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CPLR 308(1): Service on attorney in defendant's presence deemed valid.

Under CPLR 308(1), in order to be effective a summons must be delivered within the state to the party to be served. Lack of personal delivery is excusable where the defendant's conduct makes such service difficult or impossible.[48] Beyond this exception, however, the courts have often enforced CPLR 308(1) strictly.[49] For example, in *Foster v. McMorran*,[50] where *X* was wrongfully served but he redelivered the summons to *Y* (the true defendant) service was held invalid. Nonetheless, a more liberal stance was taken in the recent case of *Davidman v. Ortiz*.[51]

In *Davidman* defendant moved to dismiss on the ground that the court lacked jurisdiction over him. The defendant averred that service of the summons was made upon his attorney and not upon him personally, although defendant admitted that the attorney was served in his presence. The Supreme Court, Queens County, stressed that the purpose of service is reasonable notice that an action is being brought[52] and, noting that defendant was fully informed of the nature of the papers served upon his attorney, refused to vacate service.

Of course, the mode of service employed in *Davidman* was not technically in compliance with CPLR 308(1). And, it can be speculated that a different result would have issued if the attorney was not served in the defendant's presence.[53] Nevertheless, it is difficult to discredit the court's holding inasmuch as the service not only fully apprised defendant of the pending action, but was more practical and logical in the circumstances than service upon the defendant personally. Certainly, courts should be wary of sustaining improper service which would promote carelessness and increase the possibility of default.[54] But in situations such as *Davidman* where the spirit of the law has been met, literal

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48 *See, e.g.*, Buscher v. Ehrich, 12 App. Div. 2d 887, 209 N.Y.S.2d 941 (4th Dep't 1961) (summons left with defendant's husband at her residence after she refused to come to the door); Chernick v. Rodriguez, 2 Misc. 2d 891, 150 N.Y.S.2d 149 (Sup. Ct. Kings County 1956) (summons left at door after defendant refused to open it); Levine v. National Transp. Co., 204 Misc. 202, 125 N.Y.S.2d 679 (Sup. Ct. Queens County 1953) (summons left in the frame of the door of the car in which defendant had locked himself).

49 *Cf.* McDonald v. Ames Supply Co., 22 N.Y.2d 111, 238 N.E.2d 726, 291 N.Y.S.2d 328 (1968). The tenor of *McDonald, i.e.*, strict compliance with the service provisions of the CPLR, makes it difficult to reconcile exceptions to the rule. *See* 7B McKinney's CPLR 308, supp. commentary at 196 (1970).

50 33 App. Div. 2d 978, 307 N.Y.S.2d 291 (4th Dep't 1970).

51 63 Misc. 2d 984, 314 N.Y.S.2d 198 (Sup. Ct. Queens County 1970).

52 *See* Lumbermens Mut. Cas. Co. v. Borden Co., 268 F. Supp. 303, 310 (S.D.N.Y. 1967).

53 *Cf.* State-Wide Ins. Co. v. Lopez, 30 App. Div. 2d 694, 291 N.Y.S.2d 928 (2d Dep't 1968) (service of notice of petition to stay arbitration on attorney deemed invalid).

54 *See* McDonald v. Ames Supply Co., 22 N.Y.2d 111, 116, 238 N.E.2d 726, 728, 291 N.Y.S.2d 328, 332 (1968).

compliance with the CPLR should yield to the court's fundamental sense of fairness.[55]

CPLR 320: The appearing nonresident — Everitt *revisited.*

In *Everitt v. Everitt*[56] an action was commenced against a nondomiciliary by serving her while she was temporarily within the state. The summons was accompanied by a notice stating that the action was being brought for breach of contract and that judgment would be taken in the amount of $46,900 in the event of default.[57] After defendant had entered an appearance in the action, she was served with a complaint containing an additional cause of action for libel demanding damages of $350,000. Reasoning that the default notice was rendered ineffective by the defendant's appearance, a majority of the Court of Appeals permitted the libel cause of action to stand despite defendant's assertion that the court lacked personal jurisdiction to adjudicate that claim.

An appearance without timely objection to jurisdiction confers full in personam jurisdiction over the defendant[58] in most instances.[59] Nonetheless, it has been maintained that fundamental due process objections are raised by *Everitt* inasmuch as the defendant had not appeared in the action to defend a $350,000 claim for libel and, conceivably, she would have elected to default had she been aware of the enormity of the plaintiff's additional claim.[60] Accordingly, it has been concluded that when a defendant does enter an appearance, it should not be viewed as a "submission to a free-wheeling form of in personam jurisdiction on any and all causes of action by any and all parties to the action."[61] Moreover, it could be posited that the plaintiff in *Everitt* employed the $46,000 contract action with the attendant risk to defendant of absolute liability via default as a lever for securing jurisdiction in the much larger libel action. Similar considerations were deemed to outweigh the interests of the plaintiff and the court in resolving all issues in one action where the plaintiff has secured jurisdiction by attaching property owned by a nonresident.[62] Possibly, an expansive reading of

[55] *See* Belofatto v. Marsen Realty Corp., 62 Misc. 2d 922, 310 N.Y.S.2d 191 (N.Y.C. Civ. Ct. N.Y. County 1970), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 342, 350 (1970).

[56] 4 N.Y.2d 13, 148 N.E.2d 891, 171 N.Y.S.2d 836 (1958).

[57] *See* CPLR §§ 305 & 3215(e).

[58] CPLR 320(b).

[59] Two exceptions are the limited appearance under CPLR 320(c) and the restricted appearance under CPLR 320(b).

[60] Everitt v. Everitt, 4 N.Y.2d 13, 18, 148 N.E.2d 891, 894, 171 N.Y.S.2d 836, 840 (1958) (dissenting opinion). *But see* 3 WK&M ¶ 3025.10.

[61] 7B MCKINNEY'S CPLR 320, supp. commentary at 244 (1970).

[62] *See* FIFTEENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK A109-113 (1970).