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CPLR 308(2): Construction of "Dwelling Place"

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that defendant never intended to fulfill the contract and "in effect, committed a fraud by inducing shipment on the basis of a promise never intended to be kept."[40]

The federal district court, in rejecting this contention, stressed the careful distinction drawn between tort and contract actions in CPLR 302.[41] It concluded that the consequences of permitting characterization of a contract case as a tort action necessitates that the statutory distinction be judicially enforced. Otherwise,

> a plaintiff could, merely by alleging that a contracting party never intended to fulfill his promise, create a tortious action in fraud, [and] there would be no effective way of preventing almost every contract case from being converted to a tort for jurisdictional purposes.[42]

The plain intent of CPLR 302 supports the court's rejection of plaintiff's interpretation of the statute.[43] Moreover, a contrary decision would extend New York's long-arm jurisdiction drastically, thereby violating established judicial policy to refrain from assuming a legislative role.[44]

CPLR 308(2): Construction of "dwelling place."

CPLR 308(2)[45] prescribes that, except in matrimonial actions, personal service upon a natural person may be effected without prior attempt to personally deliver the summons to the named defendant, "by delivering the summons within the state[46] to a person of suitable age and discretion[47] at the actual place of business, dwelling place[48] or

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40 *Id.* at 795.

41 *Compare* CPLR 302(a)(2)&(3) *with* CPLR 302(a)(1)&(4).

42 325 F. Supp. at 796, *citing* Old Westbury Golf & Country Club, Inc. v. Mitchell, 44 Misc. 2d 687, 689, 254 N.Y.S.2d 679, 682 (Sup. Ct. Nassau County 1964), *aff'd*, 24 App. Div. 2d 636, 262 N.Y.S.2d 438 (2d Dep't 1965), *aff'd*, 18 N.Y.2d 670, 219 N.E.2d 868, 273 N.Y.S.2d 418 (1966).

43 *Cf.* American Eutectic Welding Alloys Sales Co., v. Dytron Alloys Corp., 439 F.2d 428 (2d Cir. 1971), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 147, 155 (1971).

44 *See* Feathers v. McLucas, 15 N.Y.2d 443, 464, 209 N.E.2d 68, 80, 261 N.Y.S.2d 8, 24, *cert. denied*, 382 U.S. 905 (1965), *discussed in The Biannual Survey*, 40 ST. JOHN'S L. REV. 122, 134-38 (1965).

45 Chapter 852 of the Laws of 1970 repealed the former CPLR 308 and replaced it with a new § 308, effective September 1, 1970.

46 "Where there is a basis of jurisdiction so that service may be made outside New York under CPLR 313 or 314, 'the state' should be construed to refer to the state where the summons is being served." 7B MCKINNEY'S CPLR 308, supp. commentary at 196 (1970).

47 *See* Bradian v. Chavez, 159 N.Y.L.J. 79, Apr. 23, 1968, at 16, col. 6 (delivery to the thirteen-year-old son of the defendant was held to be valid). *See also* 7B MCKINNEY'S CPLR 308, supp. commentary at 197 (1970): "[T]he statute should be satisfied if the summons is left with a person who has enough sense to know what it is."

48 " 'Dwelling house' means a house in which a person dwells, lives or abides . . .

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. . . ."[49] Both elements, proper delivery and proper mailing, are necessary to constitute a valid service even where a defendant receives actual notice of the summons.[50]

In *Karlin v. Avis*,[51] the process server went to an apartment at 715 Park Avenue, which had previously been leased by the defendant Avis Industrial Corporation but was then being leased in the name of the individual defendant Warren Avis, Sr. At the apartment, he delivered the summons to Warren Avis, Jr., a college student and son of the named defendant and clearly a "person of suitable age and discretion." A copy of the summons was thereafter mailed to Warren Avis, Sr. at the same address.[52]

The principal question was whether the Park Avenue apartment was "the dwelling place or usual place of abode" of Warren Avis, Sr. The court concluded that the apartment was his dwelling place, notwithstanding defendant's argument that he was a resident and domiciliary of Michigan and that the apartment was only utilized "sporadically, in lieu of a hotel room"[53] when he traveled to New York: In reaching this conclusion, the court accorded particular significance to defendant's admissions that the apartment was leased in his name and that he paid the rent therefor. Testimony indicated that he had actually occupied

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'Dwell' is to be distinguished from 'reside' which means 'to dwell permanently or continuously' (Webster's Dictionary)." *Quoted in* Rich Prods. Corp. v. Diamond, 51 Misc. 2d 675, 678-79, 273 N.Y.S.2d 687, 691 (Sup. Ct. Erie County 1966), *discussed in The Quarterly Survey*, 42 ST. JOHN'S L. REV. 128, 133 (1967). *See* Pickford v. Kravetz, 17 FED. RULES SERV. 4th 121, Case 1 (S.D.N.Y. 1952) (district court held that a hotel where defendant stayed for approximately one week constituted his dwelling place, while he was in New York City). *See also* Rovinsky v. Rowe, 131 F.2d 687 (6th Cir. 1942); Skidmore v. Green, 33 F. Supp. 529 (S.D.N.Y. 1940).

