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CPLR 308(4): Service by Publication Authorized in Negligence Action

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It should also be noted that the defendant had actually received the mailed summons and thereby had notice of the prospective litigation. Therefore, the defendant could not defend on the basis of lack of notice. Moreover, it is apparent that the defendant had not sustained his burden of proving that the Buffalo residence was no longer his "usual place of abode" within the meaning of the statute. Procedurally, *Rich* has as its salient feature the fact that the party alleging a change of domicile will be required to make a substantial showing of a severance of his ties with New York in addition to the acquisition of out-of-state facilities.

CPLR 308(4): Service by publication authorized in negligence action.

In *Deredito v. Winn*,[16] the nonresident defendant was involved in an automobile accident in New York. Since the defendant's address was unknown to plaintiff, personal jurisdiction was predicated upon service by publication alone. The appellate division, second department, unanimously held that:

> article 3 of the CPLR does not authorize service by publication upon . . . nondomiciliary defendants . . . where: (a) no prior attachment of their property in this state has occurred and (b) a finding could not properly be made that service by publication would give notice to them of the action and an opportunity to defend themselves.[17]

Subsequent to *Deredito*, the appellate division, second department, handed down the companion decisions of *Sellars v. Raye* [18] and *Dobkin v. Chapman*.[19] *Dobkin* held that due process was satisfied by service effected by the mailing of the summons to an address given by the defendant at the scene of an automobile accident, despite the fact that the defendant no longer resided there. The *Sellars* court, under factually similar circumstances, held that service upon the Secretary of State, plus registered mail sent to the address supplied by the defendant at the accident, as well as publication in the vicinity of that address was sufficient. Dissenting opinions in both *Sellars* and *Dobkin* reasoned that there was no distinction between the facts of *Deredito* and those of *Sellars* and *Dobkin*, and, therefore, *Deredito* was controlling.

A recent supreme court decision in the second department, *Gibbs v. Baldwin*,[20] has held that service by publication was

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[16] 23 App. Div. 2d 849, 259 N.Y.S.2d 200 (2d Dep't 1965).
[17] *Id.* at 849-50, 259 N.Y.S.2d at 201.
[18] 25 App. Div. 2d 757, 269 N.Y.S.2d 7 (2d Dep't 1966).
[19] 25 App. Div. 2d 745, 269 N.Y.S.2d 49 (2d Dep't 1966).
[20] 52 Misc. 2d 268, 275 N.Y.S.2d 861 (Sup. Ct. Suffolk County 1966).

sufficient to acquire personal jurisdiction over a nonresident motorist after all other attempts at service had failed. Although *Gibbs* relied on *Sellars* as authority for its holding, it did not mention *Deredito* at all. Possibly the *Gibbs* court considered that the *Sellars* and *Dobkin* decisions had eroded *Deredito* to the point that it was no longer controlling. However, *Sellars* and *Dobkin* were concerned with non-personal service by means other than by publication alone, whereas *Gibbs* and *Deredito* involved service by mere publication. This fact would appear to be a sufficient distinction to warrant the conclusion that the *Gibbs* court should have been bound by *Deredito.*

Assuming, however, that *Gibbs* is in accord with *Dobkin* and *Sellars,* and is not controlled by *Deredito,* a further problem arises: the conflict between the first and second departments concerning the constitutionality of substituted service directed at an address at which the plaintiff knows the defendant does not reside. The appellate division, second department, has upheld such service in *Dobkin* and *Sellars.* However, the appellate division, first department, is not in accord. Under the first department's decision in *Polansky v. Paugh,*[21] where it appears that the defendant no longer resides at the only address known to the plaintiff, substituted service directed at that address does not comply with the constitutional requirement of due process.[22] A fortiori, it would seem that under the *Polansky* rationale, service by publication under similar facts would be equally unconstitutional. Yet, *Gibbs* has permitted service by publication under CPLR 308(4), and thereby has accentuated the conflict between the departments as to the dictates of due process.

While the United States Supreme Court has indicated that publication is the least likely method to provide actual notice of the pendency of litigation, it has not entirely precluded its use in certain cases where the defendant's whereabouts was unknown.[23] The essential requirement of service as enunciated by the Court is that the method must be "reasonably calculated" to apprise the defendant of the action against his interest and give him a reasonable opportunity to defend.[24] Consequently, in regard to in rem actions, it has generally been held that service by publication alone will satisfy the requirements of due process [25] since the owner of the res is deemed to have knowledge

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[21] 23 App. Div. 2d 643, 256 N.Y.S.2d 961 (1st Dep't 1965).

[22] Despite the fact that the cases were decided under different sections of CPLR 308, the same due process requirements are applicable to each.

[23] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). There it was held that service by publication upon certain unknown beneficiaries of a trust was constitutional since there was no other recourse.

[24] *Ibid.*

[25] CPLR 315.

of the status of his possessions. However, in an in personam action, no such additional factor being present, service by publication cannot be expected to reach the defendant. It would, therefore, seem likely that the Supreme Court would not react favorably to a case where in personam jurisdiction is to be founded upon notice by publication alone.

It may be possible, however, to justify service by publication in actions arising from automobile accidents. In light of decisions permitting service by publication alone in in rem actions, it may well be asserted that where a party has been involved in an automobile accident requiring the exchange of license information, such as in *Gibbs*, *Polansky*, *Sellars* and *Dobkin*, he shall be presumed to have constructive notice of the possibility of some judicial action in the near future. The onus, therefore, should be upon him to permit the other party to maintain contact with him. This result may be accomplished by requiring him to provide a forwarding address upon moving from the address given at the scene of the accident. When he has failed to do so, service could then be effected by publication.

In a case where a plaintiff obtains a default judgment on a cause of action arising from an automobile accident due to the defendant's lack of actual notice, the defendant's rights are protected by CPLR 317 which permits him to open the default and defend on the merits. However burdensome this procedure may be to a defendant, it would appear that a greater injustice arises when a plaintiff is precluded from all legal recourse due to the defendant's moving to an unknown address thereby making personal or constructive service upon him impossible.

ARTICLE 10 — PARTIES GENERALLY

CPLR 1007: Legal expenses not allowed.

Frank Angelilli Constr. Co. v. Sullivan & Son, Inc.[26] involved an action by a customer against its supplier for breach of warranty of merchantability in which the supplier impleaded the manufacturer under CPLR 1007. As part of the indemnification, the supplier sought legal expenses.

Generally, in the absence of statutory or contractual liability, legal expenses in litigating a cause of action are not recoverable.[27] However, there is some New York precedent allowing their

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[26] 52 Misc. 2d 306, 276 N.Y.S.2d 181 (Sup. Ct. Westchester County 1966).
[27] Edelman v. Goodman, 47 Misc. 2d 8, 261 N.Y.S.2d 618 (Sup. Ct. Kings County 1965).