bringing the questioned process within the purview of the person to be served." 22 N.Y.2d at 115-16, 238 N.E.2d at 728, 291 N.Y.S.2d at 332.

[3] For cases dealing with service upon lower-level corporate employees, see Fashion Page, Ltd. v. Zurich Ins. Co., 69 App. Div. 2d 787, 415 N.Y.S.2d 416 (1st Dep't 1979); Isaf v. Pennsylvania R.R., 32 App. Div. 2d 578, 299 N.Y.S.2d 231 (3d Dep't 1969); Commissioners of State Ins. Fund v. Singer Sewing Mach. Co., 281 App. Div. 867, 119 N.Y.S.2d 802 (1st Dep't 1953); Buckner v. D & E Motors, Inc., 53 Misc. 2d 382, 278 N.Y.S.2d 932 (Sup. Ct. Erie County 1967).

Much of the litigation has involved the interpretation of "managing or general agent." For examples of cases construing the term, see Trophy Prods., Inc. v. Cinema-Vue Corp., 53 App. Div. 2d 18, 385 N.Y.S.2d 70 (1st Dep't 1976); Clark v. Fifty Seventh Madison Corp., 13 App. Div. 2d 693, 213 N.Y.S.2d 849 (2d Dep't), *appeal dismissed*, 10 N.Y.2d 808, 178 N.E.2d 225, 221 N.Y.S.2d 509 (1961); B & J Bakery, Inc. v. United States Fidelity & Guar. Co., 40 Misc. 2d 839, 244 N.Y.S.2d 284 (Sup. Ct. Queens County 1963), *rev'd*, 21 App. Div. 2d 783, 250 N.Y.S.2d 562 (2d Dep't 1964). The Court of Appeals had earlier defined a managing agent as

> some person invested by the corporation with general powers involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney, who acts in an inferior capacity and under the direction and control of superior authority, both in regard to the extent of his duty and the manner of executing it.

Taylor v. Granite State Provident Ass'n, 136 N.Y. 343, 346, 32 N.E. 992, 993 (1893) (citations omitted). The *Taylor* rule has continued to be relied upon as the traditional test for determining whether the person served was a "managing agent." *See, e.g.*, Jacobs v. Zurich Ins. Co., 53 App. Div. 2d 524, 525, 384 N.Y.S.2d 452, 454 (1st Dep't 1976). While the courts do not require the managing agent to be in charge of the entire operation of the company, see cases cited in SIEGEL § 70, the *Taylor* rule has been held to exclude employees in subordinate or clerical positions that impose no responsibility, *e.g.*, Isaf v. Pennsylvania R.R., 32 App. Div. 2d 578, 299 N.Y.S.2d 231 (3d Dep't 1969).

In contrast to "managing or general agent," the final term in CPLR 311(1), "agent[s] authorized by appointment or by law to receive service," has not been the subject of significant debate. The concluding language of the section was not carried over from the CPA, but was a new provision inserted into the statute based upon Rule 4(d)(3) of the Federal Rules of Civil Procedure. *See* SECOND REP., at 161; note 1 *supra*. Under common-law agency principles, actual authority can be created expressly or by conduct on the part of the principal that reasonably leads the agent to believe he is authorized to act. RESTATEMENT (SECOND) OF AGENCY § 26 (1958). The corporation, however, generally will not be bound by representations of authority by someone not in fact authorized absent some act by the corporation creating the appearance of authority, *see id.* § 8, ratification of the act, *see id.* § 82, or by estoppel in some circumstances, *see id.* § 8B. One commentator has suggested that the concept of agency as used in CPLR 311(1) is distinguishable from other agency relationships because of the limited power conferred. *See* CPLR 311, commentary at 256 (1972); *cf.* RE-

van Realty Organization, Inc. v. Syart Trading Corp.,[4] the Appellate Division, Second Department, held that a secretary-receptionist's repeated and unreproached practice of accepting service for the corporation gave rise to a "strong inference" of authorization to receive service, which would be sustained unless rebutted by the defendant corporation.[5]

In *Sullivan Realty*, the plaintiff's process server delivered the summons and complaint to an "all purpose executive-type secretary" employed by the defendant, after the secretary had indicated she was authorized to accept service.[6] The secretary, in turn, delivered the summons to the company's comptroller, an officer authorized by statute to receive service.[7] At a hearing, the secretary testified that on this and other occasions she had accepted service in the absence of the officers of the corporation, even though she was not a director, officer, managing or general agent, cashier or assistant cashier of the corporation.[8] She further testified that, although not instructed to do so, she had accepted service five or six times a year during her 2 years of employment with the corporation and had never been told to discontinue the practice.[9] Dismissing the

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STATEMENT (SECOND) OF AGENCY § 3(2) (1958) (special agent defined as one authorized to conduct single transaction or a series of transactions, without continuity of service).

