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CPLR 308(3): Validity of Service Unaffected by Defendant's Failure to Find Affixed Process

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yet would not have jurisdiction over a domiciliary who commits the same act, solely because of a change of domicile prior to commencement of the action.

CPLR 308: Immunity from service of process extended to arbitration proceedings.

A nonresident, voluntarily present in this state solely for the purpose of appearing as a party or witness in a judicial proceeding, is immune from service of civil process during the proceeding and for a reasonable time before and after.[26] This immunity is afforded to encourage voluntary appearance of nonresidents and to secure the expedient administration of justice.[27] Every proceeding of a judicial nature which relates to the trial of the issues of a case or to a public matter comes within the rule.[28]

In *Treadway Inns Corp. v. Chase*,[29] defendant, a nonresident, was served with process while voluntarily attending an arbitration proceeding as a witness. The supreme court held that immunity from service extended to parties or witnesses voluntarily appearing in arbitration proceedings. Arbitration proceedings are, in essence, a form of judicial proceeding in that the arbitrator has the power to subpoena and administer oaths.[30] Thus, to extend immunity from service of civil process to parties and witnesses in these proceedings is desirable.

CPLR 308(3): Validity of service unaffected by defendant's failure to find affixed process.

In *Denning v. Lettenty*,[31] a malpractice case, the court referred to a referee the question of whether there had been proper service. The plaintiff claimed that valid service was effected pursuant to CPLR 308(3),[32] and, in support thereof, introduced the affidavit

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[26] 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 308.05 (1965).

[27] Where attendance in the state is involuntary there is no immunity. 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 308.06 (1965).

[28] Matter of Ferrari, 134 Misc. 728, 236 N.Y. Supp. 406 (Surr. Ct. Kings County 1920); 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 308.05 (1965).

[29] 47 Misc. 2d 937, 263 N.Y.S.2d 551 (Sup. Ct. Monroe County 1965).

[30] Treadway Inns Corp. v. Chase, 47 Misc. 2d 937, 940, 263 N.Y.S.2d 551, 553 (Sup. Ct. Monroe County 1965).

[31] 48 Misc. 2d 185, 264 N.Y.S.2d 619 (Sup. Ct. N.Y. County 1965).

[32] "Personal service upon a natural person shall be made: (3) where service under paragraph one cannot be made with due diligence, by mailing the summons to the person to be served at his last known residence and . . . affixing the summons to the door of his place of business, dwelling house or usual place of abode within the state. . . ."

of the process server, who had died prior to the referee's hearing. The defendant, however, who resided at a hospital, denied seeing or finding the summons and complaint affixed to the door of his room. In the opinion of the referee, the plaintiff failed to prove by a fair preponderance of the evidence that the summons and complaint were properly affixed.

The supreme court refused to confirm the referee's report, holding that under CPLR 306,[33] such affidavit, as proof of service, was all that was required of plaintiff in order to present a prima facie case. The court further stated that defendant's contention that he did not see the summons and complaint did not overcome the affidavit, since "a reading of CPLR 308 does not require that a defendant see or find the summons and complaint." [34] It is sufficient if service is *"calculated* to insure that actual notice is given to the defendant." [35]

It is submitted that the court is also supported in its decision by CPLR 4531, which provides that "an affidavit by a person who served, posted or affixed a notice, showing such service, posting or affixing is prima facie evidence of the service, posting or affixing if the affiant is dead. . . ."

CPLR 314(1): Limitation on service without the state.

In *Chittenden v. Chittenden,*[36] previously reported in the *Survey,*[37] defendant's first wife, a New York domiciliary, commenced an action to establish the invalidity of a Mexican divorce obtained by her husband. The supreme court, Monroe County, held that the defendant's second wife, a non-domiciliary, could be validly served pursuant to CPLR 314,[38] since the court had acquired in rem jurisdiction by virtue of the fact that the plaintiff's marital res was located within the state. However, the court did not determine whether the additional relief sought, viz., judgments declaring (1) the invalidity of the husband's second marriage, and (2) the validity of his first marriage, could be obtained by service upon a non-domiciliary outside the state.

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[33] "Proof of service. It shall be in the form of a certificate if the service is made by a sheriff or other authorized public officer or in the form of an affidavit if made by any other person. . . ."

[34] Denning v. Lettenty, 48 Misc. 2d 185, 186, 264 N.Y.S.2d 619, 621 (Sup. Ct. N.Y. County 1965).

[35] FIFTH REP. 266. (Emphasis added.)

[36] 46 Misc. 2d 347, 259 N.Y.S.2d 738 (Sup. Ct. Monroe County 1965).

[37] *The Biannual Survey of New York Practice,* 40 ST. JOHN'S L. REV. 142 (1965).

[38] "Service may be made without the state by any person authorized by section 313 in the same manner as service is made within the state:

1. in a matrimonial action. . . ."