Siegmund Strauss: CPLR 5501(a)(1), "Necessarily Affects", and CPLR 3019

CPLR 5501(a)(1) states that an appeal from a final judgment also brings up for appellate review any disposition made during the course of the litigation provided that it "necessarily affects the final judgment." The Court of Appeals emphasized that "[t]he correctness of a final judgment may turn on the correctness of an intermediate non-final order."[1]

The term "necessarily affects" recently withstood withering litigation and could have been resolved with greater ease. In *Siegmund*, the Court of Appeals rejected the too "narrow" test applied by the First Department. While the Court cited its own concise and sensible jurisprudence with universal applicability, anchored in CPLR 3019, it, nevertheless, unnecessarily adopted an alternate test, all the while conceding that "a rule of general applicability regarding the 'necessarily affects' requirement" "would be difficult to distill."

Siegmund has undergone intense debate and received critical analysis from noted scholars[2] and preeminent colleagues. With no disrespect to them, I humbly and respectfully put forward a view through an alternate lens as a continuation of the dialogue.

To facilitate the comprehension of the issues in *Siegmund,* it is necessary to be aware that CPLR 5701(a) generously allows appeals from nearly all interlocutory orders and judgments. Prof. David Siegel notes that CPLR 5701(a)(1)(iv) ("involves some part of the merits") and (v) (if the order merely "affects a substantial right") "can probably absorb most of the other entries on the list, and do the job alone."[3] He further says that the generous allowance of appeals "from just about all interlocutory dispositions...at least helps avoid the prospect of an expensive trial going completely to waste because an incidental point, maybe involving only a procedural matter, involves a key one and generates a reversal of everything. An example would be an interlocutory order denying disclosure of an item later found fundamental to the loser's case,"[4] or granting or denying a motion for summary judgment as to one or more issues.

The Facts in *Siegmund*

The parties entered into negotiations to merge their corporations and operate out of a

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[1] Siegmund Strauss, Inc. v. East 149th Realty Corp., 20 N.Y.3d 37 (2012)

[2] Dangerous Interactions: Interlocutory Appeals and Judgments", Thomas F. Gleason, Esq. NYLJ, 11/19/12; The 'Necessarily Affects' Requirement of CPLR 5501, Thomas R. Newman and Steven J. Ahmuty Jr., NYLJ, 11/08/12**;** Siegel, New York State Law Digest, "Reviewing Non-Final Orders on Appeal from Final Judgment, Court of Appeals Takes More Generous View of "Necessarily Affects" Language in Statute," December 2012.

[3] Siegel, Practice Commentaries, C5701:4.

[4] Siegel, ibid.

specific building that was leased by the defendants. They drafted but did not execute a merger agreement. Nevertheless, the parties began performing under the unsigned agreement, which included Strauss' moving into the premises. Following a dispute, Strauss sought to buy out the defendants but no agreement was ever reached. Strauss subsequently removed the defendants from the corporation's payroll and changed the locks on the premises. It was alleged that Strauss had never paid the defendants the agreed upon $100,000.

The plaintiff sued the defendants and the landlord of the premises seeking a judgment declaring that it was the tenant entitled to sole possession of the property. The defendants counterclaimed against Strauss and asserted a third-party complaint against the Strauss's principals, alleging fraud, conversion, and tortious interference with a contractual relationship. *Strauss* and its principals moved to dismiss the counterclaims and third-party complaint, which was granted. The defendants did not appeal. The defendants' subsequent motion to amend their pleadings to file a third-party complaint for breach of contract was also denied. The defendants appealed but did not perfect the appeal.

The Final Judgment

After a bench trial, Supreme Court adjudged Strauss the lawful tenant of the premises. The defendants appealed to the Appellate Division from the final judgment seeking review of both prior interlocutory orders under CPLR 5501.

The Appellate Division

The Appellate Division affirmed the final judgment, simultaneously holding that the appeal from the judgment did not bring up for review the prior orders because neither order "necessarily affected" the final judgment since, if both orders were reversed, the defendants "claims would be reinstated and they would be permitted to pursue a claim for breach of contract. However, the judgment [] declar[ing] Strauss entitled to possession of the [] premises would still stand."

