

# CPLR 205(a): Prior Dismissal for Failure to Answer Calendar Call Held To Be Termination of Action for Neglect to Prosecute

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Finally, *People v. Rogers* held that once the "indelible right" to counsel has attached, statements elicited from a defendant on an unrelated charge require suppression if made in the absence of an attorney.

*The Survey* also comments upon several lower court decisions of special significance to the practitioner. In *Laffey v. City of New York*, the Appellate Division, First Department, held that dismissal for failure to answer a calendar call constituted "neglect to prosecute," barring recommencement of the action under CPLR 205(a). In the rapidly changing area of professional advertising, the Appellate Division, Second Department, circumscribed the use of advertising of legal services by mail in *In re Koffler*. The *Koffler* Court chose not to penalize the defendant attorneys, but admonished the Bar that any future violations would result in the imposition of disciplinary sanctions.

It is hoped that these and other cases examined in *The Survey* will serve to further the goal of informing the practitioner of noteworthy trends in New York practice.

#### ARTICLE 2—LIMITATIONS OF TIME

*CPLR 205(a): Prior dismissal for failure to answer calendar call held to be termination of action for neglect to prosecute*

CPLR 205(a) generally provides that a timely commenced action may be recommenced within six months of the date of its dismissal, despite the expiration of the original statute of limitations.<sup>1</sup> This extension is unavailable, however, where the prior action is terminated for neglect to prosecute.<sup>2</sup> The phrase "neglect to prose-

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<sup>1</sup> CPLR 205(a) (Supp. 1979-1980) provides:

(a) New action by plaintiff. 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, or, if he dies, and the cause of action survives, his executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences 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.

<sup>2</sup> CPLR 205(a) (Supp. 1979-1980); see, e.g., *Flans v. Federal Ins. Co.*, 43 N.Y.2d 881, 374 N.E.2d 365, 403 N.Y.S.2d 466 (1978), *rev'g*, 56 App. Div. 2d 615, 391 N.Y.S.2d 659 (2d Dep't 1977); *Jelinek v. City of New York*, 25 App. Div. 2d 425, 266 N.Y.S.2d 766 (1st Dep't 1966); *Hymowitz v. Soprinisky*, 24 App. Div. 2d 750, 263 N.Y.S.2d 822 (1st Dep't 1965); *Wright v. L.C. Defelice & Son, Inc.*, 22 App. Div. 2d 962, 256 N.Y.S.2d 63 (2d Dep't 1964),

cute" has been construed as encompassing formal dismissals for want of prosecution, abandonment, and failure to comply with a demand for a complaint;<sup>3</sup> it remains unclear, however, what lesser levels of neglect which result in the dismissal of an action would render unavailable the 205(a) extension.<sup>4</sup> Recently, the Appellate

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*aff'd*, 17 N.Y.2d 586, 215 N.E.2d 522, 268 N.Y.S.2d 345 (1966); notes 3 & 4 *infra*.

Exceptions to the availability of the 6 month extension other than dismissal for neglect to prosecute exist where the prior dismissal is based on a judgment on the merits, *see, e.g.*, *Sauerbier v. Erie R.R.*, 195 Misc. 880, 90 N.Y.S.2d 43 (Sup. Ct. Steuben County 1949), or a voluntary discontinuance. *See, e.g.*, *George v. Mt. Sinai Hosp.*, 47 N.Y.2d 170, 390 N.E.2d 1156, 417 N.Y.S.2d 231 (1979), *discussed in The Survey*, 54 ST. JOHN'S L. REV. 137, 146 (1979); *Friedman v. Long Island R.R.*, 273 App. Div. 786, 75 N.Y.S.2d 466 (2d Dep't 1947), *aff'd*, 298 N.Y. 702, 82 N.E.2d 791 (1948).

