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CPLR 308(4): Both Timely Nailing and Mailing Required to Toll Statute of Limitations

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would be to treat the personal nature of the article as establishing prima facie a reasonable expectation of forum consequences once the defective product is placed in the mainstream of commerce.

CPLR 308(4): Both timely nailing and mailing required to toll statute of limitations.

Where a natural person is to be served with process but such service cannot be made upon the defendant personally, CPLR 308 provides for "substituted" means.[71] After reasonable attempts have been made to effect in-hand delivery or mail and delivery service in accordance with subparagraphs (1) and (2) of CPLR 308, a plaintiff may resort to "nail and mail" service pursuant to 308(4).[72] Two steps are contemplated by this form of service. First, the summons must be attached to the door of the defendant's actual place of business, dwelling or usual abode.[73] Second, a copy of the summons must be mailed to the defendant's last known residence. Failure to perform either step will result in lack of jurisdiction over the defendant.[74]

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71 CPLR 308 has been deemed to provide for a "hierarchy of alternative means of service, in which the primary place is given to the delivery of process to the defendant in person." Dobkin v. Chapman, 21 N.Y.2d 490, 502, 236 N.E.2d 451, 457, 289 N.Y.S.2d 161, 170 (1968). *See generally* 1 WK&M ¶ 308.01-.02a.

72 CPLR 308 provides in 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 actual abode of the person to be served and by mailing the summons to the person to be served at his last known residence . . . .

When a plaintiff, using due diligence, has exhausted the possibility of service under the above subparagraphs, he may then proceed, without court order, to employ the nail and mail form of service

> 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. 308(4). The affidavit of service, filed with the clerk of the court following the 308(4) service, must set forth the details, including dates and hours, of the efforts made to serve the defendant personally, in order to show that the plaintiff has acted with due diligence. Blatz v. Benschine, 53 Misc. 2d 352, 354-55, 278 N.Y.S.2d 533, 536 (Sup. Ct. Queens County 1967) (mem.); Iroquois Gas Corp. v. Collins, 42 Misc. 2d 632, 636, 248 N.Y.S.2d 494, 498 (Sup. Ct. Erie County 1964), *aff'd*, 23 App. Div. 2d 823, 258 N.Y.S.2d 376 (4th Dep't 1965) (mem.).

73 The "nailing" obligation requires that the summons be affixed to a place where the defendant *in fact* resides or works. While the "mailing" requirement may be satisfied by mailing to the last known address of the defendant, the service will be vitiated upon proof that the nailing was to a place where the defendant no longer lives or works. Polansky v. Paugh, 23 App. Div. 2d 643, 256 N.Y.S.2d 961 (1st Dep't 1965) (per curiam); Entwistle v. Stone, 53 Misc. 2d 227, 278 N.Y.S.2d 19 (Sup. Ct. Onondaga County 1967) (mem.); Todd v. Todd, 51 Misc. 2d 94, 272 N.Y.S.2d 455 (Sup. Ct. Nassau County 1966) (mem.).

74 *See* Mittelman v. Mittelman, 45 Misc. 2d 445, 447-48, 257 N.Y.S.2d 86, 88-89 (Sup. Ct. Queens County 1965), *cited in* 7B McKINNEY'S CPLR 308, commentary at 209 (1972).

In *Furey v. Milgrom*,[75] the plaintiff, injured in an auto collision, attempted to serve the defendant personally on five separate occasions prior to the running of the three-year statute of limitations.[76] On the last day within the statutory period, the process server, purporting to comply with CPLR 308(4), affixed a copy of the summons and complaint to the door of the defendant's residence. On the following day, he mailed another copy to the same address. The Appellate Division, Second Department, finding the affixation of process in itself insufficient to toll the statute of limitations, dismissed the action as time-barred. The court reasoned that a holding to the contrary would subvert the legislative intent to require two separate acts of equal standing — nailing and mailing — in order to insure receipt of notice by the defendant and confer jurisdiction upon the court.[77] In addition, the court expressed concern that a contrary holding "would leave in high uncertainty whether the act of mailing would be effective, even if accomplished more than one day after the statute of limitations had run."[78]

The factual situation presented in *Furey* is particularly problematic in that it involves the conjunction of the method of substituted service with the running of the statute of limitations. The CPLR provides, as a general rule, that "[t]he time within which an action must be commenced . . . is computed from the time the cause of action accrued to the time the claim is interposed."[79] A claim is interposed (and the statute of limitations is tolled) when the defendant is served with summons.[80] Although mere attaching of the summons to the house of the defendant might satisfy constitutional due process requirements,[81] the New York Legislature, in its prescription for service under

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[75] 44 App. Div. 2d 91, 353 N.Y.S.2d 508 (2d Dep't 1974).