[4] 68 App. Div. 2d 756, 417 N.Y.S.2d 976 (2d Dep't 1979).

[5] *Id.* at 760, 417 N.Y.S.2d at 978.

[6] *Id.* at 759, 417 N.Y.S.2d at 977. The plaintiff instituted the action to recover a real estate broker's commission, alleging that a joint venture and a third party each had agreed to pay one-half of the plaintiff's fee. *Id.* at 757, 417 N.Y.S.2d at 977. Since service upon a joint venture may be made by personally serving any of the joint ventures, CPLR 310; *see* John's Inc. v. Island Garden Center of Nassau, Inc., 49 Misc. 2d 1086, 269 N.Y.S.2d 231 (Dist. Ct. Nassau County 1966), *aff'd sub nom.* C.J. Zonneveld & Sons, Inc. v. Island Garden Center, Inc., 53 Misc. 2d 1021, 280 N.Y.S.2d 84 (2d Dep't 1967) (per curiam), the plaintiff attempted to serve the Thomas Crimmins Construction Co., one of the joint venturers. *Id.*, 417 N.Y.S.2d at 977. It should be noted that the plaintiff also could have served the corporation by delivering the summons to the Secretary of State. CPLR 311(1) (Supp. 1979-1980); N.Y. BUS. CORP. LAW §§ 304, 306 (McKinney 1972 & Supp. 1979-1980); note 1 *supra*. The plaintiff's process server, who did not recall the particular service, was permitted to testify about his usual procedure in serving a corporation, which was to ask for someone authorized to receive service, and upon learning that a secretary or receptionist was not so authorized, he would return later to serve a proper party. 67 App. Div. 2d at 757-58, 417 N.Y.S.2d at 977.

[7] 67 App. Div. 2d at 760, 417 N.Y.S.2d at 978.

[8] *Id.* at 758, 417 N.Y.S.2d at 978. The secretary explained that none of the corporate officers were present when she received the *Sullivan Realty* service. *Id.* at 758-59, 417 N.Y.S.2d at 978.

[9] *Id.* at 758, 417 N.Y.S.2d at 977. The secretary testified that her duties included answering the telephone and performing secretarial tasks. *Id.* She also stated without contradiction that in the normal course of her duties, she received all legal papers served upon the company, noted the time of receipt, and turned them over to the appropriate officer of the

complaint, the Supreme Court, Westchester County, ruled that the plaintiff had failed to prove that process had been served properly.[10]

On appeal, the Appellate Division, Second Department, reversed, finding that service was proper.[11] Writing for a closely divided court,[12] Justice Suozzi emphasized that the objective of the statute, notice to the defendant, had been accomplished, since the secretary gave the summons to the comptroller.[13] The court reasoned that the actual receipt of the summons, coupled with the secretary's regular practice during the past 2 years created a "strong inference" that the secretary was authorized to receive service.[14] In the court's view, Sullivan Realty "clearly had a duty to rebut" the secretary's testimony and the inference of authorization arising from it, and had not done so.[15]

In an exhaustive dissent, Justice Damiani maintained that public policy demands strict compliance with the terms of CPLR 311(1).[16] The dissent took the view that the secretary was not a

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corporation. *Id.* at 759, 417 N.Y.S.2d at 978.

[10] *Id.* at 759, 417 N.Y.S.2d at 978.

[11] *Id.* at 761, 417 N.Y.S.2d at 979.

[12] The majority consisted of Justices Suozzi, Gulotta, and Martuscello. Justice Damiani authored a dissent in which Justice Titone concurred.