<sup>3</sup> CPLR 3216 provides the formal statutory framework for dismissals for want of prosecution. Such dismissals clearly constitute a neglect to prosecute within the meaning of CPLR 205(a). *See, e.g.*, *Williams v. New York Life Ins. Co.*, 11 Misc. 2d 823, 174 N.Y.S.2d 392 (Sup. Ct. Queens County 1958); *see* CPLR 205, commentary at 197 (McKinney 1972); CPLR 3216, commentary at 917 (McKinney 1970); 1 WK&M ¶ 205.06 at 2-141 (1977). For an in depth discussion of CPLR 3216 see SIEGEL § 375. CPLR 3404 provides for the dismissal of abandoned cases marked off the calendar and not restored within 1 year. Dismissals under this section also amount to termination for neglect to prosecute. *See, e.g.*, *Pomerantz v. Cave*, 10 App. Div. 2d 569, 195 N.Y.S.2d 437 (1st Dep't), *appeal dismissed*, 8 N.Y.2d 914, 168 N.E.2d 832, 204 N.Y.S.2d 160 (1960); *FOURTH REP.* at 200; *see* CPLR 3404, commentary at 38 (McKinney 1963). *Contra* *Austrian v. Red Arrow Bonded Messenger Corp.*, 16 Misc. 2d 1082, 184 N.Y.S.2d 92 (Sup. Ct. Queens County 1959). Dismissals under CPLR 3012(b) for failure to comply with a demand for a complaint similarly are considered to be dismissals for neglect to prosecute. *See, e.g.*, *Schwartz v. Luks*, 46 App. Div. 2d 634, 359 N.Y.S.2d 899 (1st Dep't 1974); *Wright v. Farlin*, 42 App. Div. 2d 141, 346 N.Y.S.2d 11 (3d Dep't), *appeal dismissed*, 33 N.Y.2d 657, 303 N.E.2d 705, 348 N.Y.S.2d 980 (1973). *But see* *Virgilio v. Ketchum*, 54 Misc. 2d 111, 113, 281 N.Y.S.2d 376, 378 (Sup. Ct. Broome County 1967) (failure to comply with demand for complaint not neglect to prosecute where "no pattern of dilatoriness" existed). As noted by several commentators, the *Virgilio* plaintiff need not have sought the CPLR 205(a) extension since the original statute of limitations had not run and, therefore, an extension was unnecessary. CPLR 205, commentary at 198 (McKinney 1972); *The Quarterly Survey*, 42 ST. JOHN'S L. REV. 436, 441 (1968); *see* *Abbatemarco v. Town of Brookhaven*, 26 App. Div. 2d 664, 272 N.Y.S.2d 450 (2d Dep't 1966).

<sup>4</sup> Failure to select a jury has been held to constitute neglect to prosecute. *Jelinek v. City of New York*, 25 App. Div. 2d 425, 266 N.Y.S.2d 766 (1st Dep't 1966); *cf.* *Schuman v. Hertz Corp.*, 23 App. Div. 2d 646, 257 N.Y.S.2d 400 (1st Dep't 1965) (dismissal for failure to select jury held neglect to prosecute), *rev'd*, 17 N.Y.2d 604, 605, 215 N.E.2d 683, 684, 268 N.Y.S.2d 563, 563-64 (1966) (reversed on a finding of contrary intent of the trial judge). *But see* *Schneck v. S.T. Grand, Inc.*, 11 Misc. 2d 923, 174 N.Y.S.2d 749 (Sup. Ct. Kings County 1958). The mere failure to answer a calendar call generally has not been deemed neglect to prosecute. *See* *Harris v. Harris*, 246 App. Div. 667, 283 N.Y.S. 410 (3d Dep't 1935) (*per curiam*); *Sweeting v. Staten Island Midland Ry.*, 176 App. Div. 494, 162 N.Y.S. 961 (2d Dep't 1917) (*per curiam*); *Cordova v. City of New York*, 57 Misc. 2d 823, 293 N.Y.S.2d 673 (Sup. Ct. Bronx County 1968); *Stein v. Goldberg*, 27 Misc. 2d 940, 213 N.Y.S.2d 847 (Sup. Ct. Queens County 1961); *Haber v. Telson*, 2 Misc. 2d 118, 154 N.Y.S.2d 419 (Sup. Ct. Kings County 1956), *rev'd on other grounds*, 4 App. Div. 2d 677, 163 N.Y.S.2d 503 (2d Dep't 1957), *aff'd*, 4 N.Y.2d 687, 148 N.E.2d 300, 171 N.Y.S.2d 83 (1958). Conversely, where the failure to

