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CPLR 308(2): Delivery of Summons and Complaint to Doorman in Apartment House Lobby Deemed Valid Service Upon Apartment Dweller in Certain Circumstances

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It is suggested that the defense of the underlying UCC statute of limitations in the *American Trading* situation is akin to a personal defense which bars relief against the principal obligor but which does not affect the guarantor's liability.[19] Under this view, the Court's ruling that the guarantee of a sales contract, like that accompanying any other contract, is governed by the CPLR's 6-year limitations period seems just and logical. The holding is consonant with decisions in most other jurisdictions[20] and therefore promotes the consistent procedural application of the UCC.[21]

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

CPLR 308(2): Delivery of summons and complaint to doorman in apartment house lobby deemed valid service upon apartment dweller in certain circumstances.

CPLR 308(2) provides that personal service of a summons upon a natural person may be made "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."[22] This method of service may be effected even in the absence of prior attempts to deliver the summons to the defendant personally. Problems of interpretation

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[19] *See, e.g.*, Rhodia, Inc. v. Steel, 32 App. Div. 2d 753, 300 N.Y.S.2d 1005 (1st Dep't 1969) (mem.) (defense based on defects in merchandise sold to principal debtor not available to guarantor); Ralston Purina Co. v. Siegel's Poultry, Inc., 24 App. Div. 2d 926, 264 N.Y.S.2d 601 (3d Dep't 1965) (mem.) (principal's claim against creditor for negligence in performance of service provision of sales contract guaranteed, not available to guarantor either as defense or setoff). *See generally* Ettlinger v. National Sur. Co., 221 N.Y. 467, 117 N.E. 945 (1917).

[20] *See, e.g.*, Weems v. Carter, 30 F.2d 202 (4th Cir. 1929); Bloom v. Bender, 48 Cal. 2d 793, 313 P.2d 568 (1957); Bank of Nev. v. Friedman, 82 Nev. 417, 420 P.2d 1 (1966); Fidelity & Cas. Co. v. Lackland, 175 Va. 178, 8 S.E.2d 306 (1940). *But see* First Nat'l Bank v. Drake, 185 Iowa 879, 171 N.W. 115 (1919).

[21] Besides promulgating simple and clear rules to govern modern commercial transactions without restricting ongoing expansion through custom, usage, and agreement as to commercial practices, the aim of the UCC is "to make uniform the law among the various jurisdictions." N.Y.U.C.C. § 1-102(2) (McKinney 1964).

[22] Under CPLR 308(2) service may be made

> 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; proof of such service shall be filed within twenty days thereafter with the clerk of the court designated in the summons; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service . . . .

have arisen, however, in connection with the statutory language "a person of suitable age and discretion"[23] and "a dwelling place or usual place of abode."[24] Recently, in *F.I. duPont, Glore Forgan & Co. v. Chen*,[25] the Court of Appeals held that, in at least certain situations, an apartment house doorman may be a person of suitable age and discretion to whom a summons properly may be delivered under the provisions of CPLR 308(2), and that delivery to the doorman in the apartment lobby might qualify as delivery at the defendants' actual dwelling place.[26]

In *duPont*, a process server went several times to the apartment building in which the defendant husband and wife resided attempting to serve them personally with a summons and complaint.[27] On his first two visits, the process server was permitted to proceed to

[23] *See* 1 WK&M ¶ 308.13 at 3-211. In Chemical Bank v. Kuehl, N.Y.L.J., Oct. 19, 1972, at 16, col. 2 (Sup. Ct. N.Y. County), service upon the 17-year old son of the defendant was held proper. The court noted that it is not insufficient as a matter of law to serve an adolescent, since there is no statutory requirement of delivery to an adult: "The test applied . . . is whether the person served was of sufficient age and understanding to transmit the papers to the defendant." *Id.* Similarly, the defendant's 13-year old son was held to be a person of suitable age and discretion in Bradian v. Chavez, N.Y.L.J., April 23, 1968, at 16, col. 6 (Sup. Ct. Bronx County). The court in Nassau Trust Co. v. Filderman, N.Y.L.J., July 17, 1975, at 15, col. 1F (Sup. Ct. Suffolk County), *appeal dismissed as moot*, 52 App. Div. 2d 588, 382 N.Y.S.2d 121 (2d Dep't 1976), refused to uphold service made upon the defendant's 10-year old daughter, however, reasoning that there was no indication that service could not have been made upon an adult residing in the household.