[13] *Id.* at 759-60, 417 N.Y.S.2d at 978. Justice Suozzi noted that the secretary served was an employee of the defendant and that she redelivered the summons to an appropriate corporate officer as part of her routine office procedure. *Id.* The majority therefore found that an overly strict interpretation of CPLR 311(1) was unnecessary. *Id.* Justice Suozzi distinguished two cases relied upon by the dissent, McDonald v. Ames Supply Co., 22 N.Y.2d 111, 238 N.E.2d 726, 291 N.Y.S.2d 328 (1968), and Isaf v. Pennsylvania R.R., 32 App. Div. 2d 578, 299 N.Y.S.2d 231 (3d Dep't 1969). 68 App. Div. 2d at 760-61, 417 N.Y.S.2d at 978-79. *See generally* notes 16-17 *infra*. The *McDonald* Court, observed the *Sullivan Realty* majority, indicated its approval of decisions that sustained service on an improper party where the process server had acted reasonably and diligently in attempting to serve the correct person. 68 App. Div. 2d at 760, 417 N.Y.S.2d at 979. *See generally* note 2 *supra*. Addressing *Isaf*, Justice Suozzi noted that the case had been "severely criticized." *Id.* (citing CPLR 311, commentary at 256 (1972)). In *Isaf*, the chief clerk of the defendant railroad accepted service while the freight agent was out of the office and redelivered the papers to the freight agent within ½ hour. 32 App. Div. 2d at 579, 299 N.Y.S.2d at 232. At the trial, the clerk testified that he was in charge in the freight agent's absence and that he had received service of garnishee orders in the past. *Id.* Employing the *Taylor* standard to determine whether the chief clerk was a "managing agent," the *Isaf* court held that he was not, because his duties "did not require the exercise of judgment and discretion." *Id.*, 299 N.Y.S.2d at 233. The court also concluded that the chief clerk could not be considered a temporary "managing agent," relying on the rule that service on the wrong person is not proper service even though the papers are later delivered to the correct party. *Id.*

[14] 68 App. Div. 2d at 760, 417 N.Y.S.2d at 978.

[15] *Id.*

[16] *Id.* at 762, 417 N.Y.S.2d at 980 (Damiani, J.P., dissenting) (citing McDonald v. Ames

"managing or general agent" because she had no power to act on behalf of and bind the corporation, "which is the hallmark of an agent."[17] Additionally, Justice Damiani concluded that the secretary was not an "agent authorized by appointment . . . to receive service" since there was no showing of an express authorization, which, he argued, was statutorily required.[18] Finally, the dissent contended that the defendant could not be estopped from claiming lack of jurisdiction since the plaintiff had failed to sustain its burden of proving that the process server was aware of and relied upon the defendant's failure to instruct the secretary not to accept

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Supply Co., 22 N.Y.2d 111, 114-16, 238 N.E.2d 726, 728, 291 N.Y.S.2d 328, 331 (1968)). Justice Damiani asserted that a rigid interpretation of the statute is necessary to deter careless service of process and thus increase the likelihood that defendants will receive actual notice. 68 App. Div. 2d at 762, 417 N.Y.S.2d at 980 (Damiani, J.P., dissenting).

[17] 68 App. Div. 2d 763, 417 N.Y.S.2d at 980-81 (Damiani, J.P., dissenting) (citing Taylor v. Granite State Provident Ass'n, 136 N.Y. 343, 32 N.E. 992 (1893); Oustecky v. Farmingdale Lanes, Inc., 41 Misc. 2d 979, 246 N.Y.S.2d 859 (Sup. Ct. Nassau County 1964)); *see* note 2 *supra*. The dissent maintained that employees who lack the power to perform discretionary acts for the corporation in its business affairs are not among those intended by the legislature as proper recipients for service of process. 68 App. Div. 2d at 764-65, 417 N.Y.S.2d at 981-82 (Damiani, J.P., dissenting) (citing Isaf v. Pennsylvania R.R., 32 App. Div. 2d 578, 299 N.Y.S.2d 231 (3d Dep't 1969)). Justice Damiani cautioned against an unwarranted judicial expansion of the statute. 68 App. Div. 2d at 765, 417 N.Y.S.2d at 982 (Damiani, J.P., dissenting). The dissent suggested that, while it might be time to liberalize the method of serving a corporation, such action should be taken only by the legislature. *Id.* at 765-66, 417 N.Y.S.2d at 982 (Damiani, J.P., dissenting).