Division, First Department, in *Laffey v. City of New York*,<sup>5</sup> held that a dismissal of failure to answer a calendar call despite previous warnings that adjournments would not be allowed constituted dismissal for neglect to prosecute and hence barred a new action.

In *Laffey*, the plaintiff instituted a negligence action against the defendant in 1970. On the day the case was set down for trial, both parties were admonished in conference that requests for adjournment due to the unavailability of counsel or witnesses would be denied.<sup>6</sup> On the date of trial, the plaintiff failed to answer the calendar call and the defendant's motion to dismiss was granted.<sup>7</sup> One-half-hour later the plaintiff's counsel arrived. Although the plaintiff's attorney stated that he was ready to go to trial, he conceded that he could not "actually proceed to trial" because he had no witnesses.<sup>8</sup> The court consequently dismissed the complaint notwithstanding counsel's objection that such a disposition would foreclose the plaintiff's claim because the statute of limitations had expired.<sup>9</sup> Eight days later the plaintiff reinstated the action invoking the 6-month extension of CPLR 205(a).<sup>10</sup> Five years later the defendant's motion to dismiss based on the statute of limitations was denied by the Supreme Court, New York County and the defendant appealed.<sup>11</sup>

In a memorandum decision from which Justice Fein dissented,<sup>12</sup> the Appellate Division, First Department reversed, holding that the prior dismissal was for "neglect to prosecute."<sup>13</sup> Jus-

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appear is inexcusable or part of a general pattern of delay, the courts have refused to grant the extension. See *Flans v. Federal Ins. Co.*, 43 N.Y.2d 881, 374 N.E.2d 365, 403 N.Y.S.2d 466 (1978), *rev'g*, 56 App. Div. 2d 615, 391 N.Y.S.2d 659 (2d Dep't 1977); *Hymowitz v. Soprinisky*, 24 App. Div. 2d 750, 263 N.Y.S.2d 822 (1st Dep't 1965); *Wright v. L.C. Defelice & Son, Inc.*, 22 App. Div. 2d 962, 256 N.Y.S.2d 63 (2d Dep't 1964), *aff'd*, 17 N.Y.2d 586, 215 N.E.2d 522, 268 N.Y.S.2d 345 (1966); note 20 *infra*.

<sup>5</sup> 72 App. Div. 2d 685, 421 N.Y.S.2d 350 (1st Dep't 1979).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* Plaintiff's counsel stated that his client had not responded to his letter informing her of the date of trial. *Id.*

<sup>9</sup> *Id.* The statute of limitations for an action against the state or one of its subdivisions is 1 year and 90 days. GML § 50-i (McKinney 1977).

<sup>10</sup> 72 App. Div. 2d at 685, 421 N.Y.S.2d at 350-51.

<sup>11</sup> *Id.* at 685, 421 N.Y.S.2d at 350.

<sup>12</sup> The majority consisted of Presiding Justice Murphy and Justices Birns, Bloom, and Silverman.