The First Department applied the test promoted by Prof. David Siegel, which Prof. Siegel described as "not perfect but helpful" (Siegel, New York Practice 5th Ed. § 530): "assuming that the nonfinal order or judgment is erroneous, [would] its reversal [] also require a reversal of the judgment? If it would, it's reviewable; if not, and the judgment or order can stand despite it, it's not reviewable."[5]

The Court of Appeals

The Court of Appeals held that the Siegel-test was too "narrow." Citing its own precedent authority that the "dismiss[al of] a cause of action necessarily affects the final

[5] Siegmund Strauss, Inc. v. East 149th Realty Corp., 81 A.D.3d 260 (1st Dept.,2010).

determination"[6], the Court held that both prior orders were reviewable:

> "[W]here the prior nonfinal order dismissed a cause of action or counterclaim pleaded in a complaint or answer, this Court has not applied a definition of 'necessarily affects' as narrow as that employed by the Appellate Division in this case. To satisfy 'necessarily affects' in this context, it is not required, as the Appellate Division held, for the reinstatement of the [defendants'] counterclaim upon a reversal or modification to overturn completely the judgment which declared that Strauss was entitled to possession of the leased premises."

The Court's precedent authority would have been sufficient to resolve *Siegmund*. Nevertheless, the Court advanced a two-prong test (Karger, Powers of the New York Court of Appeals § 9:5, at 304–305, 311 [3d ed rev]):[7]

> "[A] non-final order 'necessarily affects' a final judgment 'if the result of reversing that order would necessarily be to require a reversal or modification of the final [judgment]' and 'there shall have been no further opportunity during the litigation to raise again the questions decided by the [non-final] order.'
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> Put another way, because Supreme Court's dismissal of the counterclaims and third-party claim necessarily removed that legal issue from the case (i.e., there was no further opportunity during the litigation to raise the question decided by the prior non-final order), that order necessarily affected the final judgment.
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> In light of the foregoing, the Appellate Division erred in holding that the [defendants'] appeal from ... [the] final judgment did not bring up for review the [first] non-final order because the [first] order necessarily affected the [subsequent] final judgment. Accordingly, we remit this matter to the Appellate Division for review of [the first] order, together with the final judgment."

CPLR 3019

Significantly, the innate nature of CPLR 3019 and its decisional progeny regarding permissive counterclaims resolves *Siegmund* and all *Siegmund*-like actions (the dismissal of counterclaims and third-party claims) consistent with the Court's cited jurisprudence, thereby obviating the need for any tests. Although 3019 is the bedrock of *Siegmund*, it was not articulated therein.

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[6] Karlin v. IVF America, Inc., 93 N.Y.2d 282 (1999) ("[T]he Appellate Division order dismissing plaintiffs' [] claims and affirming the dismissal of five other claims does necessarily affect the final judgment. Thus, we may review this order."); Lasidi, S.A. v. Financiera Avenida, S.A., 73 N.Y.2d 947 (1989) ('On its appeal from the final judgment dismissing plaintiffs' complaint, which appeal brings up for review the nonfinal Appellate Division order affirming the dismissal of the counterclaims (CPLR 5501[b]..."); et al.

[7] Siegmund, ibid.

Under CPLR 3019, as Professor Patrick Connors writes, "a counterclaim need not arise out of the transaction or occurrence out of which the plaintiff's claim arises, nor otherwise be related to the plaintiff's claim. It can be any cause of action the defendant has against the plaintiff, legal or equitable.[8] [A]ll counterclaims are 'permissive'...When the defendant has a claim against the plaintiff, defendant can assert it as a counterclaim or bring a separate action on it. Defendant does not, merely by withholding it as a counterclaim, forfeit it, as would occur if a 'compulsory' counterclaim rule applied. Every counterclaim [] is permissive, even if its subject matter relates to plaintiff's claim."[9] Stated differently, a counterclaim joins two otherwise viably self sustaining separate actions.

Critically, the *Siegmund*-defendants' counterclaims and third-party complaint (fraud, conversion and tortious interference with a contractual relationship) which comprised their own independent actions grounded in discrete theories survived as such irrespective of the outcome of plaintiff-Strauss' action (his entitlement to possession of the premises). It was unnecessary for either appellate court to search for any tests beyond CPLR 3019 because the plaintiffs and the defendants could have simultaneously prevailed on their respective independently grounded claims – a victory to the plaintiff was not mutually exclusive of a victory to defendants. Albeit tacitly, the Court did recognize the inherent governance of permissive counterclaims in *Siegmund*:

> "To satisfy 'necessarily affects' in this context, it is not required, as the Appellate Division held, for the reinstatement of the [defendants'] counterclaim upon a reversal or modification to overturn completely the judgment which declared that Strauss was entitled to possession of the leased premises."

