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Article 18

CPLR 308(3): Where CPLR 313 Is Inapplicable, "Last Known Residence" Construed to Embrace Only a Residence Within the State

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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).

fendant's "last known residence" could result in personal jurisdiction over him.[40] However, various factors tend to indicate that it was the intent of the legislature, in enacting CPLR 308, to limit the mailing of process within the state, unless there was some substantive basis for acquiring in personam jurisdiction over the non-domiciliary defendant.[41] One such factor is that the predecessor sections to CPLR 308(3) indicated clearly that the mailing must be within the state.[42] In addition, since the legislative notes and reports on the CPLR make no mention of an out-of-state mailing,[43] it would appear that the legislature was making no attempt to change the established law as found under the CPA.[44]

CPLR 308(3) is a mere device to effectuate service when such service under 308(1) cannot be made with due diligence. The nature of CPLR 308(1) indicates an underlying basis for in personam jurisdiction (physical presence within the state). To say that service of process under 308(3) can in and of itself be utilized as a basis for acquiring in personam jurisdiction where the defendant is not physically present, but merely has a place of business within the state, without the cause of action arising from such business, would be "stretching the constitutional requirements of due process to its [*sic*] outermost limits." [45] It might even exceed those bounds.

CPLR 308(3): Claim interposed for purpose of statute of limitations when summons served pursuant to statute—not when filed.

In *Browning v. Nix*,[46] plaintiff delivered the summons to the Sheriff of Erie County thereby effecting a sixty-day extension of the statute of limitations, as provided by CPLR 203(b)(4). Thereafter, plaintiff utilized substituted service pursuant to CPLR 308(3). However, plaintiff did not file proof of the substituted service, as required by CPLR 308(3), until such time that both the statute of limitations and the CPLR 203(b)(4) sixty-day extension had expired. Therefore, the defendant argued that even though substituted service was effected during the sixty-day extension, since

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[40] See, *e.g.*, Timen v. Robinson, (Sup. Ct. N.Y. County), 151 N.Y.L.J., April 6, 1964, p. 15, col. 1; 7B McKINNEY'S CPLR 308, supp. commentary 77 (1965).

[41] *Cf.* CPLR 313-16; CCA §§ 404-08.

[42] See CPA § 230.

[43] See SECOND REP. 156; FIFTH REP. 266.

[44] "It is a sound inference that in the absence of express language indicating its intention, it is presumed that the Legislature did not intend to overturn long standing rules of law." McKINNEY'S STATUTES § 74.

[45] Durgom v. Durgom, *supra* note 38, at 516, 262 N.Y.S.2d at 878.

[46] 47 Misc. 2d 709, 263 N.Y.S.2d 42 (Sup. Ct. Erie County 1965).