A hospital administrator was held to be a person of suitable age and discretion to accept service of process for a doctor working in the hospital in Chalk v. Catholic Medical Center, N.Y.L.J., Sept. 1, 1976, at 8, col. 3 (Sup. Ct. Kings County). In G-M Assoc. v. Aldo Realty Co., N.Y.L.J., Jan. 5, 1977, at 19, col. 2 (Sup. Ct. Suffolk County), delivery of the summons and complaint to a part-time domestic in a household was deemed valid service. The court therein noted that, unlike Federal Rule 4(d)(1), "CPLR 308(2) does not require that the person served reside in the defendant's abode and thus service on a domestic whose residence is elsewhere would seem to be proper in New York, provided, of course, that the person is 'a person of suitable age and discretion.'" *Id.*

[24] *See* 1 WK&M ¶ 308.13 at 3-211. It has been noted that the words "usual place of abode" connote a higher degree of permanency than the term "dwelling place;" the former roughly may be defined as the actual place where the party lives, while the latter embraces temporary or occasional living quarters. Thus, in Karlin v. Avis, 326 F. Supp. 1325 (E.D.N.Y. 1971), the defendant's New York apartment was deemed his dwelling place even though he was a resident and domiciliary of Michigan and divided his time "between Michigan, New York, Mexico and Europe." *Id.* at 1329. On the other hand, the court in Rich Prod. Corp. v. Diamond, 51 Misc. 2d 675, 273 N.Y.S.2d 687 (Sup. Ct. Erie County 1966), found that the defendant's usual place of abode was the house he owned in Buffalo, New York, where he registered to vote and maintained a telephone listing and a checking account. The fact that the defendant had rented an apartment in Detroit was not deemed significant, since he had not lived in it. *Id.* at 676-77, 679, 273 N.Y.S.2d at 689, 691.

[25] 41 N.Y.2d 794, 364 N.E.2d 1115, 396 N.Y.S.2d 343 (1977), *rev'g* 53 App. Div. 2d 812, 385 N.Y.S.2d 89 (1st Dep't 1976).

[26] 41 N.Y.2d at 795, 364 N.E.2d at 1116, 396 N.Y.S.2d at 344.

[27] *Id.*, 364 N.E.2d at 1116, 396 N.Y.S.2d at 344-45.

the defendants' apartment, where, upon receiving no response, he left cards inviting the defendants to contact him. When he returned to the building a third time, he was met by the doorman who, after informing the process server that the defendant couple had received his earlier messages,[28] would not permit him to go to the defendants' apartment. The process server thereupon handed the doorman two sets of the summons and complaint, one for each defendant. Shortly thereafter, he also mailed copies to each defendant at the apartment house address.[29] The defendants' motion to set aside the service was denied by the Supreme Court, New York County, which confirmed the findings of a referee.[30] The Appellate Division, First Department, reversed, granted defendants' motion and dismissed the complaint.[31]

A unanimous Court of Appeals reversed the appellate division, declaring that "it cannot be said as a matter of law that the service was invalid as not in conformity with the requirements of CPLR 308(2)."[32] Judge Jones, who authored the Court's opinion, initially noted that the sections of the CPLR providing for personal service had been altered significantly by the legislature in 1970. Prior to that year, delivery of the summons to a person other than the defendant or his designated agent was impermissible unless diligent efforts first had been made to locate and serve the defendant himself.[33] With the enactment of subdivision (2) to CPLR 308, it became unnecessary to attempt in hand delivery to the defendant; a process server in the first instance could leave a summons with a person of suitable age and discretion at a defendant's dwelling place.[34]

