

Section 308(3)–Substituted Service

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Section 308(3) — Substituted Service

Section 308(3) of the CPLR provides that substituted service may be employed where "with due diligence" a summons cannot be personally served. The summons must be mailed to defendant at his last known residence and either affixed to the door of one of the places designated in the provision, or delivered to a person of suitable age and discretion at such place.

*Epstein v. Cuba*³⁶ presented the question whether service was defective because the mailing of the summons preceded its affixing to the door. The court, in construing the statute liberally, held that the affixing need not precede the mailing. By way of dictum, the court also observed that there is no priority between "affixing" and "delivering."

Since the function of section 308 is compliance with procedural due process, *i.e.*, notice and opportunity to be heard, there is no logical reason for holding that one step must precede the other.

It is important to note here that although the affixing or delivering must be made at designated places "within the state," the place where the summons is to be mailed is not so clearly confined.³⁷

Section 311(1) — Personal Service on a Corporation

Section 311(1) enumerates the persons upon whom service of process must be made in behalf of a corporate defendant. It abolishes the distinction that existed under the CPA between foreign corporations, section 229, and domestic corporations, section 228(8) and (9).³⁸

Generally, the persons designated by section 311 are readily ascertainable by title, that is, officer, director, cashier, assistant cashier or authorized agent. A more difficult person to identify among those enumerated is the "managing or general agent."

The designation of "managing agent" as a person upon whom service can be made is carried over from Section 228(8) of the CPA. A recent case decided under the CPLR defining the characteristics of such designee is *B & J Bakery, Inc. v. United States Fid. & Guar. Co.*³⁹

³⁶ (Sup. Ct, Nassau County), 151 N.Y.L.J., Feb. 7, 1964, p. 17, col. 7.

³⁷ See commentary on § 308(3) of the CPLR in 29A MCKINNEY'S JUDICIARY — COURT ACTS (Pt. 3) 96-102.

³⁸ One reason for the change is that the process server is often ignorant as to whether the corporation is domestic or foreign. SECOND REP. 161. As a practical matter, if the corporation is a foreign corporation, the court may be more prone to find that the person served was a managing agent because of the limited number of employees here. 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 311.05 (1963).

³⁹ 40 Misc. 2d 839, 244 N.Y.S.2d 284 (Sup. Ct. 1963).