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CPLR 311(1): "Acting" Managing Agent Not Managing Agent for Purpose of Receiving Service on Behalf of Corporation

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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

accept service of process, and alternative, authorized personnel may be difficult to locate. It is for these reasons that several exceptions to strict compliance with the statute have arisen.

A case arising under the CPA[55] illustrates one such exception. In *Collini v. Turner Construction Co.*,[56] service was upheld upon defendant's head bookkeeper who was temporarily acting as a managing agent. The defendant was a domestic corporation employing forty to fifty people at the premises where service was effected. However, the bookkeeper's superior, who was authorized to accept service of process, was on vacation, and the only other available person so authorized was the corporation president who was not informed of the process server's presence. The bookkeeper had previously accepted service of approximately six garnishee orders in the corporation's behalf, and, although she was not certain, she also thought she had previously accepted other legal documents for the corporation. On the occasion in question, she promised to "take care" of the summons and complaint. The court reasoned that CPA 228 could, in the proper circumstances, be liberally construed so as to apply to one acting as a managing agent at the time of service. Moreover, the court expressed the following view:

> It is inconceivable that where, as here, the president is undisturbed in his private office and the comptroller [the bookkeeper's superior] is away on vacation that no person remains qualified to act as managing agent in so large an establishment.[57]

The *Collini* exception was adopted and clarified without reference by the supreme court in *Buckner v. D. & E. Motors, Inc.*[58] In *Buckner*, plaintiff's attorney served defendant's office manager on the business premises after he was told that the owner was absent. The defendant later contended that the office manager was not the proper person to serve pursuant to CPLR 311(1), but the court, declaring that the section called for a liberal construction, held that the statute may be properly interpreted to apply to one who is acting as a managing agent at the time of service. In this court's view, it was decisive that the office manager had held himself out as a person of responsibility. He had

to make it reasonably certain that the defendant will be apprised of the service made." 35 Hun. at 371. *See also* Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917).

55 It should be noted that "the [CPLR's] phraseology . . . 'managing or general agent' is intended to simplify [the phraseology found in the CPA] *without any change in substance.* . . ." SECOND REP. at 161 n. 8. (emphasis added).

56 129 N.Y.S.2d 485 (Sup. Ct. Kings County 1954).

57 *Id.* at 486.

58 53 Misc. 2d 382, 278 N.Y.S.2d 932 (Sup. Ct. Erie County 1967).

neither objected to accepting the summons nor had he informed plaintiff's attorney that he was unauthorized to receive the same.[59]

Green v. Morningside Heights Housing Corp.,[60] illustrates a second exception formulated by the courts in order to ensure that the provisions for service upon domestic or foreign corporations are not drowned in a sea of technicalities. In *Green*, service upon a managing agent's receptionist under the CPA was upheld on the ground that "[w]here the delivery is so close both in time and space that it can be classified as part of the same act, service is effected."[61] This conclusion was reached in spite of the fact that an executive vice-president was apparently available on the premises to receive service of process.

The courts, however, have not always been so liberal in their construction of the foregoing provisions. Indeed, they have often held due diligence to be a condition precedent to the effectuation of valid personal service where such service has been made upon the wrong person. This is true even if the summons is subsequently received by the correct party within a short time thereafter.[62] In *McDonald v. Ames Supply Co.*,[63] the Court of Appeals stated that the reason for this rule lies in the fact that to hold otherwise "would negate the statutory procedure for setting aside a defectively served summons, since the motion itself is usually evidence that the summons has been received. . . ."[64]

The most recent pronouncement in the area was rendered by the Appellate Division, Third Department, in *Isaf v. Pennsylvania Railroad Co.*[65] Plaintiffs were unable to properly serve the co-defendant and appellant, the Erie-Lackawanna Railroad Co., by serving the Secretary of State pursuant to the New York Business Corporation

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59 *But see* Coles v. Pittsburgh Bridge Co., 146 N.Y. 281, 40 N.E. 779 (1895); Loeb v. Star & Herald Co., 187 App. Div. 175, 179, 175 N.Y.S. 412, 415 (1st Dep't 1919): "That [the person served] assumed to act as agent for the defendant is not sufficient. He must have been authorized by it so to act."

60 13 Misc. 2d 124, 177 N.Y.S.2d 760 (Sup. Ct. N.Y. County), *aff'd*, 7 App. Div. 2d 708, 180 N.Y.S.2d 104 (1st Dep't 1958).

61 13 Misc. 2d at 125, 177 N.Y.S.2d at 761.

62 *See, e.g.*, McDonald v. Ames Supply Co., 22 N.Y.2d 111, 238 N.E.2d 726, 291 N.Y.S.2d 328 (1968) (summons left with building receptionist without even ascertaining if she was defendant's employee); Commissioners of State Ins. Fund v. Singer Sewing Mach. Co., 281 App. Div. 867, 119 N.Y.S.2d 802 (1st Dep't 1953) (summons left with receptionist when any one of defendant's thirteen available officers could have been served with due diligence); O'Connell v. Gallagher, 104 App. Div. 492, 93 N.Y.S. 643 (1st Dep't 1905) (summons left on floor of defendant's residence before defendant's employee whom the server "thought" was defendant). *Contra*, Erale v. Edwards, 47 Misc. 2d 213, 262 N.Y.S.2d 44 (Sup. Ct. Suffolk County 1965). *See The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 303, 313 (1966).

63 22 N.Y.2d 111, 238 N.E.2d 726, 291 N.Y.S.2d 328 (1968).

64 *Id.* at 115, 238 N.E.2d at 728, 291 N.Y.S.2d at 331.

65 32 App. Div. 2d 578, 299 N.Y.S.2d 231 (3d Dep't 1969).