<sup>13</sup> 72 App. Div. 2d at 685, 421 N.Y.S. at 351 (citing *Wright v. L.C. Defelice & Son, Inc.*, 22 App. Div. 2d 962, 256 N.Y.S.2d 63 (2d Dep't 1964), *aff'd*, 17 N.Y.2d 586, 215 N.E.2d 522, 268 N.Y.S.2d 345 (1966)).

tice Fein, in contrast, concluded that the majority decision could not be supported by the record.<sup>14</sup> The precedent relied upon by the majority, Justice Fein noted, had involved dismissals for conduct more repetitious and deliberate than that of the plaintiff.<sup>15</sup> Moreover, the order dismissing the plaintiff's action had given no indication of an intent to prejudice the institution of a new suit.<sup>16</sup>

Prior to *Laffey*, courts generally have required an element of deliberateness, which typically has been evinced by a pattern of repeated delay by the plaintiff, for conduct to be deemed a neglect to prosecute.<sup>17</sup> It is submitted, therefore, that the *Laffey* decision should not be interpreted as creating an absolute rule that precludes the invocation of the liberal saving provisions of 205(a) for a failure to answer a single calendar call.<sup>18</sup> Rather, it appears that more than the plaintiff's nonappearance, his inexcusable unpreparedness to proceed to trial despite pre-trial warnings that extensions would be denied was the dispositive factor in the majority

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<sup>14</sup> 72 App. Div. 2d at 686, 421 N.Y.S.2d at 351-52 (Fein, J., dissenting).

<sup>15</sup> *Id.* at 686, 421 N.Y.S.2d at 351 (Fein, J., dissenting). See note 17 *infra*.

<sup>16</sup> 72 App. Div. 2d at 686, 421 N.Y.S.2d at 351-52 (Fein, J., dissenting). See note 21 *infra*. The dissent also noted that allowing the second action would not prejudice the defendant who had waited more than 5 years before moving to dismiss the second complaint. *Id.* at 686, 421 N.Y.S.2d at 352 (Fein, J., dissenting).

<sup>17</sup> One commentator has framed the issue as "whether there was a willful and deliberate refusal to proceed which amounted to a neglect to prosecute." 1 WK&M ¶ 205.06 at 2-142 & n.31 (1977). Similarly, Dean McLaughlin has stated that where "there is no pattern of dilatory tactics, and no contumacious refusals to proceed with the litigation, the dismissal will probably not amount to neglect to prosecute." CPLR 205, commentary at 197 (McKinney 1972). Thus, where the 6-month extension has been denied for failure to answer a calendar call, the plaintiff's non-appearance has been "coupled with . . . protracted and repeated delays," *Flans v. Federal Ins. Co.*, 43 N.Y.2d 881, 882, 374 N.E.2d 365, 365, 403 N.Y.S.2d 466, 467 (1978), *rev'g*, 56 App. Div. 2d 615, 391 N.Y.S.2d 659 (2d Dep't 1977), or is part of a "repeated and deliberate failure to proceed to trial." *Wright v. L.C. Defelice & Son, Inc.*, 22 App. Div. 2d 962, 963, 256 N.Y.S.2d 63, 65 (2d Dep't 1964), *aff'd*, 17 N.Y.S.2d 586, 215 N.E.2d 522, 268 N.Y.S.2d 345 (1966). *Cf.* *Virgilio v. Ketchum*, 54 Misc. 2d 111, 113, 281 N.Y.S.2d 376, 378 (Sup. Ct. Broome County 1967) (extension granted to plaintiff who failed to serve complaint since there was "no pattern of dilatoriness or refusal to proceed").

<sup>18</sup> See *Cordova v. City of New York*, 57 Misc. 2d 823, 826, 293 N.Y.S.2d 673, 675 (Sup. Ct. Bronx County 1968). In *Gaines v. City of New York*, 215 N.Y. 533, 109 N.E. 594 (1915), Judge Cardozo examined the origins of CPLR 205(a) and its predecessors, concluding that:

The statute is designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits. Its broad and liberal purpose is not to be frittered away by any narrow construction. The important consideration, is that by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts.

