St. John's Law Review

Volume 41
Number 3 *Volume 41, January 1967, Number 3*

Article 20

CPLR 308(4): Court-Devised Methods of Service

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In the instant case, the Court was faced with an alleged tort of *omission.* In *Feathers v. McLucas,*[31] which dealt with a tort of commission, the Court of Appeals held that a tortious act is committed only in the state where the defendant performed the act. The Court in *Platt* indicated that the failure of a person to do anything in one state cannot be an act done or committed in another state. "To treat an 'omission' as an 'act' in a particular place, one must be there to do or to omit the act."[32] Therefore, although the consequences of the omission caused injury in New York, the Court believed that no tortious act had been committed in this state.[33]

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

CPLR 308(4) gives a court, upon the filing of an ex parte motion, discretion to authorize special methods of service when service under CPLR 308(1), (2), and (3) is *impracticable.* In devising such methods, the court is required to afford the defendant the constitutional protection of due process. As a minimum, due process requires that substituted service must be reasonably calculated to give the defendant notice of the pending suit and an opportunity to be heard.[34]

In a recent case arising out of an automobile accident, the supreme court denied a motion under CPLR 308(4) requesting the court to direct that substituted service be made upon defendant's insurance carrier.[35] At the time of the accident, defendant resided in New York. The plaintiffs had attempted service at the address given to the policeman at the scene of the accident, only to find that defendant, since the time of the accident, had moved without leaving a forwarding address. The only other factors appearing in the moving papers were that mail sent by the plaintiffs was returned and that no current address could be found by inquiring at the Bureau of Motor Vehicles, or by searching the telephone directories of defendant's locale.

The court indicated that plaintiffs could have examined the records of the insurer to ascertain whether it had defendant's

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[31] 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

[32] Platt Corp. v. Platt, 17 N.Y.2d 234, 237, 217 N.E.2d 134, 135, 270 N.Y.S.2d 408, 410 (1966).

[33] In 1966, CPLR 302(a) was amended to include a new subsection (3). This subsection provides that New York will have in personam jurisdiction over a non-domiciliary who commits a tortious act without the state which causes injury within the state under certain conditions (subparagraphs (i) and (ii)). It does not appear, however, that this amendment will affect the present case, since neither of the two conditions was met.

[34] Milliken v. Meyer, 311 U.S. 457, *rehearing denied,* 312 U.S. 712 (1940).

[35] Winterstein v. Pollard, 50 Misc. 2d 354, 270 N.Y.S.2d 525 (Sup. Ct. Nassau County 1966).

current address.[36] Also, "plaintiffs by attachment plus publication could have brought defendant within the in personam jurisdiction of the New York courts . . . and attachment of the insurer's obligation under the policy would be sufficient to that end. . . ." [37] The court concluded that since the plaintiffs had not sufficiently shown that service under CPLR 308(1) and (3) was impracticable, their motion must be denied.

The court also predicated its holding upon the fact that service upon the insurance carrier would not be sufficient to meet the standards of due process. Absent some showing of an actual relationship between the defendant and insurer, "it cannot be said that notice to the insurer is reasonably calculated to give notice to the defendant."[38]

In reaching its decision, the court was careful to distinguish the instant case from two recent appellate division decisions based on similar facts. In *Dobkin v. Chapman*,[39] an order was granted under CPLR 308(4) allowing ordinary mail to be the method of service since (unlike the instant case) mail previously sent to defendant's address had not been returned. *Greenwood v. White*[40] was distinguished since the defendant there had given the police officers a wrong address, whereas defendant in the instant case gave the right address and lived there for two months after the accident.

Although it might seem that the instant case limits the effect of CPLR 308(4) as an instrument for substituted service, it should be noted that each case under this section is factually unique. Consequently, the relationship between due process and the devised method of service is only meaningful in the context of the unique circumstances of the individual case.

The court in the instant case indicated a practical solution to many of the problems concerning substituted service upon New York residents. The legislature could either designate the insurer the agent of the insured for service, or authorize the bringing of the action directly against the insurer.

CPLR 325(d): Amendment.

CPLR 325(d) has been amended to omit "of the county of Bronx, Kings, Nassau, New York, Queens, Richmond or Westchester" following "of the surrogate's court."

The amendment merely makes the procedure outlined in CPLR 325(d) applicable in all counties. In a sense, CPLR 325(d),

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[36] CPLR 3102(c) allows such an examination.
[37] Winterstein v. Pollard, *supra* note 35, at 354-55, 270 N.Y.S.2d at 527.
[38] *Ibid.*
[39] 25 App. Div. 2d 745, 269 N.Y.S.2d 49 (2d Dep't 1966).
[40] 25 App. Div. 2d 73, 266 N.Y.S.2d 1012 (3d Dep't 1966).