[18] 68 App. Div. 2d at 768, 417 N.Y.S.2d at 983 (Damiani, J.P., dissenting). The dissent relied upon federal court interpretations of rule 4(d)(3) of the Federal Rules of Civil Procedure, the source of the phrase "agent authorized by appointment or by law to receive service." *Id.; see* note 3 *supra*. Rule 4(d)(3) has been interpreted to require an express delegation of the power to accept process. *See, e.g.*, Nelson v. Swift, 271 F.2d 504 (D.C. Cir. 1959); Schwarz v. Thomas, 222 F.2d 305 (D.C. Cir. 1955); Fleming v. Malouf, 7 F.R.D. 56 (W.D.N.Y. 1947). *But see* Boryk v. deHavilland Aircraft Co., 341 F.2d 666 (2d Cir. 1965); Kamen Soap Prod. Co. v. Struthers Wells Corp., 159 F. Supp. 706, 711 (S.D.N.Y. 1958); Cohen v. Physical Culture Shoe Co., 28 F. Supp. 679, 680 (S.D.N.Y. 1938); 2 MOORE'S FEDERAL PRACTICE ¶ 4.22 [1] (2d ed. 1948). Although under CPLR 318 a corporation may expressly delegate an agent for service of process, the dissent found no evidence of this in *Sullivan Realty*. 68 App. Div. at 768, 417 N.Y.S.2d at 983-84 (Damiani, J.P., dissenting). Nor was it alleged that Sullivan Realty had executed a short-form power of attorney, or that the broker's contract named the secretary as agent for service. *Id.*, 417 N.Y.S.2d at 984 (Damiani, J.P., dissenting). Justice Damiani asserted that if public policy could be viewed as not requiring an express delegation, in this case not even an implied agency for the receipt of service had been created. *Id.* (Damiani, J.P., dissenting). In order for an implied agency to arise, Justice Damiani stated, corporate acquiescence had to be shown, which could be found only if the corporation had failed to raise its jurisdictional defense in prior cases and the secretary had been informed of this failure. *Id.* at 769, 417 N.Y.S.2d at 984 (Damiani, J.P., dissenting). The dissent therefore concluded that the plaintiff had failed to prove the prior acquiescence necessary for a finding of implied agency. *Id.* (Damiani, J.P., dissenting).

service.[19]

Although the majority, in attempting to temper the concept of strict construction urged by the dissent, might have appeared to apply the statutory phrase "managing or general agent,"[20] it is submitted that the basis of the holding was that the secretary was an "agent authorized by appointment . . . to receive service."[21] CPLR 311(1) does not state that the appointment of an agent to accept process must be in writing or be indicated by some other express manifestation.[22] Accordingly, there appears to be no reason not to sustain an implied authorization under circumstances such as those presented in *Sullivan Realty,* since the function of service of process—timely notice to the corporation of the claims against it—is likely to be fulfilled.[23] Indeed, under facts similar to those in

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[19] *Id.* at 770, 417 N.Y.S.2d at 985 (Damiani, J.P., dissenting). The dissenting opinion also concluded that the defendant had not ratified the secretary's receipt of service since the defendant had not manifested an intent to treat her act as authorized. *Id.* (Damiani, J.P., dissenting).

[20] *See generally id.* at 760-61, 417 N.Y.S.2d at 978-79.

[21] CPLR 311(1) (Supp. 1979-1980). The secretary's uncontradicted testimony revealed that she was not a managing agent for the corporation. *See* 68 App. Div. 2d at 759-60, 417 N.Y.S.2d at 978. If such a claim were made, its proponents would have to rebut considerable precedent excluding lower-level employees from the definition of "managing agent." *See* Taylor v. Granite State Provident Ass'n, 136 N.Y. 343, 32 N.E. 992 (1893); Isaf v. Pennsylvania R.R., 32 App. Div. 2d 578, 299 N.Y.S.2d 231 (3d Dep't 1969); Clark v. Fifty Seventh Madison Corp., 13 App. Div. 2d 693, 213 N.Y.S.2d 849 (2d Dep't), *appeal dismissed,* 10 N.Y.2d 808, 178 N.E.2d 225, 221 N.Y.S.2d 509 (1961). Some commentators have noted that the courts have not been liberal in construing the term. *See* CPLR 311, commentary at 255-56 (McKinney 1972); 1 WK&M ¶ 311.04. *But see* SIEGEL § 70. Although the standard for service upon a "managing agent" has been relaxed in some cases, the facts of *Sullivan Realty* do not fit easily within the rationales for those exceptions. It is debatable, for example, whether the redelivery of process to the comptroller could meet the standard of being "so close both in time and space" as to be part of the same act, *see* Green v. Morningside Heights Hous. Corp., 13 Misc. 2d 124, 125, 177 N.Y.S.2d 760, 761 (Sup. Ct. N.Y. County), *aff'd,* 7 App. Div. 2d 708, 180 N.Y.S.2d 104 (1st Dep't 1958); note 3 *supra.* Nor was the secretary in *Sullivan Realty* acting as managing agent at the time of service, 68 App. Div. 2d at 758, 417 N.Y.S.2d at 978, in contrast to findings in other cases, *see* Buckner v. D & E Motors, Inc., 53 Misc.2d 382, 278 N.Y.S.2d 932 (Sup. Ct. Erie County 1967); Collini v. Turner Constr. Co., 129 N.Y.S.2d 485 (Sup. Ct. Kings County 1954).

