St. John's Law Review

Volume 40
Issue 2 *Volume 40, May 1966, Number 2*

Article 16

April 2013

CPLR 308(1): Personal Service Held Valid Where Papers Served by Party Who Merely Found Them

St. John's Law Review

CPLR 308(1): Personal service held valid where papers served by party who merely found them.

In *Erale v. Edwards*,[24] service of summons and complaint was held proper where the papers were delivered to the defendant by the janitor of an apartment house where she resided. The janitor had found them in an empty apartment and was not himself a party to the action. The defendant appeared in the action, and in her answer asserted the defense of improper service of the summons and complaint. This fact and the fact that CPLR 308(1) was literally complied with,[25] led the court to conclude that even though the process server did not serve the papers as plaintiff intended, service was nevertheless sufficient.

Formerly, delivery of the summons through the intermediary of a defendant's husband was held not to fulfill the requirement of personal delivery.[26] However, cases where delivery was made to a member of the defendant's family upheld service which had reached the defendant even though not delivered directly to him by the plaintiff's agent.[27] In the instant case, however, mere fortuitous circumstances enabled the defendant to acquire the notice to which he is entitled under due process. Service upon a member of defendant's family is statutorily permitted in some states.[28] Under CPLR 308(3), after diligent efforts at personal service have proven fruitless, service may be made by mailing and delivering a summons to a person of suitable age and discretion at defendant's dwelling house, usual place of abode or place of business. In the instant case, it could not have been reasonably contended that the provisions of CPLR 308(3) were met.

Of course, it can be argued that as long as the defendant personally receives a copy of the summons (and thus, is given his due notice) there should be no ground for complaint on his part. For that matter, the very fact that the defendant appears in court to object to the method of service should indicate that he has received notice and preclude any further objection. However, while the tone of the CPLR is liberal, careless methods of service should not be encouraged by giving too loose a meaning to section 308(1). While due process is satisfied by notice and an opportunity to be heard the "notice must be such as is reasonably calculated to reach

---

[24] 47 Misc. 2d 213, 262 N.Y.S.2d 44 (Sup. Ct. Suffolk County 1965).

[25] CPLR 308(1): "Personal service upon a natural person shall be made: (1) by delivering the summons within the state to the person to be served. . . ."

[26] See, *e.g.*, Ives v. Darling, 210 App. Div. 521, 206 N.Y. Supp. 493 (3d Dep't 1924).

[27] *E.g.*, Marcy v. Woodin, 18 App. Div. 2d 944, 237 N.Y.S.2d 402 (3d Dep't 1963); Bleil v. Clark, (Sup. Ct. Suffolk County), 151 N.Y.L.J., March 31, 1964, p. 16, col. 3.

[28] See, *e.g.*, WIS. STAT. ANN. § 262.06(1)(b).

interested parties." [29] It would seem then that a defendant would be justified in objecting to service which was not "reasonably calculated" to reach him but by some quirk of fate managed to come into his hands. Therefore, any such method should not be condoned by the courts.

CPLR 308(3): Mailing to "last known residence" not valid where plaintiff knows that defendant no longer resides there.

In *Zelnick v. Bartlik*,[30] service at defendant's "last known residence" was alleged to be defective on the ground that the process server was apprised of the fact that the defendant no longer lived at that address. In fact, the summons was left with the defendant's wife whom he had abandoned. The court, under these circumstances, held that the service of process was not "reasonably calculated to give actual notice" and, hence, was not sufficient to render the defendant subject to the court's jurisdiction.

The instant case is in accord with *Polansky v. Paugh* [31] and *Jauk v. Mello*.[32] In the *Jauk* case, mailing and affixing (or delivery) was to the same address. And while it cannot be ascertained with any degree of certainty, it appears that such was the case in *Polansky*. A different situation is involved, however, where the mailing is to a "last known residence" which the plaintiff knows is no longer defendant's residence but the "affixing" or "delivery" is to a place where the defendant, in fact, works or dwells. One commentator would make the validity of the service last alluded to dependent upon whether the plaintiff knew, or did not know, that the defendant no longer lived at his "last known residence." [33] This does not appear entirely logical since what is important is whether the defendant can reasonably be said to have received actual notice of the pendency of the action. Although plaintiff may have actual knowledge that defendant no longer resides at his "last known residence" service should not be set aside where the "affixing" or "delivery" is to a place where defendant in fact lives or works. In such a case, it would appear that due process requirements would be satisfied.

A difficult situation is presented where plaintiff knows that the defendant no longer lives at his "last known residence," and also knows the defendant's place of business or abode—but does not know defendant's present residence. Perhaps plaintiff's best solution

---

[29] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318 (1950).

[30] 46 Misc. 2d 1043, 261 N.Y.S.2d 573 (Sup. Ct. Westchester County 1965).

[31] 23 App. Div. 2d 643, 256 N.Y.S.2d 961 (1st Dep't 1965).

[32] 45 Misc. 2d 307, 256 N.Y.S.2d 412 (Sup. Ct. N.Y. County 1964).

[33] 7B McKINNEY'S CPLR 308, supp. commentary 77 (1965).