In concluding that it could not be said as a matter of law that the doorman was not a person of suitable age and discretion within the meaning of 308(2), Judge Jones pointed to the doorman's duties, which included screening callers, announcing visitors, and accept-

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[28] *Id.*

[29] *Id.* at 796, 364 N.E.2d at 1116, 396 N.Y.S.2d at 345. Valid service under CPLR 308(2) requires both delivery and mailing; either alone is insufficient, irrespective of whether defendant receives actual notice. *See* CPLR 308, commentary at 207 (McKinney 1972).

[30] 41 N.Y.2d at 796, 364 N.E.2d at 1116, 396 N.Y.S.2d at 345.

[31] 53 App. Div. 2d at 812, 385 N.Y.S.2d at 89. The majority of the appellate division panel emphasized the fact that the process server had access to the defendants' apartment door on two occasions and could have affixed the summons and complaint to it, pursuant to CPLR 308(4), and, failing this, should have informed counsel so that a court order for service could be obtained under CPLR 308(5). *Id.* at 812, 385 N.Y.S.2d at 90. The dissent reasoned, however, that service should be upheld since "[t]he defendants should not be permitted to insulate themselves against service by instructing the doorman not to permit the process server access to their door." *Id.* at 813, 385 N.Y.S.2d at 91.

[32] 41 N.Y.2d at 796, 364 N.E.2d at 1116, 396 N.Y.S.2d at 345.

[33] *Id.* at 796, 364 N.E.2d at 1117, 396 N.Y.S.2d at 345.

[34] *Id.* at 796-97, 364 N.E.2d at 1117, 396 N.Y.S.2d at 345.

ing deliveries for tenants.[35] In addition, the Court took note of the referee's specific finding that the doorman was a "responsible communicator"[36] in that he apparently relayed information from the defendants to the process server.[37] Judge Jones went on to reject outright the defendants' contention that a person of suitable age and discretion must be an individual having " 'a family relationship' with the defendant."[38] Finally, the *duPont* Court found that there existed no other basis for setting aside, as a matter of law, the referee's determination that the doorman was a person of suitable age and discretion.

The Court of Appeals also concluded that it could not be held as a matter of law that service in the lobby of the defendants' apartment house was not service at their actual dwelling place.[39] Judge Jones reasoned that when a process server is prevented by a doorman from reaching the defendants' apartment, "the outer bounds of the actual dwelling place must be deemed to extend to the location where the process server's progress is arrested."[40] Noting that this rule probably would apply even where the doorman regularly consults the tenants before admitting visitors, the Court found that in this case the referee properly might have attributed the doorman's conduct directly to the defendants. Thus, it was concluded that the apartment lobby might be deemed the defendants' actual dwelling place within the meaning of 308(2).[41]

It is submitted that the decision in *duPont* accords with the

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[35] *Id.* at 797, 364 N.E.2d at 1117, 396 N.Y.S.2d at 345-46.

[36] *Id.* at 797, 364 N.E.2d at 1117, 396 N.Y.S.2d at 346.

[37] *Id.*

[38] *Id.*

[39] *Id.* There is no requirement of familial relationship for CPLR 308(2) service, and even under the narrow provisions of federal rule 4(d)(1) the person to whom a summons and complaint is delivered need not be a family member. *See* 1 WK&M ¶ 308.13, at 3-211 to -213. FED. R. CIV. P. 4(d)(1) provides that personal service may be made by "leaving copies thereof at his [the defendant's] dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." *See, e.g.*, Pickford v. Kravetz, 17 Fed. Rules Serv. 19, 21 (S.D.N.Y. 1952) (hotel manager was "person of suitable age and discretion then residing therein" even though he lived elsewhere); Zuckerman v. McCulley, 7 F.R.D. 739, 741 (E.D. Mo. 1947), *appeal dismissed*, 170 F.2d 1015 (8th Cir. 1948) (service upon part-time janitor who resided elsewhere held to be defective).

