

CPLR 325(d): Amendment

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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),

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).

and the Surrogate's Court Act⁴¹ provision which duplicates it, may be violative of the New York Constitution. They purport to require, before supreme court transfer to the surrogate, an order of the surrogate in effect consenting to receive the case. Article 6, Section 19(a) of the New York Constitution appears to give the supreme court the power to make such a transfer without any prior permission of the surrogate. This would cause CPLR 325(d) and its requirement of preliminary permission to fall. Indeed, a reported case already indicates as much.⁴²

ARTICLE 5 — VENUE

CPLR 504: Amendment.

This section, as amended, provides that in actions brought against a school district or a district corporation, venue is properly placed in the county in which the school district or district corporation is situated, or if situated in more than one county, in either county.

ARTICLE 11 — POOR PERSONS

CPLR 1101(c): Amendment.

Prior to the amendment, this section provided that notice of a motion to proceed as a poor person "shall be served on all parties." The amendment further requires that notice be given to the county attorney of the county in which the action is triable or to the director of finance if the action is triable in New York City.

CPLR 1102(b): Amendment.

This section provides that a poor person, whether on appeal or in a proceeding other than an appeal, may be furnished, without fee, a transcript of the minutes of the trial or proceeding made and certified by the court stenographer. The court stenographer will also make and certify an additional transcript, without fee, to be filed with the court clerk if the poor person is on appeal. In both instances, the expense of such transcripts shall be payable to the stenographer out of the court fund, upon the certificate of the judge presiding at the trial or hearing.

⁴¹ N.Y. Surr. Ct. Act § 40(9).

⁴² *In re Breen's Will*, 45 Misc. 2d 374, 256 N.Y.S.2d 770 (Surr. Ct. Richmond County 1965).