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CPLR 5511, the Pitfalls of Aggrievement, Beyond the Basics, Part I

Aggrievement occurs when requested relief is denied in whole or in part or when someone demands relief against another, who opposed the application, and the relief is granted in whole or in part.

By **Elliott Scheinberg** | August 30, 2018

An appellant must satisfy three jurisdictional predicates before the merits may be reviewed: Aggrievement [CPLR 5511]; Appealable Paper [CPLR 5512] and Timeliness [CPLR 5513]. The first sentence in CPLR 5511, "An aggrieved party or a person substituted for him may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party," and its basic implications are generally well known.

The root of appellate jurisdiction is by way of an aggrieved person. *Burmester v O'Brien*, 166 AD 932 [2d Dept 1915]. Aggrievement is jurisdictional and subject to the court's threshold review, sua sponte first time on appeal. *Klinge v. Ithaca College*, 235 A.D.2d 724 [3rd Dept 1997]; *Glickman v. Sami*, 146 A.D.2d 671 [2nd Dept 1989].

Aggrievement, Two-Tier Test

Aggrievement occurs when requested relief is denied in whole or in part or when someone demands relief against another, who opposed the application, and the relief is granted in whole or in part. *Mixon v. TBV, Inc.*, 76 A.D.3d 144 (2nd Dept 2010). A party is not aggrieved by an order which does not grant relief the party did not request. *Spielman v Mehraban*, 105 AD3d 943 [2d Dept 2013]. Incomplete relief to the successful party may include a specific finding at trial that might prejudice the party in a future proceeding by way of collateral estoppel. *Feldman v. Planning Bd. of Town of Rochester*, 99 A.D.3d 1161 [3rd Dept 2012].

Aggrievement requires an existing right, a direct interest in the controversy. A remote or contingent interest does not give the right to appeal. *In re Landis*, 114 A.D.3d 458 [1st Dept 2014]; *Application of DeLong*, 89 AD2d 368 [4th Dept 1982]. Disappointment or even having been deprived of a financial benefit does not, without more, make that party aggrieved. *Thymann v AFG Mgt.*, 112 AD3d 455 [1st Dept 2013].

A technical nonparty may have standing to prosecute an appeal, even absent a motion for leave to intervene, a notice of appearance, answer, or motion extending the time to answer (CPLR 320, 1003, 1012, 1013) where it is "expressly bound" by the order under review. *Stewart v Stewart*, 118 AD2d 455 [1st Dept 1986]; *Buller v Giorno*, 40 AD3d 316 [1st Dept 2007]; *Brady v Ottaway Newspapers, Inc.*, 97 AD2d 451 [2d Dept 1983], affd, 63 NY2d 1031 [1984]; *Petroski v Petroski*, 6 AD3d 1194 [4th Dept 2004].

An intervenor becomes a party to the underlying proceeding for all purposes, including aggrievement. *Dolomite Products Co., Inc. v Town of Ballston*, 151 AD3d 1328 [3d Dept

2017].

The children, in *Kessler v Fancher*, 112 AD3d 1323 [4th Dept 2013], were held not aggrieved by orders that dismissed petitions filed by one parent alleging violations of custody or seeking personal orders of protection against the other parent. In *In re Alexander Z.*, 151 AD3d 421 [1st Dept 2017], the children were held not aggrieved thus barring an appeal from findings of neglect against their mother. *In re Geovany S.,*143 AD3d 578 [1st Dept 2016], held that children were not aggrieved by the finding of their derivative neglect by respondent. *Gevonay* and *Alexander Z.* are counterintuitive because the children, in both cases, were the direct victims of the neglect and no one more could have had a greater direct interest or been more aggrieved.

