

Legislation Report

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

REPORT NO. 16

March 11, 2003

A. 3650

By: M. of A. Brennan
Assembly Committee: Codes
Effective Date: On the first day of January
next succeeding the date on
which it shall have become
a law

AN ACT to amend the civil practice law and rules, in relation to the validity of service of process in certain circumstances

LAW AND SECTIONS REFERRED TO: CPLR § 308

REPORT PREPARED BY THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES(#13)

THIS BILL IS APPROVED WITH MODIFICATIONS

This bill would add a new undesignated paragraph at the end of CPLR 308, to provide that if both acts of service pursuant to subdivision 2 or subdivision 4 have been attempted and only one of them is validly effected, a showing that the defendant actually received process will be sufficient to sustain the service. Filing of the proof of service will continue to be necessary for completion of service.

CPLR §308(2) and (4) provide for a two step mechanism to serve a natural person with the summons. CPLR §308(2) requires an initial personal delivery to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the defendant followed by a mailing either to the defendant's last known residence or by first class mail to the defendant's actual place of business in an envelope marked "personal and confidential" and without any indication that it is from a lawyer or concerns an action. Moreover, if service cannot be made by personal delivery (CPLR 308(1)) or by leave and mail (CPLR 308(2)) with due diligence, personal service can be made by "nail and mail" service similar to the procedure described above for leave and mail, that is, a two-step nail and mail process.

The stated purpose of the proposed amendment is "in the interest of basic fairness" to prevent the recurrence of the result in *Feinstein v. Berger*, 48 NY2d 234, 422 NYS 2d 356, 397 NE 2d 1161 (1979). In *Feinstein*, a wrongful death action, plaintiff was unable to effectuate both of the required acts under both CPLR 308(2) and CPLR 308(4) despite diligent efforts with respect to the nail and mail service. Plaintiff was able to satisfy the second step, by mailing the summons to the defendant's last known residence. However, the court found that the plaintiff failed to satisfy the first step by affixing the summons to the door of defendant's last known residence - his parents' home where he lived at the time of the accident - rather than his "actual abode"¹. Thus, the court dismissed the action even though:

1. It was undisputed that the defendant had received timely notice of the action (his father had mailed the summons and complaint to defendant's new address);
2. After moving out from his parents' home, the defendant left no forwarding address with the post-office and thus the plaintiff had no reason to believe it was not the defendant's "dwelling place" or "usual place of abode"; and
3. The Statute of Limitations had run on plaintiff's claim.

The proposed bill attempts to avoid the result in *Feinstein*, by providing for proper service where only one of the two acts prescribed under CPLR 308(2) or (4) is validly effected if the defendant actually has received notice. Because of the difficulty at times in determining a defendant's "usual place of abode" or "dwelling place", the bill serves a laudatory purpose. If the plaintiff has made diligent efforts to effect service, has complied with at least one of the required steps, and the defendant has received actual notice, it serves no purpose to find the service defective. *Feinstein* illustrates the anomalous situation that exists in the law at this moment. Complying with the letter of the law of the service statute, even if the defendant never actually receives notice, is considered proper service; while a technical defect in service, even with the defendant receiving actual notice, is determined to be defective. This is simply illogical, particularly in an evolving technological era, where e-mail or other types of service should be contemplated. However, the proposed bill contains several flaws that must be addressed:

1. Because the current statute utilizes the term "summons", that word should be substituted for "process" in the proposed amendment.
2. By negative implication, the amendment could be read to overrule existing case law upholding service if both steps in CPLR 308(2) or 308(4) are followed properly, even if the defendant never actually receives the summons.

¹ The Court used the term "*actual* abode", even though the phrase in the statute is "usual place of abode".

3. The proposed bill does not define what would qualify as "attempted service". For example, is one "attempt" at defendant's home, if he is not there, enough? Would attempts have to be made at each of defendant's "actual place of business", "dwelling place" and "usual place of abode"? Could this be read to effect the "due diligence" requirement under CPLR 308(4), that is, would the standard to be applied to determining plaintiff's diligent "attempts" under CPLR 308(2) change after the amendment?

4. The proposed amendment should either be a separate paragraph at the end of CPLR 308 (i.e. ¶7), or, based on the above comments, perhaps a better alternative would be to insert a separate sentence at the end of CPLR 308(2) and (4), in place of the proposed amendment, such as:

Where both acts of service have been attempted under this subdivision, and one of the two acts has been validly effected, an action shall not be dismissed for improper service of the summons, if the defendant has received the summons.

For the foregoing reasons, the bill is **APPROVED WITH MODIFICATIONS**.

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