[76] In the case of a motor vehicle accident within the state involving a New York plaintiff and a nonresident defendant, section 253 of the Motor Vehicle and Traffic Law offers an alternate means of service. Under this section, the nonresident motorist is deemed to have appointed the Secretary of State as his agent for service of process. *See* notes 89-91 and accompanying text *infra*. Since the defendant in *Furey* was a resident of New York, this statutory aid was unavailable to the plaintiff. Consequently, the plaintiff's only recourse was personal service pursuant to CPLR 308.

[77] 44 App. Div. 2d at 93, 353 N.Y.S.2d at 510.

[78] *Id.*

[79] CPLR 203(a).

[80] CPLR 203(b)(1).

[81] *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), wherein the Supreme Court, in discussing the validity of substituted service, stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice must be

the CPLR, has gone beyond the bare constitutional minimum.[82] CPLR 308(4) specifically requires nailing *and* mailing of the summons; therefore, according to the *Furey* court, only upon the performance of both acts may the claim be deemed interposed.

A shortcoming in the *Furey* decision, however, lies in the court's incorrect reference to completion of service.[83] The court sought to determine "at what time service was complete,"[84] yet CPLR 308(4) specifically sets this time at ten days after the filing of proof of service. It would have been more accurate for the court to speak in terms of when the claim is interposed. The holding of the case implies this was the intention of the court, but the misuse of terminology is imprecise and confusing.

Furey may be further criticized since the court failed to satisfactorily consider and distinguish other cases which have held the statute of limitations to be tolled upon due execution of the first of two required services. For example, the court omitted any reference to *Chem-Trol Pollution Services, Inc. v. Ingraham*,[85] an Article 78 proceeding wherein service upon both the Commissioner of Health and the Attorney General was required. The Appellate Division, Fourth Department, held that the timely service upon the Commissioner tolled the statute of limitations although service upon the Attorney General was not effected until after the period of limitations had expired.[86] While *Furey* appears to be in conflict with *Chem-Trol*,[87] a valid basis exists for the disparate holdings. In *Chem-Trol*, the court found a specific statutory justification for its decision. The court held that the Commissioner and the Attorney General were sufficiently united in interest

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of such nature as reasonably to convey the required information, . . . and it must afford a reasonable time for those interested to make their appearance . . . .

Id. at 314 (citations omitted).

82 *See* 7B McKINNEY'S CPLR 308, commentary at 209 (1972), wherein Dean Joseph M. McLaughlin cautions:

> The plaintiff must bear in mind not only that fair notice is required but also that the CPLR must be complied with. Thus, even though the defendant receives actual notice through service of summons by mail, a valid service under CPLR 308(4) requires that a second copy of the summons be served. One step without the other — while perhaps constitutional — fails to comply with the statute and will not result in jurisdiction [citation omitted].

83 44 App. Div. 2d at 92, 353 N.Y.S.2d at 509. *See* 7B McKINNEY'S CPLR 203, supp. commentary at 14 (1974). Dean McLaughlin notes:

> It seems clear that when the court sought to determine when service "was complete," it was not using that phrase as a term of art. Unhappily, at no time does the court define its use of the phrase, and it is unclear from the opinion what was intended . . . .

Id.

84 44 App. Div. 2d at 92, 353 N.Y.S.2d at 509.

85 42 App. Div. 2d 192, 345 N.Y.S.2d 714 (4th Dep't 1973).

86 *Id.* at 194, 345 N.Y.S.2d at 716.

87 *See* 7B McKINNEY'S CPLR 203, supp. commentary at 14 (1974).

so that, pursuant to CPLR 203(b), proper service upon one would be effective as to both for purposes of tolling the statute of limitations.[88]

The court in *Furey* did consider cases arising under the nonresident motorist statute,[89] which requires that a plaintiff serve one copy of the summons upon the Secretary of State and mail a second copy to the defendant.[90] In such a case, personal service upon the Secretary of State has been held sufficient to toll the running of the statute.[91] However, as noted in *Furey*, this result occurs since the Secretary of State has been statutorily designated the agent of the nonresident defendant for service of process.[92] Consequently, service upon the Secretary tolls the running of the statute of limitations in the same manner as would personal service upon the nonresident within the state.[93] It is noteworthy, however, that one commentator has argued that the presence or absence of such agency relationship should in no way affect the ultimate result.[94]

Significantly, both *Chem-Trol* and the class of cases arising under the nonresident motorist statute involved situations where there were two parties to be served. Not only had service been accomplished in accordance with the statutory mandate as to the party served, but there was additional statutory authority present in *Chem-Trol*[95] for holding that service sufficient for statute of limitations purposes. On the other hand, *Furey* involved a situation where only one party was to be served. CPLR 308(4) specifically requires the performance of two separate acts of service as to that one defendant. Therefore, where only one act is performed prior to the running of the statute, no one has been validly served under the definition of the statute, and, therefore, no claim has been interposed.