In *Valenson v Kenyon*, 80 AD3d 799 [3d Dept 2011], the father's parents had physical custody of the child. The father moved to modify the order. Family Court awarded, inter alia, joint legal custody to the father and the grandmother, with primary physical custody remaining with the grandmother. The mother's appeal was dismissed because she was not aggrieved. She was not a custodial parent under the prior order, she did not seek to change the prior order, and Family Court's resolution did not alter her status or affect her legal rights; thus, her direct interests were not affected. Her status as the mother and a party to the proceedings, without more, did not establish her aggrievement, accordingly, she lacked standing to appeal.

The Court's Reasoning, Adverse Language

Aggrievement does not hinge upon a court's reasons underpinning why relief was granted or denied. *Dolomite Products Co., Inc. v Town of Ballston*, 151 AD3d 1328 [3d Dept 2017]; *Brown v Condzal*, 137 AD3d 667 [1st Dept 2016]. Not the words selected by the writing judge, but the action taken by the court is what is operative and significant. *Switzer v Merchants Mut. Cas. Co.*, 2 NY2d 575 [1957]; *Wells Fargo Bank, NA v Ostiguy*, 119 AD3d 1266 [3d Dept 2014]. An appellant who received all the relief it

requested is not aggrieved, even though the court may have made some finding of fact or ruling of law with which the appellant is dissatisfied. *Benedetti v Erie County Med. Ctr. Corp.*, 126 AD3d 1322 [4th Dept 2015].

Where multiple grounds for relief are asserted, receipt of a favorable judgment or order does not render the prevailing party aggrieved as to the other grounds. *Held v New York State Workers' Compensation Bd.*, 58 AD3d 971 [3d Dept 2009].

Consent Orders, Failure to Oppose

A person who consents or fails to oppose relief requested by another has acquiesced in that relief and is not aggrieved. *Mixon v TBV, Inc.*, 76 AD3d 144, n., 2, [2d Dept 2010]. A stipulation reducing a damages award does not render the party aggrieved. *Zhagnay v Royal Realty Co.*, 87 NY2d 954 [1996]; *Nunez v City of New York*, 85 AD3d 885 [2d Dept 2011]. An appeal from a judgment entered on consent lies to the extent that it differs from the consent. *Hatsis v. Hatsis*, 122 A.D.2d 111 [2nd Dept 1986].

In *Matter of Dah'Marii G.*, 156 AD3d 1479 [4th Dept 2017], the mother never moved to vacate the finding of neglect or to withdraw her consent to the order, her contention that her consent was not knowing, intelligent, and voluntary could not be appealed.

Relief to Intertwined Nonappealing Parties

Hecht v. City of New York, 60 N.Y.2d 57 [1983], addressed the limits of an appellate court's scope of review of a judgment rendered against multiple parties but appealed by only one.

It noted that appellate scope of review is "generally limited to those parts of the judgment that have been appealed and that aggrieve the appealing party;" "no statutory nor constitutional authority permits an appellate court to exercise any general discretionary power to grant relief to a nonappealing party" [at 63]. Nevertheless, on rare occasions, *Hecht* held, appellate alteration may also inure to the

nonappealing party where the "parties hav[e] a united and inseverable interest in the judgment's subject matter, which itself permits no inconsistent application among the parties." [Also, *Cover v Cohen*, 61 NY2d 261 [1984]; *Mixon,* n. 2.]

Intertwined Orders or Judgments

Where disposition of the portion of an order or judgment appealed from is so inextricably intertwined with the portion of the order not appealed from, that it would be unjust to vacate one without the other, the court may vacate the nonappealed portion via its vacatur of the appealed portion. *Citnalta Const. Corp. v Caristo Assoc. Elec. Contractors, Inc.*, 244 AD2d 252, n. 1 [1st Dept 1997] (the failure to factor the payments to the original subcontractor into the damages award was inextricably intertwined with the failure to factor the cost of the change orders into that award, the correction of the former error required correction of the latter.)

