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CPLR 2219(a): Validity of Order Unaffected by Failure of Court to Decide Motion Within Time Limitation

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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).

supreme court case, *Kaminsky v. Abrams*,[22] ruled that an order denying the plaintiff's motion for summary judgment, made after the sixty-day period, would not be void, since the provisions of CPLR 2219(a) were merely precatory.[23] In arriving at this result, the court reasoned that, as a matter of general statutory interpretation, a provision directing action by a public officer within a stated time, in the absence of negative words restraining action thereafter, should be regarded as merely directory, rather than as a limitation on the officer's authority.

The court also stated that the plaintiff was estopped from attacking the order, since one entitled to the relief here sought, *i.e.*, the vacating of the order denying plaintiff's motion for summary judgment and the granting of summary judgment to defendants, should not await an unfavorable disposition before moving for such relief.

It has been suggested that a party considering himself aggrieved by a court's unwarranted delay might, by mandamus, compel the court to render a decision.[24] However, such a course is usually inadvisable since the court might not be favorably inclined towards the party seeking mandamus. Also, where, as in *Kaminsky*, the motion was decided only three days after the expiration of the sixty-day period, mandamus would be an ineffective and meaningless remedy in preventing such a minor delay.

The general purpose of time provisions, such as those found in CPLR 2219(a), is to provide system, uniformity, and promptness in the conduct of public business.[25] Since a party has no effective control over a court's action, it would be a harsh construction which would deprive him of the benefits of an order because of the *court's* failure to decide a motion by a particular day.

ARTICLE 31 — DISCLOSURE

CPLR 3101(b): Accident reports made by self-insurer to independent firm of private investigators may be privileged matter.

Holding that accident reports made to a liability insurer were material prepared for litigation, and therefore immune from disclosure under CPLR 3101(d), the appellate division, first department, in *Kandel v. Tocher*,[26] did not find it "necessary . . . to determine whether reports, investigation, and statements received

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[22] 51 Misc. 2d 5, 272 N.Y.S.2d 530 (Sup. Ct. N.Y. County 1965).

[23] See also Leumi Financial Corp. v. Richter (Sup. Ct. N.Y. County), 153 N.Y.L.J., March 29, 1965, p. 15, col. 4.

[24] See Fallon v. Hattemer, 229 App. Div. 397, 342 N.Y. Supp. 93 (2d Dep't 1930).

[25] *Ibid.*

[26] 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965).