St. John's Law Review

Volume 41, October 1966, Number 2 Article 16

CPLR 308: Parties May Not Provide for Their Own Methods of Service

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It may be possible to distinguish *Lewis* from *Winick* on the ground that *Lewis* contained additional jurisdictional facts. Because of this difference it will be necessary to await future decisions before predicting with accuracy when New York courts will exercise jurisdiction over a non-domiciliary defendant on the basis of acts performed by the plaintiff in New York on the defendant's behalf. It is evident, however, that if the plaintiff is an employee of the defendant, jurisdiction will be sustained. The area of uncertainty lies where the plaintiff is classified as an independent contractor.

CPLR 308: Parties may not provide for their own methods of service.

In *National Equip. Rental, Ltd. v. Dec-Wood Corp.*,[74] the parties entered into a contract whereby the plaintiff corporation, doing business in New York, leased certain machinery to the non-domiciliary defendants. The contract stipulated that all actions arising out of the agreement were to be litigated in New York, and further provided that any action may be commenced by sending the process by certified mail to the defendants at their out-of-state address. This suit, to recover rent allegedly unpaid, was commenced by service in this manner.

The defendants objected to New York's exercise of jurisdiction on the grounds that (1) New York had no basis for jurisdiction since the defendants never transacted business in New York, and (2) the method of service employed was defective since this method was not authorized by the CPLR.

The court rejected the defendants' first contention that New York had no basis for jurisdiction. In so doing, the court was in accord with prior case law which has established that parties may designate the forum in which the actions arising out of their contracts are to be adjudicated.[75] The court, however, sustained the contention that the method of service was invalid because it lacked statutory authorization. The court based this holding upon the New York State Constitution and those segments of the CPLR which indicate that the legislature *alone* may specify methods of service. The state constitution provides that the legislature shall have the power to regulate "jurisdiction and proceedings in law and in equity . . ." [76] and CPLR 306 states that "proof of service shall specify . . . that the service was made . . . in an authorized manner." These factors, together with the additional fact that the CPLR [77] expressly provides for the manner in which service may

[74] 49 Misc. 2d 538, 267 N.Y.S.2d 820 (Dist. Ct. Nassau County 1966).
[75] Gilbert v. Burnstine, 255 N.Y. 348, 174 N.E. 706 (1931).
[76] N.Y. CONST. art. VI, § 30.
[77] CPLR 303, 311, 318.

be made under various contingencies, led the court to conclude that the parties could not provide for their own method of service.

In holding that the parties may not prescribe their own procedural rules, the court in the instant case appears to be supported by existing New York authority. Prior cases refused to allow parties to devise new methods of service,[78] and have pointed out that service is ineffective if the statutory requirements are not met.[79]

In the federal sphere, the United States Supreme Court, in *National Equip. Rental, Ltd. v. Szukhent*,[80] interpreted Section 4(d)(1) of the Federal Rules of Civil Procedure which provides, in part, that service of process upon an individual may be made "by delivering a copy of the summons and of the complaint to an agent authorized by appointment . . . to receive service of process." The Court held that under this section a party may appoint an agent to receive service of process, although the agent is neither personally known to the party, nor has expressly consented to transmit notice to the party, provided, however, that the agent does in fact give such notice. While this holding may be a liberal interpretation of the Federal Rules, it is not analogous to the situation in the instant case where the defendants virtually sought to write their own procedural rules. It may be permissible for parties to liberally interpret methods of service which already exist in statutory form but to allow parties to circumvent the CPLR by contract is a result not to be desired.

CPLR 308(4): Court-devised methods for service of process.

Prior to the CPLR, the methods by which service of process could be effected were exclusively statutory. With the enactment of CPLR 308(4), however, the courts, upon ex parte motions, were given the discretionary power to devise means of service in cases where it could be shown that the ordinary statutory methods of service [81] had failed. In devising such methods, the court must examine the individual circumstances of each case and choose a particular method of service calculated to inform the defendant of the pendency of the suit. The court is limited in its choice since the defendant must be afforded "due process of law" as required by the federal constitution.

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[78] *E.g.*, Erickson v. Robison, 282 App. Div. 574, 125 N.Y.S.2d 736 (4th Dep't 1953). The court did not permit the parties to effectively agree that the mere admission of service by a nonresident who was not physically present in the state is equivalent to personal service within New York.

[79] *E.g.*, Eisenhofer v. New Yorker Zeitung Publishing & Printing Co., 91 App. Div. 94, 86 N.Y. Supp. 438 (1st Dep't 1904). A similar statement is made in 3 CARMODY-WAIT, NEW YORK PRACTICE § 24:1 (2d ed. 1965).

[80] 375 U.S. 311 (1964).

[81] The normal statutory methods of service are found in CPLR 308(1)-(3).