[40] 41 N.Y.2d at 797, 364 N.E.2d at 1117, 396 N.Y.S.2d at 346. While there appear to be no prior cases adopting a broad reading of the words actual dwelling place, in DiGiuseppe v. DiGiuseppe, 70 Misc. 2d 188, 189, 333 N.Y.S.2d 245, 247 (N.Y.C. Civ. Ct. N.Y. County 1972), the court liberally construed the 308(2) phrase "actual place of business" and held that service was proper at the personnel office of defendant's company, even though the defendant actually worked in a separate but nearby building.

[41] 41 N.Y.2d at 797, 364 N.E.2d at 1117, 396 N.Y.S.2d at 346. On remittitur from the Court of Appeals, the Appellate Division, First Department, upheld the service of process. N.Y.L.J., August 5, 1977, at 1, col. 6 (1st Dep't July 14, 1977).

intent underlying the legislature's adoption of an alternative method of personal service. In recommending the repeal of former section 308 of the CPLR and its replacement with the present section, the Judicial Conference explained that the new section's "expanded provision for personal service of process . . . would thoroughly satisfy the requirements of notice and the opportunity to be heard,"[42] while substantially eliminating the evils of "sewer service."[43] According to one authority, "[t]he crucial question for the court in each case should be whether the purpose of the statute—to give fair notice—is satisfied by the service in issue."[44] Delivery of the summons and complaint to an apartment house doorman who personally communicates on a regular basis with the defendants or who has been instructed by them not to allow the process server past the lobby seems reasonably calculated to inform the defendants of the pending lawsuit and thus to afford them an opportunity to be heard.[45] Indeed, it has been stated by a noted commentator that "the statute should be satisfied if the summons is left with a person who has enough sense to know what it is."[46] Moreover, although the actual dwelling place of a person residing in an apartment building usually has been considered to be the individual apartment,[47] it would appear that the Court wisely extended the definition to encompass the lobby of a building in instances where a reasonable inference may be drawn that the doorman has been instructed by the defendant not to allow the process server to proceed beyond the lobby; a contrary holding would not only have resulted in an unduly strict interpretation of 308(2), but also would have enabled defendants to profit from their own evasiveness.[48]

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[42] EIGHTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1970) *in* SIXTEENTH ANN. REP. N.Y. JUD. CONFERENCE A39 (1971).

[43] *Id.* The requirement that due diligence be used to serve the defendant personally before other forms of service could be resorted to was viewed as one of the major causes of "sewer service" and the falsification of affidavits by process servers. *Id.* at 38. For a discussion of sewer service, see Tuerkheimer, *Service of Process in New York City: A Proposed End to Unregulated Criminality*, 72 COLUM. L. REV. 847 (1972).

[44] 1 WK&M ¶ 308.13, at 3-212.

[45] Allowing service to be made upon a doorman in this situation avoids the expense and time which would be consumed if a court order had to be obtained pursuant to CPLR 308(5), which allows a court to devise a method of service when service is otherwise impracticable.

[46] CPLR 308, commentary at 207 (McKinney 1972).

[47] *See, e.g., id;* 1 WK&M ¶ 308.13, at 3-213.

[48] The courts apparently have been flexible in applying CPLR 308 and its predecessors to cases involving evasive defendants. Thus, in Cohen v. Arista Truck Renting Corp., 70 Misc. 2d 729, 335 N.Y.S.2d 30 (Sup. Ct. Nassau County 1972) (mem.) the defendant was estopped from claiming that the plaintiffs had not complied with the mailing provisions of CPLR 308(4), as defendant had furnished plaintiffs with a noncurrent address after an automobile

ARTICLE 45—EVIDENCE

CPLR 4513: Sandoval *held inapplicable to civil actions.*

With its decision in *People v. Sandoval,*[49] the Court of Appeals recognized the broad discretion of a trial court to determine whether a prior conviction may be admitted under CPL 60.40(1)[50] for the purpose of impeaching the credibility of a criminal defendant.[51] The *Sandoval* court was of the opinion that such discretion must be

