

Section 311(1)--Personal Service on a Corporation

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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).

In that case the process server stated, by affidavit, that when he informed the receptionist at defendant's office that he had a summons to serve on the defendant, the receptionist directed him to present it to the managing agent of the defendant, who was also the executive secretary to the vice president. After the process server informed the managing agent of the nature of his business, she went into the vice president's office. She returned shortly thereafter and told him to leave the summons with her and that "she would take care of it."

Defendant's motion to dismiss raised the question of whether this was valid service upon the corporation. The court, quoting Judge Cardozo's test enunciated in *Tauza v. Susquehanna Coal Co.*,⁴⁰ stated that "if their [the agent's] positions are such as to lead to a just presumption that notice to them will be notice to the principal, the corporation must submit. . ."⁴¹ The agent's position, however, must be one of importance and responsibility. The court observed that the attitude which now appears to be taking hold is that a person can be a managing agent to receive process if his duties entail the exercise of discretion in the handling of the corporation's business and he is in "constant communication with the officers."⁴²

The court observed that, in light of the intent of the Legislature to simplify the method of service upon a corporation, "paramount consideration should be given to substance rather than procedural technicalities. . ."⁴³ This ruling is in accord with the overall theory of the CPLR, to give primary weight to substance rather than form.⁴⁴ But note that the teller at a bank window or at a bowling alley stand is not the "cashier" or "assistant cashier" that section 311(1) contemplates.⁴⁵

Removal from Supreme Court to Lower Court

Section 325 of the CPLR provides a procedure for transferring a properly commenced litigation in the supreme court to a court of inferior jurisdiction where the relief sought may be obtained in

⁴⁰ 220 N.Y. 259, 115 N.E. 915 (1917).

⁴¹ *Id.* at 269, 115 N.E. at 918.

⁴² *B & J Bakery, Inc. v. United States Fid. & Guar. Co.*, 40 Misc. 2d 839, 842, 244 N.Y.S.2d 284, 288 (Sup. Ct. 1963). To support its position the court quoted from *Green v. Morningside Heights Housing Corp.*, 13 Misc. 2d 124, 125, 177 N.Y.S.2d 760, 761 (Sup. Ct.), *aff'd mem.*, 7 App. Div. 2d 708, 180 N.Y.S.2d 104 (1st Dep't 1958), where Mr. Justice Steuer said: "Where the delivery is so close both in time and space that it can be classified as a part of the same act service is effected."

⁴³ *B & J Bakery, Inc. v. United States Fid. & Guar. Co.*, 40 Misc. 2d 839, 843, 244 N.Y.S.2d 284, 289 (Sup. Ct. 1963).

⁴⁴ 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 311.01 (1963).

⁴⁵ *Ousteky v. Farmingdale Lanes, Inc.*, 246 N.Y.S.2d 859 (Sup. Ct. 1964); *cf. Taylor v. Commercial Bank*, 174 N.Y. 181, 66 N.E. 726 (1903).