

CPLR 308(1): Redelivery Doctrine Liberalized

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The present decision follows prior New York case law established in *Kramer v. Vogl*⁵³ and *Millner Co. v. Noudar, Lda.*⁵⁴

CPLR 308(1): Redelivery doctrine liberalized

The supreme court, Queens County, in *Pitagno v. Staiber*,⁵⁵ held that delivery of the summons to the defendant by his wife, who found it in a sealed envelope beneath the mail slot in their home, met the requirements of CPLR 308(1)⁵⁶ and constituted valid service. The fact that no affidavit of service had been made was deemed to be immaterial, since testimony given by defendant's wife in open court establishing personal service upon defendant was of greater force than an affidavit would have been.⁵⁷

It should be noted that in the instant case, and in a prior case⁵⁸ cited by the court to support its argument, there were compelling circumstances favoring a finding that the service was valid: had the court held the service of process invalid, the causes of action would have been barred by the statute of limitations.⁵⁹

ARTICLE 10 — PARTIES GENERALLY

CPLR 1007: Right of impleader extended to insurer prior to payment of claim.

CPLR 1007 provides that "[a]fter the service of his answer, a defendant may proceed against a person not a party who is or may be liable to him for all or part of the plaintiff's claim against

⁵³ 17 N.Y.2d 27, 215 N.E.2d 159, 267 N.Y.S.2d 900 (1966). The Court of Appeals held that the phrase of 302(a) (1), "transacts any business within the state," did not encompass Austrian defendants who carried on no sales, promotion or advertising activities within the State, made all arrangements in Austria and sold their goods, eventually destined for New York, F.O.B. Austria.

⁵⁴ 24 App. Div. 2d 326, 266 N.Y.S.2d 289 (1st Dep't 1966). There the court held that the acceptance, signing, and mailing of a contract in New York was not an "act" of the foreign defendant here, nor was it sufficient to warrant the assumption of jurisdiction over it.

⁵⁵ 53 Misc. 2d 858, 280 N.Y.S.2d 178 (Sup. Ct. Queens County 1967).

⁵⁶ CPLR 308(1) requires that "[p]ersonal service upon a natural person shall be made: (1) by delivering the summons within the state to the person to be served. . . ."

⁵⁷ 53 Misc. 2d at 860, 280 N.Y.S.2d at 180-81.

⁵⁸ *Marcy v. Woodin*, 18 App. Div. 2d 944, 237 N.Y.S.2d 402 (3d Dep't 1963) (memorandum decision).

⁵⁹ In a recent case, where the action would not have been barred, the court refused to sustain the validity of the service stating that to dispense with the requirement of compelling circumstances to allow a departure from statutory mandate of direct delivery would erase the distinctions between CPLR 308(1) and CPLR 308(3). See *Miller v. Alda Corp.*, 53 Misc. 2d 279, 278 N.Y.S.2d 574 (N.Y.C. Civ. Ct. 1967). See generally *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 283, 288 (1967).