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CPLR 308(3): Mailing to "Last Known Residence" Not Valid Where Plaintiff Knows that Defendant No Longer Resides There

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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

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[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).

would be to resort to CPLR 308(4). The court, with little difficulty, could direct that the summons be *both* mailed and affixed or delivered to the business address or place of abode.[34] There would appear to be nothing unconstitutional or procedurally incorrect with such substituted service. Section 308(4), thus far, has not been utilized to any great extent by the practicing bar. This section could alleviate many of the problems caused by the requirement of mailing to a "last known residence." [35]

CPLR 308(3): Where CPLR 313 is inapplicable, "last known residence" construed to embrace only a residence within the state.

In *Durgom v. Durgom*,[36] the defendant was a nonresident and a non-domiciliary. He did, however, maintain a business office in New York City. Plaintiff's action was based on an alleged breach of a separation agreement. Plaintiff alleged that the court acquired personal jurisdiction over the defendant by virtue of the fact that service was made upon him pursuant to CPLR 308(3).[37] The summons was affixed to the door of defendant's place of business in New York City and a copy was mailed to his California residence.

Defendant's motion to dismiss the complaint was granted on the ground that the court lacked jurisdiction over his person. In reaching its conclusion the court stated that unless CPLR 313 was applicable, the "last known residence" provision of CPLR 308(3), which requires a mailing to the "last known residence," necessarily had to be interpreted as meaning a "last known residence" within the state.[38]

In the instant case, there was no substantive basis for in personam or in rem jurisdiction. Breach of a separation agreement does not give rise to in personam jurisdiction over a non-domiciliary under CCA § 404 (civil court counterpart of CPLR 302).[39] In addition, an individual who transacts business in New York is not subject to in personam jurisdiction under CPLR 302 unless the cause of action arises out of the business transacted.

As the court noted, there is some authority in support of the plaintiff's contention that the mere out-of-state mailing to a de-

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[34] See Timen v. Robinson, (Sup. Ct. N.Y. County), 151 N.Y.L.J., April 6, 1964, p. 15, col. 1.

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

[36] 47 Misc. 2d 513, 262 N.Y.S.2d 874 (N.Y. City Civil Ct. 1965).

[37] CPLR 308(3) is made applicable to the civil court via operation of Section 403 of the Civil Court Act.

[38] Durgom v. Durgom, 47 Misc. 2d 513, 516-17, 262 N.Y.S.2d 874, 878-79 (N.Y. City Civil Ct. 1965).

[39] See Willis v. Willis, 42 Misc. 2d 473, 248 N.Y.S.2d 260 (Sup. Ct. N.Y. County 1964).