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CPLR 303: Court Declares Personal Delivery To Be the Only Acceptable Method of Service

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thus overcome the otherwise harsh effect of the statute of limitations.[81] These results are clearly justifiable, because in circumstances where no prejudice to a defendant is evident, the statute of limitations is satisfied by sufficient notice in the original pleading.

ARTICLE 3 — JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 303: Court declares personal delivery to be the only acceptable method of service.

Pursuant to CPLR 303, the commencement of an action in New York by one who is not himself subject to personal jurisdiction in the state is an automatic designation of his attorney in the action, during its pendency, as his agent for service of process.[82] The section also contains a provision to the effect that service upon such an agent is deemed to be service upon his principal only in any other action in which the principal is a defendant and a party to the principal's original action is a plaintiff if the subsequent action, had it been brought in the supreme court, would have been permitted as a counterclaim.[83] However, the statute does not indicate what manner of service must be employed. In *Twentieth Century-Fox Film Corp. v. Dupper*,[84] the first department, in a per curiam opinion, recently held that since the statute is silent on this point, only personal delivery will suffice; substituted service, apparently employed in *Twentieth Century-Fox*, will be deemed void.

Pre-CPLR case law would seem to support the court's conclusion.

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81 *See, e.g.*, Ringle v. Bass, 46 Misc. 2d 896, 260 N.Y.S.2d 1006 (Sup. Ct. Ulster County 1965); Berlin v. Goldberg, 48 Misc. 2d 1073, 266 N.Y.S.2d 475 (N.Y.C. Civ. Ct. N.Y. County 1966).

Where a defendant has notice of an action for personal injuries arising from an automobile collision and is thereby apprised of possible liability for property damage, there is no reason to allow the statute to continue running. In such an instance it is appropriate to apply the principle of laches; and, where no prejudice is shown, the amendment is proper. 1 W. K. & M. ¶ 203.30.

82 Although it would seem that the section cannot be employed where the defendant is, in fact, subject to personal jurisdiction when his agent is served, a federal district court has held that no attempt at service upon the defendant is necessary in the first instance. Miller v. Massa, 237 F. Supp. 915 (S.D.N.Y. 1965).

The resultant agency relationship begins with the service of process and terminates with entry of the final judgment in the action commenced by that service. Concourse Super Serv. Station, Inc. v. Price, 33 Misc. 2d 503, 226 N.Y.S.2d 651 (Sup. Ct. Bronx County 1962). Similar statutory schemes have been upheld as a proper exercise of the state's jurisdiction. *E.g.*, Adam v. Saenger, 303 U.S. 59, 67-68 (1938).

83 It has been recognized that this provision is expansive rather than restrictive, as it permits the plaintiff to bring his action without being bound by jurisdictional monetary limits in the court in which the first action was brought. 1 W. K. & M. ¶ 303.07.

84 33 App. Div. 2d 682, 305 N.Y.S.2d 918 (1st Dep't 1969).

For example, in *Cirigliano v. Brown*[85] a requirement of notice in a rent regulation statute governing holdover proceedings was held to mean notice by personal service in the absence of specific legislative authorization sanctioning a different mode of service. And, in *Stevens v. State*,[86] the case relied upon by the *Twentieth Century-Fox* court, this principle was recognized in a secondary holding by the appellate division. *Stevens* dealt with service of a judgment with notice of entry upon an adverse party's attorney, and under the CPA[87] and RCP[88] service by mail was held to be invalid; of course, the same would be true today under the CPLR which perpetuates the dichotomy between initiatory process and interlocutory papers.[89]

Even though the result arrived at in *Twentieth Century-Fox* is undoubtedly correct, the court's declaration that personal *delivery* is the only acceptable method of service upon a 303 agent is questionable in view of the alternatives presented by CPLR 308. In the latter section the legislature provided methods for effecting personal *service* upon "the person to be served." This phrase was adopted in lieu of the CPA language — "to the defendant in person"[90] — in recognition of CPLR provisions permitting service upon persons other than the defendant.[91] Because of CPLR 308's expanded concept of personal service, it should no longer be equated with personal *delivery*, and it seems clear that personal delivery is now merely one of the ways to effect personal service. In short, CPLR 308 designates *how* service may be made, and not *who* may be served. Thus, the 308(3) "nail and mail" method of service should be available for serving a 303 agent if the server has fulfilled the due diligence requirement[92] contained in 308 (1). Moreover, 308(4), which enables a plaintiff to move for a court order authorizing substituted service, should also be a valid mode of service upon a 303 agent when service under either 308(1) or 308(3) is impracticable. Indeed, in view of the scope of the CPLR, the modes of service made available by 308 should be useful in any statutory

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85 185 Misc. 329, 57 N.Y.S.2d 113 (N.Y.C. Munic. Ct. 5th Dist. 1945).

86 277 App. Div. 418, 100 N.Y.S.2d 826 (3d Dep't 1950); *see also* Duckworth v. Duckworth, 200 Misc. 10, 105 N.Y.S.2d 617 (Sup. Ct. N.Y. County 1951).

87 CPA 225.

88 RCP 20.

89 *Compare* CPLR 307-315 and CPLR 403(c) & (d) *with* CPLR 2103.

90 CPA 225(3). *See* CPA 230 & 231.

91 *See* CPLR 303, 311, & 318; 1 W. K. & M. ¶¶ 308.11 and 308.15.

92 *See* Blatz v. Benschine, 53 Misc. 2d 352, 278 N.Y.S.2d 533 (Sup. Ct. Queens County 1967). One notable treatise is in accord with the *Twentieth Century-Fox* court's holding that personal delivery is the proper method when service is directed without specifying the method. *See* 2A W. K. & M. ¶ 2103.04.

scheme which requires notice but which fails to designate the method of service to be employed.[93]

As indicated previously, however, the plaintiff in *Twentieth Century-Fox* would not have fared any better under this construction of the statute since he had not complied with CPLR 308 to any degree. And, the courts have repeatedly held that substituted service cannot be utilized without express statutory authority or court permission.[94] Nevertheless, a valid argument can be made that the rules for service upon a 303 agent should be more relaxed than the other rules governing service of initiatory process, and that service upon such an agent should be valid if the summons and complaint are mailed to, or left at, his office. This follows from the very character of CPLR 303: the section can only be utilized when a defendant in the first action wishes to bring a cause of action in the nature of a counterclaim against the party who commenced that action.[95] Counterclaims are interposed by an answer,[96] and it is always permissible to serve answers upon the plaintiff's attorney by personal delivery, mail, or by leaving it at his office.[97] Thus, the requirement for personal service of process upon a 303 agent could be viewed as comparatively restrictive. Justification for this distinction might lie in the fact that after service is made in an action an attorney anticipates receipt of certain papers relating thereto, and this would not be true of a summons commencing an independent action against his client. However, motions papers are not always anticipated, and they may be served by mail.[98] Therefore, perhaps the solution in such a case is to permit a more liberal method of service while also liberalizing the ability to vacate a default judgment if the defendant can make a satisfactory showing that he has not received the summons and had no notice of the action.

In any event, the courts and practitioners should realize the utility of CPLR 308 in cases where personal delivery cannot be effected upon the person to be served pursuant to a statute which is silent on the method of service required.

ARTICLE 5 — VENUE

CPLR 506(b)(2): Express venue provision for comptroller held controlling in action with multiple defendants.

93 *See* CPLR 101.
94 *See* notes 85 and 86 *supra* and accompanying text.
95 *See* 7B McKINNEY'S CPLR 303, commentary 440-41 (1963).
96 CPLR 3011.
97 CPLR 2103(b).
98 *Id.*