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Article 17

CPLR 308(4): Substituted Service Permitted Upon Plaintiff's Own Insurer As "Real Party in Interest"

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from the defendant in quantum meruit for their services in that connection. Defendant never entered New York personally, and he contended that the New York court had failed to obtain jurisdiction over him because his Chicago attorneys were "independent contractors" and not "agents"; therefore, their acts in New York could not be attributed to him.

Defendant moved to dismiss the complaint, but Justice Meyer denied the motion without prejudice since the papers failed to indicate whether or not the defendant had authorized the Chicago attorneys to proceed in New York on the Illinois judgment. In the court's view, if defendant had authorized the institution of the action on the Illinois judgment in New York, then the retention of the plaintiffs by the Chicago attorneys was an act by agents of the defendant. However, if the Chicago attorneys had independently determined there was a need to engage the plaintiffs, their actions were those of independent contractors which could not be deemed to be the acts of the defendant. The defendant would be able to establish the nature of the Chicago attorneys' acts in his answer when he again asserted that the New York courts lacked jurisdiction over him.

Justice Meyer has dealt with the problem of the agent-independent contractor dilemma in an exemplary manner. However, it is hoped that either an appellate authority or the legislature recognizes the immediate need to reconsider *Millner* and CPLR 302(a) in the light of both *Elman* and Professor McLaughlin's position. Access to the New York courts should not be denied to residents who perform purposeful acts within the state on behalf of non-domiciliaries merely because of technical distinctions which often prove meaningless for jurisdictional purposes.

CPLR 308(4): Substituted service permitted upon plaintiff's own insurer as "real party in interest."

CPLR 308(1), (2) and (3) provide three methods by which service of a summons upon a natural person shall be made.[43] CPLR 308(4), however, allows a court to substitute a fourth method of its own choosing when service by one of the other three methods proves impracticable. Of course, the alternate method which a court directs must meet due process requirements.

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[43] By delivery to such person within the state; by delivery within the state to his agent designated pursuant to CPLR 318; and by mailing the summons to such person's last known address and ensuring that the summons is also properly left at his place of business, dwelling house or usual place of abode within the state. CPLR 308.

At one time it was mandatory that the means of service employed be reasonably calculated to give a defendant actual notice of the proceedings.[44] However, in *Dobkin v. Chapman*,[45] the Court of Appeals upheld a method which concededly did not provide actual notice. The Court accepted the contention that a liability insurer (MVAIC) was the "real party in interest"; substantial justice would therefore be served by allowing service upon the insurer and substituted service by ordinary mail upon the defendant at his last known address even though repeated attempts to give defendant actual notice of the proceedings at that address had failed. The Court justified its position in part by noting that there existed an opportunity for the defendant to reopen the case under CPLR 317, and this would further serve to protect his interests.[46]

Dobkin was recently relied upon successfully in *Pieret v. Murray*,[47] a case distinguished by a novel fact pattern. The plaintiff in *Pieret* was injured when her car, driven by defendant, collided with an abutment. When the defendant could not be served at his alleged address, plaintiff applied for substituted service upon the defendant by ordinary mail in conjunction with service upon her insurer. She contended that the insurance carrier was the real party in interest in view of the fact that the defendant-driver was an insured under her liability policy at the time of the accident. In reality, therefore, the insurer would be ultimately liable for any judgment not in excess of the policy limits.

The situation presented thus differed from the one in *Dobkin* in that there was but one car involved, and plaintiff was contending that her *own* insurer was the real party in interest. The court found *Dobkin* controlling however, and held that the method of service plaintiff sought to employ would be permissible if she could sufficiently demonstrate that the other means of service provided by CPLR 308 were impracticable.[48]

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44 Milliken v. Meyer, 311 U.S. 457 (1940).

45 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968).

46 *See The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 310 (1968).

47 59 Misc. 2d 201, 298 N.Y.S.2d 201 (N.Y.C. Civ. Ct. Bronx County 1969).

48 The court required submission of the following information:

1. An affidavit by plaintiff setting forth in detail how long she knew defendant prior to the accident, whether she knew where he ever lived or worked etc., 2. An affidavit by the process server stating at what times and on what days service was attempted on the defendant at 1500 Noble Avenue, Bronx, New York City. Said affidavit should set forth the names and apartment numbers of the tenants the process server claims he spoke to about defendant's living there and whether he spoke to the superintendent of the building. 3. Copy of Police Blotter. 4. Copy of envelope returned from Post Office to attorney for plaintiff containing the notation thereon that defendant had "moved and left no address." 5. A statement by plaintiff's attorneys as to what they did to obtain information arising out of the disposition, if any, by the Criminal Court of the charge as to the issuance of

The decision appears to be well within the *Dobkin* rationale. In both situations service is made upon a "token defendant" and an insurer who is the real party in interest in order to afford a presumably worthy plaintiff a forum. Furthermore, the cases are in harmony with the philosophy adopted by the Court of Appeals in *Seider v. Roth.*[49]

CPLR 311(1): "Acting" managing agent not managing agent for purpose of receiving service on behalf of corporation.

CPLR 311(1) substantially adopts and combines the provisions of CPA 228(8) and (9) and CPA 229,[50] thus apparently ending the troublesome distinction between service on domestic and foreign corporations.[51] However, practitioners are still faced with a problem that existed under the CPA — when is defendant's employee a "managing agent" for purposes of determining whether or not delivery of the summons upon him will constitute personal service upon the corporation?[52]

While the statute is clear on its face,[53] it is often difficult, if not impossible, for a process server to determine if the recipient of the summons is indeed what he purports to be — a managing agent in fact.[54] Moreover, managing agents are not always readily available to

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the summons by the police to the defendant for operating an automobile without an operator's license, at the time of the accident. 6. A letter from the Dept. of Motor Vehicles of the State of New York stating whether their records indicate whether or not defendant has an operator's license and what address it has for defendant.

59 Misc. 2d at 203-04, 298 N.Y.S.2d at 203-04. Counsel involved in litigation over substituted service and a real party in interest should endeavor to accumulate this information and material in advance of any application to a court under CPLR 308(4).

49 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). *See generally* Note, *Seider v. Roth: The Constitutional Phase,* 43 ST. JOHN'S L. REV. 58 (1968).

50 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 311.01 (1968).

51 *Compare* Kiely v. Utica Gas & Elec. Co., 134 Misc. 258, 235 N.Y.S. 288 (County Ct. Herkimer County 1929) *with* SECOND REP. at 161 n. 8.

52 At this juncture it should be noted that one authority has suggested that, practically speaking, a lesser quantum of proof may be required to establish that someone is a managing agent for a foreign corporation, in contrast to a domestic corporation, due to the fact that there are less personnel to receive process on its behalf. 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 311.05 (1968).

53 CPLR 311 provides, in part, that:

> Personal service upon a corporation . . . shall be made by delivering the summons as follows:
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> 1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier. . . .

54 In Taylor v. Granite State Provident Ass'n, 136 N.Y. 343, 346, 32 N.E. 992, 993 (1893), the Court of Appeals defined a managing agent as

> some person invested by the corporation with general powers involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney, who acts in an inferior capacity and under the discretion and control of superior authority, both in regard to the extent of his duty and the manner of executing it.

But see Palmer v. Pennsylvania Co., 35 Hun. 369 (2d Dep't), *aff'd,* 99 N.Y. 679 (1885). "Every object of the service is attained when the agent is of sufficient character and rank