

## Section 308(4)–Service as Court Directs

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*Section 308(4) — Service As Court Directs*

Another ground for the motion to dismiss was that the method of service made pursuant to section 308(4) was insufficient to give notice. That section provides that personal service shall be made upon a natural person "in such manner as the court, upon motion without notice, directs, if service is *impracticable* under paragraph one, two or three of this section."<sup>19</sup> Here the service of the summons and complaint was made on the defendant's literary agent, who represented the defendant in matters other than those concerning the transaction which gave rise to the present controversy. In sustaining the method of service, the court stated that service under section 308(4) may be directed to be made on a non-resident by service on his actual agent, even though the agent is unconnected with the transaction out of which the cause of action arose. It reasoned that "the actual agent of such person must be regarded as cloaked with authority to receive service and as the person calculated to give notice to the defendant."<sup>20</sup>

Although section 308(4) appears to be a "catchall section" in that it allows a court to direct service in any adequate manner, the Revisers did not intend it to be used too frequently. They believed that it should only be employed where circumstances indicated that service pursuant to subdivision (1), (2) or (3) would be *futile*.<sup>21</sup>

Thus, the statute as enacted provides that section 308(4) may be utilized only "if service is *impracticable* under paragraph one, two or three of this section." This conforms with the Revisers' test of futility, because "impracticable" denotes infeasibility of performance.

Bearing on the practicability of service under section 308(4) is the authorization of section 313 to the effect that a "302 defendant" may be served without the state in the same manner as within. Thus, due to the existence of section 313, it might have been held that service under section 308(4) should not be authorized without a showing that service is impracticable outside the state, as well as within.<sup>22</sup> The court in *Totero*, in sus-

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<sup>19</sup> CPLR § 308. (Emphasis added.)

<sup>20</sup> *Totero v. World Telegram Corp.*, 41 Misc. 2d 594, 596, 245 N.Y.S.2d 870, 873 (Sup. Ct. 1963).

<sup>21</sup> "Where it would be futile to attempt service by one of the above-mentioned means, then the plaintiff may seek an order for some other method of service. . . ." 1961 N.Y. LEG. DOC. NO. 15, FIFTH REPORT TO THE LEGISLATURE BY THE SENATE FINANCE COMMITTEE ON THE REVISION OF THE CIVIL PRACTICE ACT 266 [hereinafter cited as FIFTH REP.].

<sup>22</sup> The "Practice Commentary" to McKinney's CPLR § 308 employs the Revisers' test of futility and states that § 308(4) authorizes the court to grant an order for service to be made in another manner "when all other

taining service pursuant to section 308(4), holds *in effect* that an endeavor to serve a defendant outside the state under section 313 is *not* a condition precedent to the use of section 308(4).<sup>23</sup>

*Section 302(a)(2) — Commission of a "Tortious Act"*

Section 302(a)(2) of the CPLR provides that a non-domiciliary is subject to in personam jurisdiction if the cause of action arises out of his commission of a tortious act within the state. An interesting case, and one which has taken a restrictive approach to section 302(a)(2), is *Feathers v. McLucas*.<sup>24</sup>

In that case, the defendant Darby Corporation, incorporated under the laws of, and having its only place of business in Kansas, had no direct contacts with New York. It manufactured cargo pressure tanks used for the transportation of liquefied petroleum products. Darby sold one of these tanks to a Missouri corporation, having its principal place of business in that state; this vendee affixed the tank to a trailer chassis and wheels. The completed tank trailer was sold to a Pennsylvania corporation engaged in interstate commerce. While this trailer was being driven through New York to Vermont, the tank ruptured and exploded, giving rise to an alleged cause of action for personal injuries and property damage. Relying on section 302(a)(2), the plaintiff served the president of the defendant Darby Corporation in Kansas, which is permissible under section 313 in a section 302 case. The defendant successfully moved to set service aside (*i.e.*, made a motion under rule 3211(a)(8)), contending that the court lacked in personam jurisdiction.

In resolving this issue, the court examined the cases decided under the Illinois "longarm statute," Section 17 of the Illinois Practice Act, on which section 302(a) is based, and adopted the distinction between a tortious act and a tortious injury, as drawn by a federal district court in Illinois in *Hellriegel v. Sears*

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avenues have been exhausted unsuccessfully." 7B MCKINNEY'S CPLR § 308, commentary 475.

<sup>23</sup> The fact that § 308 (service in New York) precedes § 313 (service outside New York) indicates that § 308(4) clearly contemplates only the exhaustion of in-state service under § 308(1)-(3) without reference to extra-state service under § 313. In any event, that numerical position of § 308(4) offers good ground for such a determination. As a practical matter, § 308(4) might become a comparatively useless tool if, before an order could be moved for under it, service in a foreign nation had to be resorted to. If the service ordered under § 308(4) is such as to satisfy due process—and in the *Totero* case the agent designated for service seemed a reliable source to assure that the defendant would be notified—it seems preferable to permit application for an order under § 308(4) without requiring that extra-state service first be attempted under § 313.

<sup>24</sup> 41 Misc. 2d 498, 245 N.Y.S.2d 282 (Sup. Ct. 1963).