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accident and had never filed a change of address form with the Commissioner of Motor Vehicles. *Id.* at 731, 335 N.Y.S.2d at 31. In Kenworthy v. Van Zandt, 71 Misc. 2d 950, 337 N.Y.S.2d 481 (N.Y.C. Civ. Ct. N.Y. County 1972) the court held service under CPLR 308(5) to be proper where defendant told plaintiff's counsel that he would be home at a designated time to accept service and then left a letter saying he had moved to Tennessee. *Id.* at 954, 337 N.Y.S.2d at 484. *See also* Buscher v. Ehrich, 12 App. Div. 2d 887, 209 N.Y.S.2d 941 (4th Dep't 1961)(mem.); Levine v. National Transp. Co., 204 Misc. 202, 125 N.Y.S.2d 679 (Sup. Ct. Queens County), *aff'd mem.*, 282 App. Div. 720, 122 N.Y.S.2d 901 (2d Dep't 1953).

[49] 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974). In *Sandoval,* defendant, who had been indicted for common law murder, made a pretrial motion requesting the trial court to prohibit the use of evidence concerning past criminal convictions to impeach his credibility. The trial judge, while ruling that two of the convictions were admissible, prohibited the introduction of several other convictions, finding that their potential for unfair prejudice outweighed their probative value on the credibility issue. *Id.* at 373, 314 N.E.2d at 415, 357 N.Y.S.2d at 852. In affirming the lower court's holding, the Court of Appeals noted that although CPL 60.40 permits admission of past criminal convictions, it does not address the question of "when and to what extent a defendant may be cross-examined concerning prior convictions." *Id.* at 374, 314 N.E.2d at 416, 357 N.Y.S.2d at 853 (quoting CPL § 60.40, commentary at 256 (McKinney 1971)). The Court pointed out that in the absence of legislation the trial judge has always possessed discretionary authority concerning the "nature and extent of cross-examination." 34 N.Y.2d at 374, 314 N.E.2d at 416, 357 N.Y.S.2d at 853. Reasoning that the purpose of proving criminal convictions on cross-examination of a defendant is to impeach credibility, the Court of Appeals concluded that such evidence should be utilized only if its probative value on the question of credibility outweighs its prejudicial impact upon the defendant. *Id.* at 378, 314 N.E.2d at 418, 357 N.Y.S.2d at 856. In assessing the conviction's tendency to discredit the defendant, a trial court must take into account both the nature of the underlying criminal act and the lapse of time since its occurrence. *Id.* at 376, 314 N.E.2d at 417, 357 N.Y.S.2d at 855.

[50] CPL § 60.40(1) states:

> If in the course of a criminal proceeding, any witness, including a defendant, is properly asked whether he was previously convicted of a specified offense and answers in the negative or in an equivocal manner, the party adverse to the one who called him may independently prove such conviction. If in response to proper inquiry whether he has ever been convicted of any offense the witness answers in the negative or in an equivocal manner, the adverse party may independently prove any previous conviction of the witness.

[51] 34 N.Y.2d at 374, 314 N.E.2d at 416, 357 N.Y.S.2d at 853. Prior to the ruling in *Sandoval,* the lower courts were in disagreement concerning whether CPL 60.40(1) abrogated the judiciary's discretion to determine the admissibility of prior convictions in criminal proceedings. *Compare* People v. Pritchett, 69 Misc. 2d 67, 329 N.Y.S.2d 147 (Sup. Ct. Queens County 1972), *with* People v. King, 72 Misc. 2d 540, 339 N.Y.S.2d 358 (Sup. Ct. Queens County 1972). For a discussion of the right to impeach a witness in a criminal proceeding, including an analysis of *Sandoval,* see Note, *The Dilemma of a Defendant Witness in New York: The Impeachment Problem Half-Solved,* 50 ST. JOHN'S L. REV. 129 (1975).