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CPLR 308(1): Redelivery of Service Held Improper Where No Exigent Circumstances Found

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avoid being brought to task in New York for a tort committed while he was a domiciliary here.

CPLR 308(3): Server's testimony as to custom and habit allowed exigent circumstances found.

In *Miller v. Alda Corp.*,[8] a summons and complaint were left at the defendant Hasso's office. The papers were delivered to the defendant several days later by one of his business associates.[9] The court held the service upon the defendant improper under CPLR 308(1), since it failed to meet that section's requirement of personal delivery,[10] and no special circumstances sufficient to justify departure from the requirement was found.[11] It cited two instances where redelivery to the party to be served by one other than plaintiff's agent would generally be allowed: when the redelivery is "so close both in time and space that it can be classified as part of the same act"[12] and when the defendant attempts to evade or block service.[13] Additionally, it mentioned some recent decisions upholding re-transmission under 308(1) in other than the two generally accepted instances,[14] but distinguished these from the present case. The court maintained that to approve the method of service in the instant case would render CPLR 308(1) similar to 308(3) without that section's safeguard of prior due diligence to make personal service.

The wisdom of the court's decision in the instant case is apparent. Much of the service performed presently is suspect. To expand the exceptions to 308(1) beyond a bare minimum

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[8] 53 Misc. 2d 279, 278 N.Y.S.2d 574 (N.Y.C. Civ. Ct. 1967).

[9] While the record was unclear as to whether delivery had been made by one Savidge, a co-defendant, or Savidge's wife, not a party to the action, the Court assumed for purposes of its opinion that delivery had been made by the wife, since delivery by Savidge would have been void under CPLR 2103(a).

[10] "Personal service upon a natural person shall be made: (1) by delivering the summons within the state to the person to be served. . . ." CPLR 308(1).

[11] Miller v. Alda Corp., 53 Misc. 2d 279-80, 278 N.Y.S.2d 574, 576 (N.Y.C. Civ. Ct. 1967).

[12] Green v. Morningside Heights Housing Corp., 13 Misc. 2d 124, 125, 177 N.Y.S.2d 760, 761 (Sup. Ct. N.Y. County), *aff'd*, 7 App. Div. 2d 708, 180 N.Y.S.2d 104 (1st Dep't 1958).

[13] *See* Buscher v. Ehrick, 12 App. Div. 2d 887, 209 N.Y.S.2d 941 (4th Dep't 1961); 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 308.03 (1966).

[14] *See, e.g.*, Marcy v. Woodin, 18 App. Div. 2d 944, 237 N.Y.S.2d 402 (3d Dep't 1963); Erale v. Edwards, 47 Misc. 2d 213, 262 N.Y.S.2d 44 (Sup. Ct. Suffolk County 1965). The *Erale* case is treated in length in *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 303, 313 (1966).

would further increase the probability of sloppy service. Exceptions to actual service, therefore, should be severely limited, lest the exceptions become the rule.

CPLR 308(3): Server's testimony as to custom and habit allowed to cure defect in affidavit of service.

In *Peninsula National Bank v. Hill*,[15] defendant moved to set aside service of a summons and vacate judgment solely because of a defect in the affidavit of service. The challenge was made approximately five and a half years after entry of judgment following an intentional and deliberate default. Plaintiff's process server testified he had no recollection of the service, and was denied by the lower court the opportunity to testify as to his usual custom and habit in situations requiring substituted service.

The appellate term, second department, however, reversed, and held that the server's testimony was adequate to establish the mode of service in the present case and cure the defect in the affidavit.[16]

CPLR 308(4): Court-ordered service on defendant's insurer set aside.

As the courts order service under CPLR 308(4) with increasing frequency, guidelines continue to be set regarding what methods of court-ordered service are permissible in certain circumstances.[17] Added to the montage is *Brodsky v. Spencer*.[18] There, the action arose from an automobile accident, and service was made by court order pursuant to 308(4) upon the Secretary of State and the defendant's insurer. The service was set aside by the same court as not "reasonably calculated to give the defendant the required

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[15] 52 Misc. 2d 903, 277 N.Y.S.2d 162 (App. T. 2d Dep't 1966).

[16] *Id.* at 903, 277 N.Y.S.2d at 163.

[17] *See, e.g.*, Sellars v. Raye, 25 App. Div. 2d 757, 269 N.Y.S.2d 7 (2d Dep't 1966); Dobkin v. Chapman, 25 App. Div. 2d 745, 269 N.Y.S.2d 49 (2d Dep't 1966); Deredito v. Winn, 23 App. Div. 2d 849, 259 N.Y.S.2d 200 (2d Dep't 1965); Winterstein v. Pollard, 50 Misc. 2d 354, 270 N.Y.S.2d 525 (Sup. Ct. Nassau County 1966). *See generally The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 128, 134-36 (1967); *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 644, 648-49 (1967); *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 462, 475-76 (1967); *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 279, 296-98 (1966); *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 122, 140-42 (1965).

[18] 53 Misc. 2d 4, 277 N.Y.S.2d 802 (Sup. Ct. Monroe County 1966).