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CPLR 308(4): Conflict Over Requirements of Due Process

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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).

copy of the summons and complaint to the defendant at this address and affixed a copy to the door of the same premises. The court held that such service satisfied due process requirements. In so doing, it attempted to distinguish *Polansky* by showing that in that case an affidavit was produced stating that the defendant had left the address at which service was made "some time ago." However, in the instant case, only an unsigned post office notation stating that the defendant had moved was introduced into evidence. The court relied on *Dobkin* for the proposition that plaintiff's knowledge that the defendant no longer resides at the last known address where service is made does not vitiate such service. The fact that *Dobkin* arose under 308(4), while *Brown* arose under 308(3), was of no moment, since the *Brown* court felt that if the service in *Dobkin* satisfied due process, "then it would appear that service pursuant to CPLR 308 (subd. [3]) would also satisfy the requirements of due process."[20]

Remaining, however, is the apparent conflict between the first and second departments on the question of whether substituted service is valid when directed at an address at which plaintiff knows the defendant does not reside. Only the Court of Appeals and, possibly, the United States Supreme Court can resolve this problem. It is submitted that the first department's holding in *Polansky* is more consistent with traditional concepts of due process. It is difficult to see how service directed at an address known to be incorrect can be reasonably calculated to apprise the defendant of the pendency of a suit.[21]

ARTICLE 22 — STAY, MOTIONS, ORDERS AND MANDATES

CPLR 2219(a): Validity of order unaffected by failure of court to decide motion within time limitation.

According to CPLR 2219(a), an order determining a motion relating to a provisional remedy shall be made within twenty days, and an order determining any other motion shall be made within sixty days, after such motion is submitted for decision. A recent

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[20] *Id.* at 414, 273 N.Y.S.2d at 347.

[21] It should also be noted that the instant decision tends to extend the limits of CPLR 308(3) further than the legislature intended. The statute clearly states that when service under 308(1) cannot be made with due diligence, then service is to be made "by mailing the summons to the person to be served at his last known residence and *either affixing the summons to the door of his place of business, dwelling house or usual place of abode. . . .*" (Emphasis added.) The language of the statute appears to indicate that the legislature did not intend that the "nailing" and mailing be both made at the defendant's last known residence, as in the instant case. See MCKINNEY'S CPLR, supp. commentary 133 (1965).