In *City of Mount Vernon v Mount Vernon Hous. Auth.*, 235 AD2d 516 [2d Dept 1997], plaintiff-appellant cross-moved to amend the notice of appeal. The Appellate Division found that this case was a rare occasion "where an appellate court may review and alter provisions of an order or judgment which were not described in a limited notice of appeal [because] the subject of the limited appeal are[sic] 'inextricably intertwined' with those that are not, so that to give appropriate relief requires the court, by necessity, to disturb a provision of the order or judgment which would otherwise not be before it." Although the Appellate Division denied the cross-motion to amend the notice of appeal, it did "not foreclose the power [] to review and, if required, alter any portion of the order appealed from necessary to afford the appellant appropriate relief with respect to its limited appeal."

Accepting the Benefits of a Judgment

Generally, a party accepting the benefits of a judgment waives the right to appeal that judgment. An exception occurs where the appeal seeks to increase the amount of the

judgment. *Estate of Fleischer*, 126 AD2d 805 [3d Dept 1987].

In *Kriesel v May Dept. Stores Co.*, 261 AD2d 837 [4th Dept 1999], plaintiff executed a satisfaction of judgment for damages for past and future lost wages and past and future medical expenses. Plaintiff could appeal the verdict's failure to include damages for pain and suffering:

Where "the outcome of the appeal could have no effect on the appellant's right to the benefit he or she accepted, its acceptance should not preclude the appeal. 'There is nothing inconsistent in a party's accepting the benefit of a judgment * * * and appealing in an attempt to increase the award' " ... "This exception appears to be limited to those instances where the appellant's right to the amount awarded by the original judgment is absolute, making it possible to obtain a more favorable judgment without the risk of a less favorable result upon retrial."

Also *Webber v Webber*, 145 AD3d 1499 [4th Dept 2016]; *Cornell v T. V. Dev. Corp.*, 17 NY2d 69 [1966].

Assignment of Judgment or Rights

An assignment, without reservation, is generally a transfer of one's whole interest. The assignee takes all the right, title and interest possessed by the assignor. *Trans-Resources, Inc. v Nausch Hogan and Murray*, 298 AD2d 27 [1st Dept 2002].

An appellant who had no interest in the judgment at the time of the order or during the statutory period for filing a notice of appeal is not aggrieved. That the judgment was again assigned to the appellant during the pendency of the appeal does not confer jurisdiction nunc pro tunc on the Appellate Division. *Jacob and Valeria Langeloth Foundation v. Dickerson Pond Associates*, 149 A.D.2d 408 [2nd Dept 1989]; *Advanced Distribution Systems, Inc. v. Frontier Warehousing, Inc.*, 27 A.D.3d 1151 [4th Dept 2006].

Individual and Corporate Aggrievement

Individual and corporate rights of aggrievement are distinct. In *Carollo v N. Westchester Hosp. Ctr.*, 5 AD3d 715 [2d Dept 2004], an action for medical malpractice and wrongful death, the plaintiffs were granted leave to add David T. Ennis, M.D., P.C., the professional corporation under which the defendant Dr. David Ennis conducted his medical practice, as a defendant. Dr. Ennis appealed. The order affected only the rights of the corporation, and not Dr. Ennis' individual rights. He was thus not aggrieved and could not appeal. [Also, *LaRose v Cricchio*, 20 NYS3d 169 [2d Dept 2015]].

Part II, which will run Tuesday in Outside Counsel, addresses aggrievement and its relationship to: standing; third-party standing; alternative grounds for affirmance; the consequences of default, including conditional orders – CPLR §§ 3126, 5015(a)(1); 22 NYCRR 202.27; and subject of contest. *Elliott Scheinberg is a member of the New York State Bar Association Committee on Courts of Appellate Jurisdiction. He is the author of the upcoming compendium, "The Civil Appellate Citator," NYSBA (TBA), and of "Contract Doctrine and Marital Agreements in New York," NYSBA, (3d ed. 2016). He is also a fellow of the American Academy of Matrimonial Lawyers.*

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An issue is not actually litigated if, for example, there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading or even because of stipulation.

