

# CPLR 2303: Propriety of Substituted Service of Subpoena Confirmed

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City Council enacted Article 43, Chapter 32 of the Administrative Code of the City of New York,<sup>55</sup> providing in pertinent part that "it shall be unlawful for any person to be employed as or perform the services of a process server without a license therefor."<sup>56</sup> This provision was challenged in *ABC Process Serving Bureau Inc. v. City of New York*<sup>57</sup> on two grounds: first, that it was applicable only to individual process servers, and, second, that the new law was in conflict with CPLR 2103(a).<sup>58</sup>

Neither argument prevailed. From the definition of "process server" in the statute,<sup>59</sup> the court found an intention on the part of the City Council to include those in the business of serving process as well as the actual servers. Regarding a possible conflict with the CPLR, the court held that the local law was complementary to the statewide procedure. Furthermore, there was no evidence of legislative preemption as a bar to its enactment.

*ABC Process* represents the first sign of dissatisfaction with the new provision. However, a more relevant question for the future will not be to whom does the provision apply but to what types of papers does it apply. While the need for some kind of control over process servers is obvious, the new proviso may result in the opening of a Pandora's box of inconveniences if it is construed in its broadest sense to include the service of *all* process. More sensibly, the law should be applied only in the case of service of initiatory process and not to other less important papers which are often served by the attorney's clerk or secretary.

#### ARTICLE 23 — SUBPOENAS, OATHS AND AFFIRMATIONS

##### *CPLR 2303: Propriety of substituted service of subpoena confirmed.*

Under the CPA, a subpoena issued to compel the attendance of a witness was required to be "delivered to the witness."<sup>60</sup> Although this requirement for personal delivery was not construed so strictly as to

<sup>55</sup> 1969 Local Laws of the City of New York, No. 80 (effective April 1, 1970).

<sup>56</sup> *Id.* § B32-450.0.

<sup>57</sup> 63 Misc. 2d 33, 310 N.Y.S.2d 859 (Sup. Ct. N.Y. County 1970).

<sup>58</sup> CPLR 2103(a) provides that "[e]xcept where otherwise prescribed by law or order of court, papers may be served by any person not a party of the age of eighteen years or over."

<sup>59</sup> 1969 Local Laws of the City of New York, No. 80, § B32-451.0, provides:

A process server is a person engaged in the business of serving or one who purports to serve or one who serves personally or by substituted service upon any person, corporation, governmental or political subdivision or agency, a summons, subpoena, notice, citation or other process, directing an appearance or response to a legal action, legal proceeding or administrative proceedings.

<sup>60</sup> CPA 406.

countenance “[e]vasion and willful refusal of a witness to accept the lawful process of a court,”<sup>61</sup> it did preclude the use of substituted service in the instance of subpoenas.<sup>62</sup> Nevertheless, the adoption of the CPLR expanded the allowable means of service to include not only substituted service, but all of the alternatives available for service of a summons.<sup>63</sup> The recent case of *Underwriters Trust Co. v. Scala*<sup>64</sup> confirms the propriety of such usage.

In *Scala*, the subpoena in question was purportedly served in accordance with CPLR 308(3).<sup>65</sup> The court wasted little time in declaring the mode of service proper, it “being authorized, in the case of subpoenas by statute.”<sup>66</sup> However, plaintiff’s motion for an order punishing the alleged recipient for contempt in not responding to the subpoena was denied; plaintiff had failed to establish “due diligence” on the part of the process server before resorting to an alternate means of service. Indeed, the court chastised the attorney and the process server for submitting affidavits comprised of conclusory statements rather than facts demonstrating due diligence.

*Scala* is well-reasoned and in accord with an overall concern for policing process servers.<sup>67</sup> Most important, however, is the court’s confirmation of the propriety of substituted service. For, this mode was heavily curtailed in *Beach v. Lost Mountain Manor*<sup>68</sup> wherein it was held that a subpoena could not be served outside the state, regardless of whether or not the recipient was a New York domiciliary.<sup>69</sup> If, as *Scala* indicates, CPLR 2303 adopts the qualifications contained in CPLR 308, then it should also be deemed to allow the beneficial aspects of that section. Thus, service outside the state upon a New York domiciliary should be permitted, provided, of course, that the “due diligence” requirements are met.<sup>70</sup>

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<sup>61</sup> *In re Barbara*, 14 Misc. 2d 223, 228, 180 N.Y.S.2d 924, 929 (Sup. Ct. Tioga County 1958). See also 2A WK&M ¶ 2303.03.

<sup>62</sup> *Broderick v. Shapiro*, 172 Misc. 28, 14 N.Y.S.2d 542 (Sup. Ct. N.Y. County 1939).

<sup>63</sup> See generally 2A WK&M ¶ 2303.03.

<sup>64</sup> 62 Misc. 2d 877, 311 N.Y.S.2d 454 (N.Y.C. Civ. Ct. N.Y. County 1970).

<sup>65</sup> The “nail and mail” provision for substituted service is now contained in CPLR 308(4).

<sup>66</sup> 62 Misc. 2d at 878, 311 N.Y.S.2d at 454.

<sup>67</sup> See notes 54-59 and accompanying text *supra*.

<sup>68</sup> 53 Misc. 2d 563, 279 N.Y.S.2d 93 (Sup. Ct. Monroe County 1967).

<sup>69</sup> It is important to distinguish the two-pronged aspects of substituted service: notice which is reasonable may nonetheless be invalid because the recipient does not have any contacts with the particular jurisdiction. Thus, the *Beach* court’s determination that a nondomiciliary having no contacts with New York could not be served outside the state cannot be criticized. See 7B MCKINNEY’S CPLR 2303, supp. commentary at 30 (1968).

<sup>70</sup> See *id.*