

# CPLR 308(3): Server's Testimony as to Custom and Habit Allowed to Cure Defect in Affidavit of Service

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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*,<sup>15</sup> 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.<sup>16</sup>

*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.<sup>17</sup> Added to the montage is *Brodsky v. Spencer*.<sup>18</sup> 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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<sup>15</sup> 52 Misc. 2d 903, 277 N.Y.S.2d 162 (App. T. 2d Dep't 1966).

<sup>16</sup> *Id.* at 903, 277 N.Y.S.2d at 163.

<sup>17</sup> 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).

<sup>18</sup> 53 Misc. 2d 4, 277 N.Y.S.2d 802 (Sup. Ct. Monroe County 1966).