*Id.* at 539, 109 N.E. at 596; see 1 WK&M ¶ 205.01 at 2-131 to 132 (1977); *The Quarterly Survey*, 44 St. JOHN'S L. REV. 532, 539 (1970).

holding.<sup>19</sup> Moreover, it is submitted that no other interpretation of

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<sup>19</sup> It appears that two factors present in *Laffey* also have influenced the resolution of several recent cases. First is the nonappearance of plaintiffs on scheduled dates "with no attempt being made to excuse such failure." *Flans v. Federal Ins. Co.*, 56 App. Div. 2d 615, 618, 391 N.Y.S.2d 659, 663 (2d Dep't 1977) (Martuscello, J., dissenting), *rev'd*, 43 N.Y.2d 881, 374 N.E.2d 365, 403 N.Y.S.2d 466 (1978); *see Laffey v. City of New York*, 72 App. Div. 2d 685, 685, 421 N.Y.S.2d 350, 350 (1st Dep't 1979). Thus, a dismissal for the inexcusable unpreparedness of the plaintiff to proceed to trial has been held to constitute neglect to prosecute and a bar to the reinstated action, *see Hymowitz v. Soprinsky*, 24 App. Div. 2d 750, 263 N.Y.S.2d 822 (1st Dep't 1965), while the presence of a mitigating circumstance such as the unavoidable engagement of counsel in another case has saved the reinstated action. *See Cordova v. City of New York*, 57 Misc. 2d 823, 293 N.Y.S. 2d 673 (Sup. Ct. Bronx County 1968). *Cf. Sweeting v. Staten Island Midland Ry.*, 176 App. Div. 494, 162 N.Y.S. 961 (2d Dep't 1917) (*per curiam*) (failure to answer calendar call held mistake or inadvertence and not neglect to prosecute).

A second factor present in the recent cases is that the plaintiffs have been fully aware of and have agreed to the possibility of dismissal for failure to prosecute. While this circumstance has been discussed as an element constituting a voluntary discontinuance, it also has been found to constitute neglect to prosecute. *Flans v. Federal Ins. Co.*, 56 App. Div. 2d 615, 618, 391 N.Y.S.2d 659, 662-63 (2d Dep't 1977) (Martuscello, J., dissenting), *rev'd*, 43 N.Y.2d 881, 374 N.E.2d 365, 403 N.Y.S.2d 466 (1978). This is understandable in that a forewarning to the plaintiff naturally would tend to color his subsequent failure to appear as "willful" and "deliberate." *See Wright v. L.C. Defelice & Son, Inc.*, 22 App. Div. 2d 962, 963, 256 N.Y.S.2d 63, 65 (2d Dep't 1964), *aff'd*, 17 N.Y.2d 586, 215 N.E.2d 522, 268 N.Y.S.2d 345 (1966).

In *Flans*, for example, the plaintiffs had timely commenced an action to recover for property damage allegedly covered by their homeowner's insurance policy. 56 App. Div. 2d at 615, 391 N.Y.S.2d at 659-60. Both parties had agreed to a stipulation which required the plaintiffs' appearance at a pre-trial examination and warned of the threat of dismissal for failing to be prepared on the date of the trial. Thereafter, the plaintiffs and their counsel failed to appear at the examination and the plaintiffs also failed to appear for trial because they had moved to Israel. The trial court dismissed the suit and the plaintiffs recommenced the action even though the statute of limitations had expired. *Id.* at 616, 391 N.Y.S.2d at 660-61 (Martuscello, J., dissenting). The majority in the appellate division held that the plaintiffs were entitled to recommence the action since the defendant had notice of the plaintiffs claim within the period provided in the insurance policy. 56 App. Div. 2d at 615, 391 N.Y.S.2d at 660. Justice Martuscello, dissenting with Justice Latham, opined that the dismissal was for both a voluntary discontinuance and a neglect to prosecute. *Id.* at 618, 391 N.Y.S.2d at 663 (Martuscello, J., dissenting). The dissent felt that the plaintiffs' conduct amounted to "far more than a routine failure to answer a calendar call . . . It was a deliberate and unabashed refusal to prosecute the action. . . ." *Id.* at 618, 391 N.Y.S.2d at 663 (Martuscello, J., dissenting) (citations omitted). According to Justice Martuscello:

It is playing with the court's processes to permit plaintiffs to ignore their clear promises to the court that by March 17, 1975 the deposition would be held; that by March 24, 1975 the trial would commence; and that if the examination were not held or if the parties were not prepared to go to trial on the date stipulated, the action would be dismissed. Plaintiffs should be held to their promises.