49 Prior to the 1970 amendment to CPLR 308, the mailing had to be to the last known "residence." The commentary to the former provision points out that "[t]he mechanics of the second service under the CPLR would depend upon whether the plaintiff knew that the defendant no longer *lived* at the 'last known' residence." 7B MCKINNEY'S CPLR 308, supp. commentary at 205 (1965) (emphasis added). The new provision with its "change in statutory language clearly suggests that jurisdiction should not be denied upon the ground that the last known address was not the true residence of the defendant." Karlin v. Avis, 326 F. Supp. 1325, 1330 (E.D.N.Y. 1971). Hence, "[I]f an individual has an address that has been used by him and is known as such, the mailing of the summons to that address will serve the notice function of the statute." *Id.*

50 *See* Mittelman v. Mittelman, 45 Misc. 2d 445, 257 N.Y.S.2d 86 (Sup. Ct. Queens County 1965).

51 326 F. Supp. 1325 (E.D.N.Y. 1971).

52 An affidavit was submitted stating that an unsuccessful attempt to serve Warren Avis, Sr., personally at his residence in Michigan had been made before substituted service was effected. *Id.* at 1328 n.2.

53 *Id.* at 1329.

the apartment during the entire week prior to service of process.[54] The court cited *Pickford v. Kravetz*,[55] in which it had been held that a hotel where defendant was a guest for one week constituted his dwelling place. It noted that "Warren Avis' connection with the Park Avenue apartment is considerably greater than a transient's nexus to a hotel."[56]

The court's construction of "dwelling place" as being broader than "residence" is a most pragmatic one. For, "[i]n a highly mobile society it is unrealistic to interpret CPLR 308(2) as mandating service at only one location where, in fact, a defendant maintains several dwelling places."[57] Furthermore, such decision is in accord with the underlying purpose of CPLR 308(2), *i.e.*, to assure fair notice to the defendant.[58] It cannot be argued seriously that delivery of process to an individual of suitable age and discretion at an apartment such as the one discussed above, is not well calculated to give fair notice to the defendant.[59]

ARTICLE 10—PARTIES GENERALLY

CPLR 1005(a): New York court refuses to extend basis for class actions.

With the advent of the consumer protection movement, there has been an upsurge in interest in the class action.[60] In the recent case of *Zachary v. R. H. Macy & Co.*,[61] the Supreme Court, New York County, declined to liberalize the requirements for instituting such actions. While deploring the inadequacy of solutions, the court concluded that plaintiff Zachary could not institute a class action. Zachary alleged that Macy's bookkeeping system imposed interest upon previous financing charges, but was not a proper party because her account had not yet been charged such interest.[62]

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54 *Id.*

55 17 FED. RULES SERV. 4th 121, Case 1 (S.D.N.Y. 1952).

56 326 F. Supp. at 1329-30.

57 *Id.* at 1329. *See also* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1096, at 368 (1969), where Federal Rule 4(d)(1), the federal parallel to CPLR 308, is discussed.

> In a highly mobile society in which 'summer' and 'winter' homes are becoming more and more common, it is unrealistic to interpret Rule 4(d)(1) so that the person to be served only has one dwelling house or usual place of abode at which the process may be left. In the same vein, it makes little sense to construe Rule 4(d)(1) technically when actual notice has been received. . . ."

58 *See* 7B MCKINNEY'S CPLR 308, supp. commentary at 203 (1966).

59 326 F. Supp. at 1329.

60 For a comprehensive survey of the use of the class action in consumer suits, see Starrs, *The Consumer Class Action—Part I: Considerations of Equity*, 49 BOSTON L. REV. 211 (1969); Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, *id.* 407 (1969). *See also* Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433 (1960).

61 66 Misc. 2d 974, 323 N.Y.S.2d 757 (Sup. Ct. N.Y. County 1971).

62 *Id.* at 976-77, N.Y.S.2d at 760. The court also refused to allow Zachary to maintain an individual suit, since she had not been injured. *Id.*, 323 N.Y.S.2d at 762. Additionally, the