By **Elliott Scheinberg** | August 31, 2018

Standing is "a party's right to make a legal claim or seek judicial enforcement of a duty or right." Black's Law Dictionary [10th ed. 2014]. For example, a candidate of one political party has no standing to challenge the internal affairs and operating functions of another political party in its designation of candidates. *Lavell v Baker*, 153 AD3d 1135 [4th Dept 2017]; *Hardwick v Ward*, 109 AD3d 1223 [4th Dept 2013].

In *Three Amigos SJL Rest., Inc. v 250 W. 43 Owner LLC*, 144 AD3d 490 [1st Dept 2016], the commercial tenants were granted a Yellowstone injunction. The current landlord-defendants were neither parties to the action when the injunction was issued nor when the former landlord filed the notice of appeal. Nevertheless, the Appellate Division, sua sponte, deemed the notice of appeal to be a notice of appeal by the current landlords because they were aggrieved.

In re Gena S., 101 AD3d 1593 [4th Dept 2012], the mother's parental rights had been terminated and, therefore, lacked standing to participate in the permanency hearing and to appeal any of the orders.

One held to lack standing is aggrieved and has standing to appeal that finding. *Levitt & Kaizer v Charles*, 150 AD3d 478 [1st Dept 2017].

Third-Party Standing

Generally, a party has no standing to raise the legal rights of another, *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761 [1991]. The concept of third-party standing allows a third party who has suffered an "injury in fact" to assert the constitutional rights of others. *New York County Lawyers' Ass'n [NYCLA] v State*, 294 AD2d 69 [1st Dept 2002], citing *Powers v. Ohio*, 499 U.S. 400 [1991]:

Three factors ... are relevant in determining whether the principle of third-party standing applies in a particular case ... (1) some substantial relationship between the party asserting the claim and the rightholder, (2) the impossibility of the rightholder asserting his own rights, and (3) the need to avoid a dilution of the parties' constitutional rights....

NYCLA was also held to have organizational standing, citing *Grant v. Cuomo*, 130 A.D.2d 154 [1987], affd. 73 N.Y.2d 820 [1988]; *Urban Justice Ctr. v Silver*, 66 AD3d 567 [1st Dept 2009].

Nonaggrieved Party, CPLR 5501(a), Alternative Grounds for Affirmance

CPLR 5501(a)(1) provides that "an appeal from a final judgment brings up for review any non-final judgment or order which necessarily affects the final judgment, including any which was adverse to the respondent on appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal ..."

In *Parochial Bus Sys., Inc. v Bd. of Educ. of City of New York*, 60 NY2d 539, 546 [1983], the Court of Appeals emphasized: "5501(a)(1) permit[s] a broad scope of review of any determinations that were 'adverse to the respondent. ... This rule permits a respondent to obtain review of a determination incorrectly rendered below where, otherwise, he might suffer a reversal of the final judgment or order upon some other ground. Hence, the successful party, who is not aggrieved ... is entitled to raise an error made below, for review by the appellate court, as long as that error has been properly preserved and would, if corrected, support a judgment in his favor."

Although the respondent's cross-appeal was dismissed because it was not aggrieved, the Appellate Division, nevertheless, considered the contentions therein as alternative grounds for affirmance of the order. *In re Tehan*, 144 AD3d 1530 [4th Dept 2016]. [Also *Nieves v Martinez*, 285 AD2d 410 [1st Dept 2001]].

Leave to Replead, Refile

A party is not aggrieved from an order which dismisses a cause of action or a motion with leave to replead or refile. *Meachum v. Outdoor World Corp.*, 273 A.D.2d 208 [2nd Dept 2000]; *Rubiano v Kelly*, 136 AD3d 780 [2d Dept 2016].