56 App. Div. 2d at 618, 391 N.Y.S.2d at 662.

The Court of Appeals reversed the majority of the appellate division finding that the prior dismissal was "inferentially for 'neglect to prosecute.'" 43 N.Y.2d 881, 374 N.E.2d 365, 403 N.Y.S.2d 466.

*Laffey* can be reconciled with precedent and it is unlikely that the majority would institute such a fundamental shift in policy in a memorandum decision.

The *Laffey* decision, nonetheless, reflects the contemporary reluctance of the courts to allow extensions of the statute of limitations in questionable cases.<sup>20</sup> The trial bar should be alert to this trend and when confronted with a dismissal should seek to have the record indicate whether it is with or without prejudice for purposes of recommencing the action. Specifying that the dismissal is without prejudice will insure a plaintiff's right to recommence an action under CPLR 205(a), since the intent of the trial court at the time of dismissal is all but dispositive of this issue.<sup>21</sup> If the dismissal is with prejudice, the preferable strategy would be to seek to vacate the dismissal and appeal directly any adverse ruling rather than perfunctorily attempting to invoke the 6-month extension.<sup>22</sup>

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<sup>20</sup> Commentators have long noted a conservative trend in allowing the 6-month extension through a broadening of the neglect to prosecute exception. See McLaughlin, *Survey of New York Law — Civil Practice*, 18 SYRACUSE L. REV. 407, 415-16 (1966); McLaughlin, *Survey of New York Law — Civil Practice*, 17 SYRACUSE L. REV. 331, 340-41 (1965); *The Biannual Survey*, 40 ST. JOHN'S L. REV. 120, 127 (1965). Compare *Wright v. L.C. Defelice & Son, Inc.*, 22 App. Div. 2d 962, 256 N.Y.S.2d 63 (2d Dep't 1964), *aff'd*, 17 N.Y.2d 586, 215 N.E.2d 522, 268 N.Y.S.2d 345 (1966) and *Jelinek v. City of New York*, 25 App. Div. 2d 425, 266 N.Y.S.2d 766 (1st Dep't 1966) with *Schneck v. S.T. Grand, Inc.*, 11 Misc. 2d 923, 174 N.Y.S.2d 749 (Sup. Ct. Kings County 1958).

The *Laffey* decision appears to surface at the forefront of this trend in finding neglect to prosecute from a single instance of inexcusable delay while prior cases concerned repetitive patterns of delay. See note 17 *supra*. The attitude of the courts may be explained by a heightened concern for expeditious administration in an age of calendar congestion and trial delay. See *Wright v. L.C. Defelice & Son, Inc.*, 22 App. Div. 2d 962, 963, 256 N.Y.S.2d 63, 65 (2d Dep't 1964), *aff'd*, 17 N.Y.2d 586, 215 N.E.2d 522, 268 N.Y.S.2d 345 (1966); McLaughlin, *Survey of New York Law—Civil Practice*, 17 SYRACUSE L. REV. 331, 341 (1965).