It is submitted that the *Sullivan Realty* holding that the secretary was an "agent authorized by appointment" does not contradict Isaf v. Pennsylvania R.R., 32 App. Div. 2d 578, 299 N.Y.S.2d 231 (3d Dep't 1969); *see* note 13 *supra,* since the *Isaf* court specifically premised its decision on the term "managing agent," 32 App. Div. 2d at 579, 299 N.Y.S.2d at 233. *But see* CPLR 311, commentary at 114 (Supp. 1979-1980).

[22] CPLR 311(1) (Supp. 1979-1980); *cf.* CPLR 308(3) (Supp. 1979-1980) (authorizes delivery of summons upon an agent designated in writing pursuant to CPLR 318).

[23] Judge Cardozo said, in reference to service upon a foreign corporation within the terms of the Civil Practice Act, *see* note 1 *supra*: "If the persons named are true agents, and if their positions are such as to lead to a just presumption that notice to them will be notice

Sullivan Realty, the first department recently adopted such a view.[24]

Practitioners should note that neither department specified the threshold standards for determining the point at which an inference of agency will arise[25] nor indicated the standard of evidence that will be necessary for defendants to rebut the inference.[26] The burden of proving that service was properly effected rests upon the

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to the principal, the corporation must submit." Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 269, 115 N.E. 915, 918 (1917) (citations omitted); *accord,* Mastan v. Desormeau Dairy-Vend Service, Inc., 11 App. Div. 2d 860, 203 N.Y.S.2d 343 (3d Dep't 1960). Where, as in *Sullivan Realty,* definite procedures have been established for the receipt of legal papers by a secretary, there would seem to be a just presumption that service upon the secretary would result in notice to the corporation. Even if the secretary in *Sullivan Realty* had not redelivered the summons to an officer, service nevertheless should be sustained because a true agency was created. Notwithstanding the dissent's strict requirements for a finding of an implied agency, *see* note 18 *supra,* the *Restatement of Agency* provides that manifestations of assent may be made "by any means intended to cause the agent to believe that he is authorized or which the principal should realize will cause such belief," RESTATEMENT (SECOND) OF AGENCY § 26, Comment b (1958). Arguably then, in *Sullivan Realty,* the comptroller's failure to reprimand the secretary over a 2-year period could cause the secretary to believe that she was authorized to accept service, thereby creating an implied agency. Similarly, the Second Circuit and the Southern District of New York have held that authorization of an agent for service of process can be implied from the nature of the employee's duties. *E.g.,* Boryk v. deHavilland Aircraft Co., 341 F.2d 666 (2d Cir. 1965); Kamen Soap Prod. Co. v. Struthers Wells Corp., 159 F. Supp. 706, 711 (S.D.N.Y. 1958); Cohen v. Physical Culture Shoe Co., 28 F. Supp. 679, 680 (S.D.N.Y. 1938); *see* 2 MOORE'S FEDERAL PRACTICE ¶ 4.22[1] (2d ed. 1948). *But see* Fleming v. Malouf, 7 F.R.D. 56 (W.D.N.Y. 1947); cases cited in note 18 *supra.*

[24] Fashion Page, Ltd. v. Zurich Ins. Co., 69 App. Div. 2d 787, 415 N.Y.S.2d 416 (1st Dep't 1979). In *Fashion Page,* the process server was directed by a receptionist to take the papers to the secretary to the vice president in charge of the office. *Id.* at 787-88, 415 N.Y.S.2d at 418. The vice president was not in the office at the time, so the secretary, as was her usual practice, accepted the service after indicating that she was authorized. *Id.* at 788, 415 N.Y.S. 2d at 418. Noting that the defendant insurance company must have made arrangements for the receipt of service as part of its "regular course of business," *id.,* and that the secretary apparently had forwarded the summons to the defendant's attorneys immediately, the court concluded that the secretary was an agent authorized by appointment to receive service. *Id.*

