

## CPLR 308(4): Designee Faced with Procedural Dilemma

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of notification is all that the situation permits."<sup>27</sup> The primary justification for upholding such "futile" service comes from an examination of the defendant's duties following an accident, and from an examination of the feasible methods for locating the defendant that are left open to the plaintiff.

The Court of Appeals felt that anyone involved in a serious automobile accident is aware that he may be involved in a suit. He, therefore, as a potential defendant, has a duty to keep his whereabouts known by contacting either the other parties involved, his insurance company, or the post office. In concluding, the Court also pointed out how the interplay of CPLR 317 with CPLR 308 may prevent any harsh results by allowing a defendant, who was not personally served, and who did not appear, to be relieved of a default judgment within the proper time and under the proper circumstances.

*CPLR 308(4): Designee faced with procedural dilemma.*

In *Cosby v. Moyant*,<sup>28</sup> the defendants' attorney was designated to receive process on defendants' behalf, pursuant to court order under CPLR 308(4).<sup>29</sup> The attorney attempted to make a special appearance to object to the designation on the grounds that he was not representing the defendants in the matter in issue.

The Court held, however, that since the enactment of CPLR 320(b) the procedure of making a special appearance to contest jurisdiction has been abandoned<sup>30</sup> and that such challenges can now be asserted only by motion or in a responsive pleading.

It is submitted that, where the court has deemed it appropriate to serve a summons through a designee, that individual should have a simple procedure to challenge whether or not he is in fact a proper designee. There is at present no procedure set forth in the CPLR for such a challenge and the designee is thus faced with a dilemma. He might be left in a position of potential liability to the defendant for not redelivering the service, yet, he might be totally unaware of who the defendant is or how to locate him. Furthermore, if the designee must appear either by motion or by a responsive pleading of the defendant, it must be assumed that the party served is not only the proper designee for service but that he has authority to appear for the defendant. This authority

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<sup>27</sup> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950).

<sup>28</sup> 55 Misc. 2d 393, 285 N.Y.S.2d 980 (Sup. Ct. N.Y. County 1967).

<sup>29</sup> Service has been allowed upon someone other than the defendant when it is shown that his relationship to the defendant is such that it is reasonably probable that the defendant will become aware of the action. See 7B MCKINNEY'S CPLR 308(4), *supp.* commentary 132 (1966).

<sup>30</sup> See 7B MCKINNEY'S CPLR 320, *commentary* 577-78 (1963).

the court cannot confer; only the defendant can authorize another to appear in his behalf.

*CPLR 316: Mailing requirement interpreted.*

In *Gross v. Gross*,<sup>31</sup> a divorce action, plaintiff-wife sought support and maintenance. Unable to effectuate personal service, she was granted an order to serve defendant by publication pursuant to the procedures of CPLR 316. The court first concluded that it was proper to assert in personam jurisdiction over the defendant as a resident of New York since the parties were married here and made their residence here. Although the defendant could not be found, no evidence was submitted that he was a non-resident and thus, a presumption of his residence continued.<sup>32</sup> The court then met a challenge that due process had not been fulfilled by substituted service, concluding that publication afforded defendant reasonable notice and a fair opportunity to be heard.<sup>33</sup>

This case may provide one of the few interpretations of 316's mailing requirement. Under 316, where service is by publication in a matrimonial action, a copy of the summons must be mailed to the defendant. The standard by which such a mailing's effectiveness is to be judged can possibly be gleaned from the provision under which such mailing may be dispensed with by the court. The section states that such mailing must be made "unless a place where such person *probably would* receive mail cannot with due diligence be ascertained."<sup>34</sup> This would seem to suggest that such mailing as establishes a probability that it will reach the defendant is sufficient. Here, the mailing of the summons to the husband in care of his father was held to be satisfactory.

*N.Y. Const. art. VI, § 7(c): Court of Appeals clarifies breadth of supreme court's jurisdiction.*

As a court of general original jurisdiction, the supreme court, in the past, has been held to have subject matter jurisdiction over all common-law actions<sup>35</sup> and all statutorily-established actions unless the Legislature in creating the latter specifically negatives this result.<sup>36</sup> The 1962 amendment to section 7 of the judiciary article of the New York Constitution has prompted recent review of the

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<sup>31</sup> 56 Misc. 2d 286, 288 N.Y.S.2d 674 (Sup. Ct. King's County 1968).

<sup>32</sup> *Harris v. Harris*, 83 App. Div. 123, 82 N.Y.S. 568 (2d Dep't 1903).

<sup>33</sup> *McDonald v. Mabey*, 243 U.S. 90 (1917); *Rawstorne v. Maguire*, 265 N.Y. 204, 192 N.E. 294 (1934).

<sup>34</sup> CPLR 316(b) (emphasis added).

<sup>35</sup> *In re Steinway*, 159 N.Y. 250, 255-58, 53 N.E. 1103, 1104-05 (1899).

<sup>36</sup> *Thrasher v. United States Liab. Ins. Co.*, 19 N.Y.2d 159, 166, 225 N.E.2d 503, 506, 278 N.Y.S.2d 793, 798 (1967).