

Substituted Service Proper Under Section 313

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Substituted service proper under section 313.

Paragraph one of section 308 provides for personal service within the state upon a natural person. Paragraph three provides for what is commonly known as "substituted" service where personal service cannot be made with due diligence. Section 313 provides that a person domiciled in New York or subject to the jurisdiction of its courts under sections 301 and 302 may be served outside the state in the same manner as service is made within the state. It was contemplated that, when 313 was applicable and outside service authorized, the *methods* of service outside the state would be the same as those provided by 308 for service within the state.⁸⁸

The federal district court, in *Davis v. Gahan*,⁸⁹ although quashing the service as defective, made that assumption, and indicated that in a case where 313 (authorizing extra-state service) is applicable, substituted service under 308 (3) may be made outside the state. The Federal Rules of Civil Procedure allow service in a federal district court action to be made pursuant to state statute.⁹⁰ Thus, the CPLR was applied in the cited case. There, defendant's wife was served with summons and complaint in Florida. The Florida marshal never certified that he could not serve the defendant personally. Also, process was never mailed to defendant. The court found that there was sufficient basis for jurisdiction over defendant under section 302, thereby rendering him amenable to service outside the state under section 313, but found that service under section 308(3) was not properly executed. The case is important, however, for it is strong authority that substituted service under section 308(3) will be permitted via section 313.

CPLR 320 — Defendant's appearance; notice of appearance not waiver of jurisdictional objection.

In New York, a defendant appears by serving an answer, or a notice of appearance, or by making a motion which has the effect of extending the time to answer.⁹¹ Prior to the 1964 amendment to rule 320(b), an appearance of the defendant was equivalent to personal service upon him unless, *at the time of appearance*, an objection to jurisdiction was asserted by motion or by answer. The 1964 amendment deleted the words "at the time of appearance," thereby significantly changing the effect of the provision. Before the amendment was effective, if the defendant

⁸⁸ See Book 29A, pt. 3 MCKINNEY'S CCA § 403, commentary 98-99.

⁸⁹ 227 F. Supp. 867 (S.D.N.Y. 1964).

⁹⁰ FED. R. CIV. P. 4(e), (f).

⁹¹ CPLR 320(a).