

CPLR 308(4)--Service as the Court Directs

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court in *Johnson* referred to Section 1.03(a)(4) of the Uniform Interstate and International Procedure Act. This section provides for personal jurisdiction over a non-domiciliary as to a cause of action arising from tortious injury within the state by an act or omission outside the state where defendant *inter alia* "derives substantial revenue from goods used or consumed" within the state. It would appear that the facts of the *Gray* case do not fall within this restrictive standard.

CPLR 308(4)—Service as the court directs.

In *Goldenthal v. Terry*,⁵⁶ plaintiff after several unsuccessful attempts to serve the defendant personally, thereafter made service pursuant to court order under CPLR 308(4). The court order provided for substituted service⁵⁷ which, in effect, permitted plaintiff to *mail* and *affix* to the *last known residence*, as opposed to CPLR 308(3) which permits mailing to the last known residence and affixing to the *present* place of business, abode or dwelling house.⁵⁸ Thus, the court order pursuant to CPLR 308(4) was more liberal than CPLR 308(3). Defendant moved to dismiss on the ground that he was not living at the address specified in the order at the time service was made. The court, nevertheless, held service valid since defendant failed to sustain the burden of showing that he had acquired a new residence, and also since he had failed to show that service was not reasonably calculated to give him notice of the suit.

CPLR 308(3) has been drafted in such a manner as to assure that actual notice is given to the defendant.⁵⁹ A CPLR 308(4) court order must do likewise. If a defendant has acquired a new residence, mailing and affixing to the old one could hardly be deemed service reasonably calculated to give notice. Thus, if defendant had proved that he had acquired a new residence, service would have been deemed invalid.

It is interesting to note that the plaintiff did not allege that service was attempted pursuant to CPLR 308(3) or that such an attempt would have been impracticable. Resort can be made to CPLR 308(4) when service under subdivisions (1), (2) and (3) would be *impracticable*. According to the Revisers, *impracticable* means *futile*.⁶⁰ The practitioner is advised, therefore,

⁵⁶ 44 Misc. 2d 851, 255 N.Y.S.2d 151 (Sup. Ct. 1964).

⁵⁷ CPA § 230 required a court order before substituted service could be utilized.

⁵⁸ Service under CPLR 308(3) may 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 within the state . . ." or delivering the summons to a person of suitable age and discretion at one of these places.

⁵⁹ FIFTH REP. 266.

⁶⁰ *Ibid.*

to exhaust CPLR 308 possibilities before moving *ex parte* for a court order. Although the order may be granted, service will be ineffectual if defendant sets up the defense that he has acquired a new residence. Aside from the inconvenience of commencing the action anew, in some cases, the statute of limitations would bar the action.

CPLR 312: Personal service upon a court, board or commission.

In *Cale-Rome, Inc. v. Board of Assessors*,⁶¹ petitioner brought a proceeding to review a tax assessment on its property under Article 7 of the Real Property Tax Law. Respondents moved to dismiss alleging lack of jurisdiction due to faulty service. Section 708 of the Real Property Tax Law provides that service shall be made upon the clerk of the assessing unit (the assessing unit here being the City of Rome). A provision of the city charter designated the *City Clerk* as clerk of all city boards unless one was otherwise specified. No clerk had been designated for the board of assessors.

One Garrimone proceeded to serve the petition on the Clerk of the Board of Assessors. In an office at city hall designated "Board of Assessors," he found three people and inquired as to the identity of the assessors' clerk. Hughes, who was the Assessors' Aide, stated that all three were clerks. Garrimone, thereupon, served the papers on Hughes. The court stated that service would have been defective if section 708 were the sole method of service permitted since no attempt was made to serve the City Clerk. However, since CPLR 403(c) provides that a notice of petition shall be served in the same manner as a summons, and since Section 704(2) of the Real Property Tax Law states that the review proceeding shall be maintained against the assessors either by naming them individually or by using the official name of the assessing unit, service could also have been made under CPLR 311(3)⁶² or 312.⁶³ The court held that service was valid under CPLR 312 even though not personally given to the Clerk of the Board of Assessors. Had the facts been merely that Garrimone handed the papers to Hughes, without anything more, there would have been no compliance. However, the process server had taken all the steps that anyone under similar circumstances would, or could have taken.

⁶¹ 44 Misc. 2d 675, 255 N.Y.S.2d 12 (Sup. Ct. 1964).

⁶² Under CPLR 311(3), personal service upon any city other than New York City shall be made by delivering the summons "to the mayor, comptroller, treasurer, counsel or clerk"

⁶³ CPLR 312 provides that personal service upon a board or commission having a chairman or presiding officer, secretary or clerk may be made by delivering the summons to that person.