Law[66] because the appellant was a domestic railroad.[67] Accordingly, plaintiffs' attorney endeavored to serve appellant at one of its railroad stations. The freight agent was temporarily absent, but appellant's chief clerk, after being informed of the reason for the attorney's visit, agreed to accept service of the summons and complaint, whereupon he was served. The freight agent returned within one-half hour after service, received and read the papers, called his superior, and forwarded copies of the papers to appropriate representatives of the appellant the very same day. The chief clerk subsequently testified that he was in charge of the office when the freight agent was absent, and that he had received service of garnishee orders in appellant's behalf on several occasions.

On the basis of these facts, special term held that the freight agent qualified as a "managing agent" under CPLR 311, and that the chief clerk became an acting "managing agent" upon whom service could also properly be made since he took charge of the office in the freight agent's absence. The appellate division, reversing on the law and the facts, granted appellant's motion to dismiss the complaint and to vacate and set aside service of the summons and complaint.

The court was certain that the chief clerk's duties (clerk, bookkeeper and timekeeper) were not the acts of a managing agent within the intendment of the CPLR. Moreover, his temporary assumption of the freight agent's duties was qualitatively insufficient to authorize service upon him as an agent of the defendant corporation and subsequent redelivery of the papers to those authorized to receive them did not validate the process.[68]

The *Isaf* decision is thus based upon the premise that the chief clerk could not, under the circumstances, become a managing agent even for a temporary period. This holding appears to be both hypertechnical and untenable.

Collini recognized the principle that one could temporarily assume the role of managing agent for service of process in a large establishment where no one else was available to accept service. Except for the size of the establishment at which service was attempted,[69] the facts in *Isaf* are strikingly similar to the facts in *Collini*. In addition, the *Buckner* decision clearly establishes that one can satisfy the re-

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[66] N.Y. BUS. CORP. LAW § 306 (McKinney 1963).

[67] *See id.* § 103 (exclusion for corporations formed under the New York Railroad Law).

[68] 32 App. Div. 2d at 579, 299 N.Y.S.2d at 233.

[69] Service in *Isaf* was attempted at appellant's station in Elmira, New York, a "business establishment" concededly smaller with respect to the number of employees than the defendant's premises in *Collini*.

quirement for a managing agent by holding himself out as one responsible to accept service and inform the corporate defendant thereof. The chief clerk in *Isaf* apparently did just that. Furthermore, the facts in *Isaf* readily lend themselves to the "close in time and space" principle enunciated in *Green*.

Moreover, the cases relied upon by the appellate division in *Isaf* (*McDonald v. Ames Supply Co.*[70] and *Clark v. Fifty Seventh Madison Corp.*[71]) are clearly distinguishable. In *McDonald*, the person served was the building receptionist, and the process server was not sure that she was defendant's employee; in *Clark*, the recipient was not identified in the opinion. In neither case, however, could the plaintiff contend that he had acted with the same reasonableness and diligence exercised by the plaintiff in *Isaf*. And in *McDonald*, the Court of Appeals stated that in some instances

> service is sustained even though the process server did not in fact hand the summons to the proper party. . . . In [such] cases, the process server has acted reasonably and diligently in attempting to fulfill the statutory mandate and under circumstances bringing the questioned process within the purview of the person to be served. Consequently, upholding service in such cases does not endanger the statutory scheme by encouraging careless service.[72]

It is submitted, therefore, that the *Isaf* court failed to reach the proper conclusion, and it is hoped that future cases will construe CPLR 311(1) more liberally in an effort to "adhere less strictly to form and give greater recognition to reality."[73] Nevertheless, the case illustrates the close questions involved in the selection of a managing agent for service of process, and serves as a warning to the practitioner that he must exercise the utmost care in the selection of a corporate representative upon whom such service may be made.[74]

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70 22 N.Y.2d 111, 238 N.E.2d 726, 291 N.Y.S.2d 328 (1968).

71 13 App. Div. 2d 693, 213 N.Y.S.2d 849 (2d Dep't), *appeal dismissed*, 10 N.Y.2d 808, 178 N.E.2d 225, 221 N.Y.S.2d 509 (1961).

72 22 N.Y.2d at 115-16, 238 N.E.2d at 728, 291 N.Y.S.2d at 331-32, *citing*: Marcy v. Woodin, 18 App. Div. 2d 944, 237 N.Y.S.2d 402 (3d Dep't 1963) (personal service upon defendant's son upheld); Green v. Morningside Heights Housing Corp., 13 Misc. 2d 124, 177 N.Y.S.2d 760 (Sup. Ct. N.Y. County), *aff'd*, 7 App. Div. 2d 708, 180 N.Y.S.2d 104 (1st Dep't 1958). *But see* Ives v. Darling, 210 App. Div. 521, 206 N.Y.S. 493 (3d Dep't 1924) (personal service upon defendant's husband at her request held invalid in absence of justifying factors).

Cf. cases upholding personal service upon natural persons where the defendants resisted service, and the process servers left the summonses in their general vicinity: Buscher v. Ehrich, 12 App. Div. 2d 887, 209 N.Y.S.2d 941 (4th Dep't 1961); Chernick v. Rodrigues, 2 Misc. 2d 891, 150 N.Y.S.2d 149 (Sup. Ct. Kings County 1956); Levine v. National Transp. Co., 204 Misc. 202, 125 N.Y.S.2d 679 (Sup. Ct. Queens County 1953).

73 Marcy v. Woodin, 18 App. Div. 2d 944, 945, 237 N.Y.S.2d 402, 403 (3d Dep't 1963).

74 *See* 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 311.06 (1968).