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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).

In two recent cases, decided simultaneously by the appellate division, second department, methods of service devised under CPLR 308(4) were upheld over the defendants' contentions that "due process" had been violated.

Dobkin v. Chapman[82] involved an action for personal injuries sustained by the plaintiff when he was struck by the defendants' automobile. The injury occurred in New York, but the defendants were nonresidents, and the automobile was registered in Pennsylvania. The defendants supplied their addresses at the scene of the accident. They also presented a registration and driver's license which listed their addresses. These addresses were given to the New York police and were certified as correct by the Pennsylvania Bureau of Motor Vehicles. After the normal methods of service failed, the plaintiff, pursuant to CPLR 308(4), obtained an ex parte order permitting process to be sent by ordinary mail to these addresses. The appellate division upheld this method of service since ordinary mail sent to the defendants at the same addresses had not been returned and, therefore, notice by ordinary mail was reasonably calculated to afford the defendants notice. In determining that "due process" had not been violated, the court stated that "it can hardly be said that process directed to be served at the very address given by the party who was the driver involved in an automobile accident and who thus may fairly expect that litigation will follow is violative of his rights."[83]

Sellars v. Raye[84] was a wrongful death action arising out of an automobile accident. The decedent, a passenger in the defendant's automobile, was killed when the defendant drove the car off the road and into a tree. At the time of the accident the defendant's address was in New York. Personal service directed at the defendant's address failed, and all correspondence sent to the defendant at that address was returned. The plaintiff applied for an ex parte order under CPLR 308(4). The court ordered that service be made by means of Section 254 of the Vehicle and Traffic Law which required that a registered letter be sent to the defendant, and that the return receipt be filed as proof of service. Two registered letters sent to defendant were returned with the notation that the addressee had moved without leaving a forwarding address. Since this method of service failed, the plaintiff once again asked the court to devise a method of service. The court then ordered that service be effected upon the Secretary of State, provided that the plaintiff send a copy of the summons and complaint to the defendant by registered mail (without the requirement of filing the

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[82] 25 App. Div. 2d 745, 269 N.Y.S.2d 49 (2d Dep't 1966).

[83] Dobkin v. Chapman, 25 App. Div. 2d 745, 746-47, 269 N.Y.S.2d 49, 51 (2d Dep't 1966).

[84] 25 App. Div. 2d 757, 269 N.Y.S.2d 7 (2d Dep't 1966).

return receipt), and publish a copy of the summons and court order in a specified paper in defendant's locale.

The appellate division validated this method of service and, for the reasons expressed in *Dobkin,* held that there was no constitutional impediment to this particular method of service.

These two cases illustrate the utility of CPLR 308(4) and indicate that this subsection can be of great assistance to plaintiffs when it is impossible to comply with the statutory methods of service. Although the potential of CPLR 308(4) is vast, it should be noted that, just as the particular methods of service upheld by the instant cases depended upon the particular circumstances found therein, devised methods of service must be tailored to the unique factors of each individual case. The court in devising such methods of service must always be wary of transgressing the basic requirements of the "due process" which must be afforded a defendant. In both of the instant cases, strong dissenting opinions were voiced which stated that each of the defendants had, in fact, been denied "due process" since the methods of service devised were not likely to afford them *actual notice.*[85]

CPLR 311: Service upon public corporation at improper address validated.

Ware v. Manhattan & Bronx Surface Transit Operating Authority[86] illustrates how some courts look with disfavor upon those activities of public agencies which make it difficult for plaintiffs to serve process. This case involved a motion to give effect to a notice of claim filed a day late upon the defendant. The plaintiff alleged that the notice was timely since, on the last day allowed for filing, her attorney attempted service by going to the only address listed for the defendant in the telephone directory.[87] When he arrived he was directed to an attorney for the Authority whose office was located in an adjoining building. There, upon making his intentions known to the guard in the lobby, he was told that the Authority's attorney had left, and that no one else would accept the notice. When he requested permission to go up to the office of the defendant's attorney, his request was refused, and he was advised to go to the defendant's claims department across town. By the time

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[85] Sellars v. Raye, 25 App. Div. 2d 757, 758-59, 269 N.Y.S.2d 7, 10-11 (2d Dep't 1966); Dobkin v. Chapman, *supra* note 83, at 747-49, 269 N.Y.S.2d at 52-54.

[86] 49 Misc. 2d 704, 268 N.Y.S.2d 519 (Sup. Ct. N.Y. County 1965).

[87] CPLR 311 provides rules for service upon corporations. Since the defendant was a public corporation for which service is not specifically provided by CPLR 311(2)-(7), CPLR 311(1) was held to apply. Accordingly, service upon an officer, director, managing or general agent would be sufficient.