

Serving Hard-to-Find Defendants – Motions for Alternate Service

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Filing a complaint in a New York court can be easy. But after a plaintiff files that complaint, the plaintiff must serve the defendant with the summons and complaint. Failing to serve the defendant properly may lead the case to be dismissed. For many plaintiffs, attempting to serve the complaint on the defendant is as far as they get. Often, defendants know that if they can make it difficult for the plaintiff to serve the complaint, they have a chance to make the lawsuit go away. However, when plaintiffs have difficulty serving the defendant, they can take advantage of New York's laws and creatively serve the complaint and move their case forward.

In New York, CPLR 308 is the law that identifies the methods a plaintiff must use for completing personal service on a defendant.

Ideally, a plaintiff can serve a defendant by personally delivering the summons to him or her. CPLR 308(1).

But if not, a plaintiff may deliver the summons to a person "of suitable age and discretion" at the defendant's "actual place of business" or "dwelling place or usual place of abode." CPLR 308(2).

Suppose plaintiff cannot serve the defendant by personal delivery or to a person of suitable age and discretion despite the plaintiff's due diligence. In that case, the plaintiff may affix the summons to the door of the defendant's "actual place of business, dwelling place or usual place of abode" and then mail a copy of the summons to the defendant's "last known residence" or "actual place of business" in the specific manner called for in CPLR 308(4).

For many plaintiffs, one of those three service methods will do the trick.

But what if a plaintiff cannot track down the defendant's actual place of business? Or does the defendant's place of business have security that won't permit access to the defendant's office? Or the plaintiff cannot access the defendant's home because it's in a gated community?

This is where CPLR 308(5) comes in: when serving a defendant is "impracticable," a plaintiff may ask the court for permission to serve the defendant in any "such manner as the court . . . directs."

To request this from the court, a plaintiff can file a motion. Sometimes, these motions are called motions for substitute service or for alternate service. In that motion, the plaintiff must show the efforts undertaken and that serving the defendant is "impracticable"—not impossible. Then, the plaintiff may request the court to allow it to serve the defendant by some method other than CPLR 308 prescribes.

In considering these types of motions, courts require that the defendant receive due process and that the service on the defendant is “reasonably calculated, under all circumstances, to apprise the defendant” of the lawsuit.

Courts have wide latitude in fashioning the method of service and adapting that method to the particular facts of the case.

In deciding these motions, some courts have prescribed plaintiffs to serve the summons and complaint on a defendant’s attorney, insurance company, or family member, and some have even allowed service by email.

The circumstances for each situation are different. However, if a plaintiff is having difficulty serving a defendant—perhaps because the defendant is evading service—then that plaintiff might consider pursuing a motion under CPLR 308(5). This is particularly important because serving the summons and complaint must be completed within 120 days after commencing the lawsuit. CPLR 306-b.

When a plaintiff prepares a motion under CPLR 308(5), it is crucial to include documentation of the plaintiff’s efforts. Those efforts will not only tend to show that service on the defendant is “impracticable” but also that the proposed method of service that the plaintiff seeks to use is fair and will give the defendant due process.