<sup>21</sup> A critical factor in finding neglect to prosecute is the intention of the trial judge granting the dismissal motion. See *Schuman v. Hertz Corp.*, 17 N.Y.2d 604, 215 N.E.2d 683, 268 N.Y.S.2d 563 (1966); SIEGEL § 376 at 484. Consequently, a dismissal which expressly states that it is without prejudice would seem to preserve a plaintiff's right to recommence an action. See *Izquierdo v. Cities Servs. Oil Co.*, 47 Misc. 2d 1087, 264 N.Y.S.2d 58 (Sup. Ct. Kings County 1965). A dismissal without prejudice nevertheless, may be challenged as an abuse of discretion by a defendant. See CPLR 205, commentary at 198 (McKinney 1972). See also *Litwin v. Grand Central Apartments, Inc.*, 37 Misc. 2d 115, 234 N.Y.S.2d 73 (Sup. Ct. Queens County 1962). The record is reviewable in a new action instituted under CPLR 205(a) in order to determine the intent of the trial judge in dismissing the prior suit. See *Schuman v. Hertz Corp.*, 17 N.Y.2d 604, 215 N.E.2d 683, 268 N.Y.S.2d 563 (1966), *rev'g*, 23 App. Div. 2d 646, 257 N.Y.S.2d 400 (1st Dep't 1965).

<sup>22</sup> See *Hymowitz v. Soprinsky*, 24 App. Div. 2d 750, 263 N.Y.S.2d 822 (1st Dep't 1965); McLaughlin, *Survey of New York Law — Civil Practice*, 18 SYRACUSE L. REV. 407, 416

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

*CPLR 308(4): Affixing summons to defendant's former residence ineffective to confer jurisdiction notwithstanding plaintiff's reasonable mistake nor defendant's receipt of process*

CPLR 308(4)<sup>23</sup> permits service of process by "affixing the summons to the door of either the [defendant's] actual place of business, dwelling place or usual place of abode" and mailing it to his "last known residence" when service by delivery<sup>24</sup> cannot be ac-

(1966). Failure to challenge an order of dismissal by direct appeal in the original action may itself be a contributing factor to a finding of neglect to prosecute. *See Flans v. Federal Ins. Co.*, 56 App. Div. 2d 615, 618, 391 N.Y.S.2d 659, 662 (2d Dep't 1977) (Martuscello, J., dissenting), *rev'd*, 43 N.Y.2d 881, 374 N.E.2d 365, 403 N.Y.S.2d 466 (1978); *Hymowitz v. Soprinisky*, 24 App. Div. 2d 750, 263 N.Y.S.2d 822 (1st Dep't 1965). Confronted with such a judicial sentiment, it is submitted that the most effective review of the merits of a dismissal order is upon direct appeal.

<sup>23</sup> CPLR 308(4) (Supp. 1979-1980). CPLR 308 provides for service of process upon a natural person by the following methods:

1. by delivering the summons within the state to the person to be served; or
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

. . . .

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; . . . or

5. [i]n such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section.

<sup>24</sup> Under CPLR 308, alternative and independent methods of service by delivery are available. *See* CPLR 308(1), (2) (1972); note 23 *supra*. Personal delivery is one method. "Deliver and mail" service, as an alternative to personal delivery, is of recent origin. Under the Civil Practice Act, service other than by personal delivery, so-called "substituted service," was obtainable only by court order. CPLR 308 as originally enacted permitted "deliver and mail" or "nail and mail" service without a court order, but only if personal delivery could not have been made with "due diligence." *See* CPLR 308, ch. 308, § 308 [1962]N.Y. LAWS 1316 (current version at CPLR 308(2) & 308(4) (1972)); SIXTEENTH ANN. REP. OF THE N.Y. JUD. CONFERENCE A38 (1971) [hereinafter cited as SIXTEENTH ANN. REP.]; SIEGEL § 71. The excessive hardships imposed to process servers attempting to comply with the statute led to an abuse known as "sewer service," the fraudulent practice of serving process in an unauthorized manner and then executing false affidavits of service. SIXTEENTH ANN. REP., *supra*, at A38; *see* Note, *Abuse of Process: Sewer Service*, 3 COLUM. J. L. SOC. PROB. 17, 22 (1967) [hereinafter cited as *Sewer Service*]; Comment, *Sewer Service and Confessed Judgments: New Protection for Low-Income Consumers*, 6 HARV. CIV. RIGHTS - CIV. LIB. L. REV. 414, 422 (1971) [hereinafter cited as *New Protection*].

In an attempt to ease the problem, the service requirements of CPLR 308 were liberal-