Default

An issue is not actually litigated if, for example, there has been a default, a confession

of liability, a failure to place a matter in issue by proper pleading or even because of stipulation. *Krause v. Krause*, 282 N.Y. 355 [1940]. A party cannot appeal from an order entered upon default, the proper procedure is to move to vacate the default and, if necessary, appeal from the denial of that motion. *Menghi v Trotta-Menghi*, 162 AD3d 771 [2d Dept 2018]. When it is unclear whether an order was granted on default, remittal is necessary to the issuing court for clarification. *Glickman v. Sami*, 146 A.D.2d 671 [2nd Dept 1989].

Where a party contests the application for entry of a default judgment, CPLR 5511 is inapplicable and the judgment predicated upon the party's default is appealable. *Achampong v. Weigelt*, 240 A.D.2d 247 [1st Dept 1997]; *Cole-Hatchard v Eggers*, 132 AD3d 718 [2d Dept 2015]; *Robert Marini Bldr. Inc. v Rao*, 263 AD2d 846 [3d Dept 1999]; *Spano v Kline*, 50 AD3d 1499 [4th Dept 2008].

Default, Admissions, Burden of Proof

The granting of a default judgment does not impose a "mandatory ministerial duty" upon a court. *Gagen v. Kipany Productions Limited.*, 289 A.D.2d 844 [3rd Dept 2001]. While a default admits all factual allegations of the complaint and all reasonable inferences therefrom, it does not admit legal conclusions which are reserved for the court's determination. *Silberstein v Presbyt. Hosp. in City of N.Y.*, 96 AD2d 1096 [2d Dept 1983]; *McGee v. Dunn*, 75 A.D.3d 624 [2nd Dept 2010]. Plaintiff must present prima proof of entitlement to the relief, *Walley v. Leatherstocking Healthcare*, LLC., 79 A.D.3d 1236 [3rd Dept 2010]; he must meet the burden of stating a viable cause of action. *Paulus v Christopher Vacirca, Inc.*, 128 AD3d 116 [2d Dept 2015], without which the party moving for judgment is not entitled to the relief, even on default, *Nationstar Mtge., LLC v Hilpertshauser*, 156 AD3d 1052 [3d Dept 2017], and the court may sua sponte dismiss the complaint upon the motion for a default judgment [*Walley*].

An order entered upon an uncontested inquest after a default is not reviewable on

appeal. *Pincus v Family Dental Services*, 142 AD2d 561 [2d Dept 1988].

Default by Behavior

Disruptive behavior in the courtroom may constitute a default. *Kondratyeva v. Yapi*, 13 A.D.3d 376 [2nd Dept 2004]. Walking out of a hearing may be treated as a knowing and willing default. *Anita L. v Damon N.*, 54 AD3d 630 [1st Dept 2008].

22 NYCRR 202.27

Dismissal of an action for failure to prosecute is proper where, on the scheduled date of trial, a party either fails to appear and proceed or is not ready to proceed, such as refusing to select a jury, 22 NYCRR 202.27[b]. This constitutes a default. *Community Network Serv., Inc. v Verizon New York, Inc.*, 48 AD3d 249 [1st Dept 2008]. Absence of an order of dismissal under 22 NYCRR 202.27(b) does not mean that there is no default. *Saunders v Riverbay Corp.*, 17 AD3d 137 [1st Dept 2005].

An attorney's nonappearnce at a preliminary conference does not remove the order out of the realm of a default and a motion to vacate is required. *Kelly v Long Is. Coll. Hosp.*, 199 AD2d 244 [2d Dept 1993].

Conditional Orders, CPLR §§ 3126, 5015(a)(1)

A default order entered pursuant to CPLR 3126 is directly appealable because it was made on notice enabling the defaulter to contest the motion. An appeal is the sole remedy; the defaulter may not proceed by way of CPLR 5015. "A 5015(a)(1) motion would effectively grant that party an extension of time in which to appeal, a result anathema to the legislative intent of CPLR 5513." *Pinapati v Pagadala*, 244 AD2d 676 [3d Dept 1997]; *Clarke v United Parcel Serv., Inc.*, 300 AD2d 614 [2d Dept 2002]. Were a 5015(a)(1) motion permissible, the recalcitrant party would be allowed to relitigate the very issue previously contested and decided, to wit, whether there was an excusable failure to comply with the disclosure orders. *Pergamon Press, Inc. v Tietze*, 81 AD2d

831 [2d Dept 1981].