Admittedly, the result in *Furey* is a harsh one,[96] and the reasoning

88 42 App. Div. 2d at 194, 345 N.Y.S.2d at 716. CPLR 203(b) carves out certain exceptional cases where a claim may be deemed interposed before a summons is served on the defendant. One such instance is where service has been timely made against a party united in interest with the defendant. *See* Prudential Ins. Co. v. Stone, 270 N.Y. 154, 200 N.E. 679 (1936).

89 N.Y. VEH. & TRAF. LAW § 253 (McKinney 1970).

90 *Id.*

91 *See* Sadek v. Stewart, 38 App. Div. 2d 655, 327 N.Y.S.2d 271 (3d Dep't 1971) (mem.), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 768, 771 (1972); Dominion of Canada Gen. Ins. Co. v. Pierson, 27 App. Div. 2d 484, 280 N.Y.S.2d 296 (3d Dep't 1967); Glines v. Muszynski, 15 App. Div. 2d 435, 225 N.Y.S.2d 61 (4th Dep't 1962) (per curiam).

92 44 App. Div. 2d at 93, 353 N.Y.S.2d at 510.

93 *Id.*

94 *See* 7B MCKINNEY'S CPLR 203, supp. commentary at 15 (1974).

95 *See id.* at 14.

96 As Dean McLaughlin has pointed out:

When two services are required to obtain jurisdiction, the first service is just as likely as the second to give notice to the defendant that the action is being

offered by the opinion alone would not appear to warrant so strong a holding. However, in the absence of statutory authority to the contrary, the intent of the legislature seems clear that in order to interpose a claim against a defendant by means of substituted service under CPLR 308(4), literal compliance with both of the required acts of service must be achieved. As the court noted, a holding that nailing alone would effectively toll the statute of limitations would relegate the second act of mailing to a position of very minor importance.[97] Perhaps an even more serious consideration is the practical difficulty which would result from a contrary holding in this case. No time limit for performance of the second act of service would exist and the courts would be faced with the problem of determining in each case the effectiveness of the later service.[98] Such important procedural issues should not be left to determination on an ad hoc basis.

CPLR 327: Court of Appeals dismisses on the ground of forum non conveniens *suit arising from an accident occurring in New York.*

Prior to *Silver v. Great American Insurance Co.*,[99] New York maintained an inflexible *forum non conveniens* doctrine.[100] For example, as a result of the Court of Appeals' decision in *De La Bouillerie v. De Vienne*,[101] New York courts were required to retain jurisdiction over foreign torts if either party was a New York resident.[102] This rigid

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commenced . . . [and] . . . it is usually the defendant's conduct which forces the plaintiff to use a double-edged service . . . .

Id. at 15.

It should be noted, however, that the plaintiff may avail himself of the sixty-day extension period pursuant to CPLR 203(b)(5). *See* H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 76 (4th ed. 1973), wherein the author states:

If the statute of limitations is about to run out, the plaintiff can automatically gain an additional sixty days beyond the statutory period within which to serve the defendant or commence service by publication. This is accomplished in an action in a court of record by delivering the summons to the sheriff of the county where the defendant resides, is employed or is doing business; or, if these are not known after reasonable inquiry, to the sheriff of the county where the defendant is known to have last resided, been employed or been engaged in business.

97 44 App. Div. 2d at 93, 353 N.Y.S.2d at 510.

98 *See* text accompanying note 78 *supra*.

99 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972).

100 For a discussion of the development of the *forum non conveniens* doctrine in New York, see *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 561, 588 (1972).

101 300 N.Y. 60, 89 N.E. 15 (1949).

102 *De La Bouillerie* involved an action by a nonresident plaintiff against New York defendants for false imprisonment and conspiracy to defraud. These charges arose from activities carried on by the defendants in France. The defendants moved under CPA 107, the forerunner of CPLR 3211, to dismiss the action on the ground that France represented the proper forum for this suit. The Court of Appeals reversed the lower court's dismissal, because of a failure to consider the residence of the parties. *Id.* at 61, 89 N.E. at 15. In *De La Bouillerie*, Chief Judge Loughran reiterated the traditional