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CPLR 308(3): Substituted Service Vacated

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the defendant did not reside at the address at the time that the plaintiff's process server swore he made substituted service. The court also refused plaintiff's application for a nunc pro tunc order pursuant to CPLR 308(4), stating that even though the plaintiff had no knowledge of the process server's perjury, this did not excuse the wholly unauthorized act of "nailing and mailing" the summons and complaint to a place where the defendant did not in fact reside. The court went on to stress its strong disapproval of this practice:

> [P]rocess servers should be discouraged from *sewer service*, and attorneys from employing process servers who cannot be trusted to perform the acts they swear they do by refusing to accord any significance to acts performed by them without the factual basis which the law requires.[11]

The practitioner would be wise to heed the court's warning in view of the fact that should service be subsequently vacated, the statute of limitations may have expired.

CPLR 308(3): Substituted service vacated.

In *Todd v. Todd*,[12] substituted service under CPLR 308(3) was vacated where it was conclusively shown that defendant did not reside at the address where the process server swore service had been made.

The court, however, noted that the plaintiff might be able to seek authorization to examine defendant's present attorney concerning defendant's address. Then, if the defendant's address could not be obtained in this fashion, the court indicated that plaintiff would have a basis for a 308(4) order authorizing service on the attorney, "for there clearly is contact between defendant and his attorney and service on the attorney will conform to the requirements of due process."[13]

This would seem to be in accord with *Winterstein v. Pollard*,[14] wherein the court did not allow substituted service under 308(4) on the defendant's insurer since there was no showing of an actual contact between the defendant and the insurer. The court in *Winterstein* stated that "it cannot be said that notice to the insurer is reasonably calculated to give notice to the defendant." [15]

In the present case, there would seem to be three possibilities of service: (1) if the plaintiff fails to secure an examination of

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[11] *Id.* at 95, 272 N.Y.S.2d at 456. (Emphasis added.)
[12] 51 Misc. 2d 94, 272 N.Y.S.2d 455 (Sup. Ct. Nassau County 1966).
[13] *Id.* at 96, 272 N.Y.S.2d at 456.
[14] 50 Misc. 2d 354, 270 N.Y.S.2d 525 (Sup. Ct. Nassau County 1966).
[15] *Id.* at 355, 270 N.Y.S.2d at 527.

the attorney, he could then move under CPLR 308(4) for an order directing service on the attorney as agent for the defendant, since the court has said that there is "contact" between the attorney and the defendant; (2) if the plaintiff secures an examination of the attorney, however, and obtains the defendant's address, then he would have to attempt service under 308(1) and (3) before he could move for an order under 308(4); (3) if service under 308(1) and (3) were to be *impracticable*, however, he could then move to serve the attorney as defendant's agent under 308(4).

CPLR 308(4): Conflict over requirements of due process.

Although substituted service need not give actual notice to the defendant, it must be reasonably calculated to apprise him of the pendency of the action and afford him the opportunity to be heard.[16] There appears to be a conflict between the first and second departments concerning substituted service under CPLR 308 and the constitutional requirements of due process.

The second department, in *Dobkin v. Chapman*,[17] affirmed a court-devised method of service under CPLR 308(4). There, the court held that due process was satisfied by service which amounted to the mailing of the summons to an address supplied by the defendant at the time of an automobile accident, even though the plaintiff knew that the defendant no longer resided there.

The approach taken by the first department, however, was more restrictive. In *Polansky v. Paugh*,[18] the court unanimously held that where a plaintiff knew that the defendant did not reside at the stated address, due process was not satisfied since there was no reasonable probability that the defendant would receive notice of the pending action. Although *Polansky* was decided under CPLR 308(3), and *Dobkin* under 308(4), it should be noted that the same due process considerations apply to each.

Brown v. Green Bus Lines, Inc.,[19] a recent supreme court case in the second department, involved the validity of substituted service under CPLR 308(3). There, an automobile accident occurred in New York between plaintiff, a New York resident, and a non-domiciliary defendant. Defendant gave plaintiff a Florida address at which the plaintiff attempted service under Section 253 of the Vehicle and Traffic Law. However, this attempt failed since the registered letter sent to the defendant in Florida was returned marked "moved—left no address." Thereafter, plaintiff had a Florida sheriff attempt personal service on the defendant at the Florida address. When this also failed, the sheriff mailed a

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[16] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).
[17] 25 App. Div. 2d 745, 269 N.Y.S.2d 49 (2d Dep't 1966).
[18] 23 App. Div. 2d 643, 256 N.Y.S.2d 961 (1st Dep't 1965).
[19] 51 Misc. 2d 412, 273 N.Y.S.2d 346 (Sup. Ct. Queens County 1966).