Where a pleading is stricken based on a self-executing conditional order, a motion to vacate the conditional order pursuant to CPLR 5015(a)(1) is required, not an appeal from the conditional order. But where a noncompliant party has defaulted on a motion seeking a conditional order to strike its pleading or had consented to the conditional order before failing to comply with it, that party has had no opportunity to offer a reasonable excuse for the default or a meritorious claim or defense, the additional prerequisite to relief under CPLR 5015(a)(1). Accordingly, an appeal is not only expressly precluded by CPLR 5511, it also would be an empty exercise, given the lack of any record on those issues. *Lauer v City Of Buffalo*, 53 AD3d 213 [4th Dept 2008]. *Lauer* further underscored:

[E]ven where a motion for a conditional order to strike a pleading has been opposed, if the motion is granted and the conditional order by its terms is self-executing upon the failure to comply with its conditions, there likewise has been no opportunity to present an excuse for that default or a meritorious claim or defense, and thus there likewise is no record on those issues.

Subject of Contest

A default by the appealing party notwithstanding, an appeal from a judgment brings up for review those "matters which were the subject of contest" below. *Bank of New York Mellon Tr. Co., N.A. v Sukhu*, 163 AD3d 748 [2d Dept 2018], citing *James v. Powell*, 19 N.Y.2d 249, 256 n. 3 [1967].

In *Feldman v. Teitelbaum*, 160 A.D.2d 832 [2nd Dept 1990], the appellant defaulted in answering the complaint but, during the litigation, moved to dismiss the complaint, that motion was the subject of contest and hence appealable. In *Tun v. Aw*, 10 A.D.3d 651 [2nd Dept 2004], counsel appeared at a hearing without the client but refused to participate. Counsel's request for an adjournment was denied. The client defaulted but

the application for an adjournment was held to be the subject of contest.

Subject of contest includes anything that had been contested below: (1) denial of a motion to appear by either mail or telephone, *In re Sacks v Abraham*, 114 AD3d 799 [2d Dept 2014]; *Rossi v Spano*, 26 AD3d 388 [2d Dept 2006]; (2) whether Family Court had personal jurisdiction over the personal representatives of the decedent's estate, *Constance P. v Avraam G.*, 27 AD3d 754 [2d Dept 2006]; (3) failure to state a cause of action, *Smith v Howard*, 113 AD3d 781 [2d Dept 2014]; (4) motion to withdraw as counsel, *Sarlo-Pinzur v Pinzur*, 59 AD3d 607 [2d Dept 2009]; (6) waiver of the right to counsel, *Graham v Rawley*, 140 AD3d 765 [2d Dept 2016]; etc.

In *O'Donnell v. O'Donnell*, 80 A.D.3d 586 [2nd Dept 2011], plaintiff moved to confirm the referee's report. Defendant neither moved to reject the report (CPLR 4403) nor did he oppose plaintiff's motion to confirm the report. The Supreme Court confirmed the report. Defendant could appeal from portions of the judgment since the underlying issues were the "subject of contest" at the hearing. On appeal, defendant could not, however, raise the same issues in the context of objections to the referee's report. By failing to challenge the referee's errors in the report before Supreme Court, he waived his right to raise those objections on appeal.

Elliott Scheinberg is a member of the New York State Bar Association Committee on Courts of Appellate Jurisdiction. He is the author of the upcoming compendium, "The Civil Appellate Citator," NYSBA (TBA), and of "Contract Doctrine and Marital Agreements in New York," NYSBA, (3d ed. 2016). He is also a fellow of the American Academy of Matrimonial Lawyers.