[25] The inference that the secretary in *Sullivan Realty* has been authorized was based in part upon the number of times she accepted service—approximately 12 times in 2 years. 68 App. Div. 2d at 760, 417 N.Y.S.2d at 978. Likewise, the *Fashion Page* court, *see* note 24 *supra,* emphasized that the defendant regularly was served with process and that the secretary normally accepted service when the vice president was out. 69 App. Div. 2d at 787, 415 N.Y.S.2d at 418. In both *Sullivan Realty* and *Fashion Page,* the secretaries accepted service in the absence of a corporate officer. *Sullivan Realty,* 68 App. Div. 2d at 758, 417 N.Y.S.2d at 978; *Fashion Page,* 69 App. Div. 2d at 788, 415 N.Y.S.2d at 418.

[26] Apparently, in neither case did the defendants offer proof on the issue of implied authorization beyond stating that the secretary had not been authorized. *Sullivan Realty,* 68 App. Div. 2d at 759, 417 N.Y.S.2d at 978; *Fashion Page,* 69 App. Div. 2d at 788, 415 N.Y.S.2d at 418.

one asserting jurisdiction.[27] Although alleviated by the inference of authorization, that burden probably should not be sustained where, for example, a defendant presents evidence that the secretary spoke untruthfully or negligently or that the secretary's superior acted without authority in permitting him to accept service.[28] As a practical matter, the process server may not know at the time of service whether the secretary has been authorized, regardless of what the secretary tells him,[29] and thus will still be required to make a reasonable and diligent effort to ensure service upon a proper person.[30] Accordingly, it appears that *Sullivan Realty* will not encourage careless service of process, but may help prevent selective avoidance of service by corporate defendants seeking refuge in unnecessary formalism.

Lois Peel Eisenstein

ARTICLE 9—CLASS ACTIONS

CPLR 902: Court of Appeals refuses to grant class certification following summary judgment

CPLR 902 places the burden upon the complainant to seek class certification of his action within 60 days following the expira-

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[27] Jacobs v. Zurich Ins. Co., 53 App. Div. 2d 524, 384 N.Y.S.2d 452 (1st Dep't 1976); Slotnick v. Campanile, 47 App. Div. 2d 536, 363 N.Y.S.2d 614 (2d Dep't 1975), *aff'd*, 38 N.Y.2d 986, 348 N.E.2d 911, 384 N.Y.S.2d 435 (1976); Saratoga Harness Racing Ass'n v. Moss, 26 App. Div. 2d 486, 275 N.Y.S.2d 888 (3d Dep't 1966), *aff'd*, 20 N.Y.2d 733, 229 N.E.2d 620, 283 N.Y.S.2d 55 (1967); CPLR § 306 (1972 & Supp. 1979-1980).

[28] In *Fashion Page*, the court indicated that the plaintiff should allege in his complaint whether or not the secretary had been authorized; whether he told the truth about having the authority to accept the service; what the officer did; and what the corporation did besides moving to vacate the service. 69 App. Div. 2d at 788, 415 N.Y.S.2d at 418.

[29] The existence of an agency cannot depend merely on "agent's" assertion of authority absent some manifestation on the part of the corporation which creates the appearance of authority, *see* RESTATEMENT (SECOND) OF AGENCY § 8 (1958) (apparent authority); *id.* § 8 B (estoppel), or by later ratification of the agent's act, *id.* § 82; *see* note 2 *supra*. Thus, the courts have refused to uphold service merely on the basis of a secretary's statement to the process server that she could accept the summons. *See* Coler v. Pittsburgh Bridge Co., 146 N.Y. 281, 40 N.E. 779 (1895); B & J Bakery, Inc. v. United States Fidelity & Guar. Co., 21 App. Div. 2d 783, 250 N.Y.S.2d 562 (2d Dep't 1964); Loeb v. Star & Herald Co., 187 App. Div. 175, 175 N.Y.S. 412 (1st Dep't 1919). CPLR 311(1) does not indicate the agents of the corporation that have the power to appoint an agent for service of process, but it appears that a managing agent is unable to make such an appointment. *See* Isaf v. Pennsylvania R.R., 32 App. Div. 2d 578, 299 N.Y.S.2d 231 (3d Dep't 1969).

[30] *See* 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); note 2 *supra*.