The Court buoyed its conclusion that the Appellate Division's ruling of nonreviewability "[did] not comport with our jurisprudence"[10] with five precedent cases that either expressly or "implicitly"[11] held that "prior nonfinal order[s] dismiss[ing] [both] a cause of action [involving no counterclaims or third-party claims] or counterclaim pleaded in a *complaint or answer*" are brought up for review following entry of the final judgment. *Siegmund* thus contemplates an ordinary "action [and a] a counterclaim." Not one of the five cases referenced a test of any kind – the jurisprudence is sound and uniform. CPLR 3019 is the litmus test.

"Necessarily Affects" Which Action?

Since the presence of a counterclaim or other third-party activity means that, under CPLR 3019, there are separately and individually sustainable actions permissively joined together, at

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[8] Prof. Patrick M. Connors, Practice Commentaries, C3019:1.

[9] Prof. Patrick M. Connors, Practice Commentaries, C3019:2.

[10] Siegmund, ibid.

[11] Siegmund, ibid.

the option of the third-party(ies), where each action could have stood alone seeking the discrete relief unique to itself, the ultimate question becomes which final judgment must have been "necessarily affected" by the non-final order to make the non-final order reviewable? Irrespective of any tests, the supervening predicate is that an affirmative answer to the question "would a reversal of the non-final order require a reversal or modification of the final judgment" must corelate to the relief sought within the context of the action in which the non-final order was made and not another party's action.

The Appellate Division erroneously applied the affirmative answer to the first question (will the final judgment require a reversal or a modification) in the defendants' action (tortious interference and breach of contract) to the judgment in plaintiff-Strauss' action (awarding him possession of the premises). Put another way, the Appellate Division asked whether a reversal of the non-final order against the defendants within the context of their own action (counterclaim and third-party claim) would require a reversal of the final judgment in favor of the plaintiff in the plaintiff's action.

The permissiveness of CPLR 3019 requires that the conjoined actions be treated as hypothetically separate/severed, to wit, that the defendants had not counterclaimed within plaintiff's action and that each action was being prosecuted separately, with an ensuing examination of the orders and their consequences within the contexts of their respective actions – a reversal of the non-final order against the *Siegmund*-defendants in their own action (the counterclaim) would, therefore, be irrelevant and inconsequential to the judgment in *Strauss*' action. The essence of this notion is captured in cases involving actual severance, e.g., *Grullon v. Servair, Inc.*:[12] "[u]pon severance, the severed causes of action bec[ome] a separate action which may be terminated in a separate judgment." The option to proceed by counterclaim did not result in a forfeiture or surrender of the procedural protections that would have inured had the defendants proceeded in a separate action as plaintiffs.

Another way of looking at this is to imagine that Siegmund Strauss had never started its own action—that the only action would have been the action commenced by the defendants against Siegmund Strauss. Under this scenario, the now-defendants' action would have been the only action against which the question "does it necessarily affect the final judgment" could have been asked. The counterclaim is that action.

The doctrine of 'implied severance", raised by learned colleagues, merits attention. The definition of "finality," set forth in the landmark decision *Burke v. Crosson*,[13] requires a finding of finality in *Siegmund* because Supreme Court's nonfinal orders disposed of all the defendants' causes of action "leav[ing] nothing for further judicial action (apart from mere ministerial matters)" such that a reversal would have reinstated the defendants' claims. Furthermore, the

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[12] 121 A.D.2d 502 (2nd Dept.,1986).

[13] 85 N.Y.2d 10 (1995).

doctrine of implied severance need not be reached in *Siegmund*. *Burke* explains implied severance as the "very limited exception to the general rule of nonfinality" which must satisfy two requirements conjunctively: (1) the order must have disposed of only some of the causes of action, not all; and (2) "only if the causes of action it resolves do not arise out of the same transaction or continuum of facts or out of the same legal relationship as the unresolved causes of action." *Siegmund* fails both tests.

The Tests

The first question in both tests answers the same substantive issue, will the final judgment require a reversal or a modification? The second question is procedural only and does not directly implicate the underlying merits or substantive determination – it is a consequence of the first question examining only whether a procedural restraint barred the aggrieved party from pursuing the claim(s) throughout the balance of the litigation. In fact, the second question is actually subsumed and inherent in the first question because a dismissal arising from, e.g., a motion under CPLR 3211 (motion to dismiss), CPLR 3212 (summary judgment), deprivation of a jury trial,[14] either abruptly terminates the litigation or immediately forecloses the losing party from prosecuting the subject issue(s) during the life of the litigation. Similarly, a court's rejection of a new scientific theory following a *Frye*[15] hearing either truncates a branch of a claim or aborts the action entirely.

After an order, it is clear whether the affected party was barred from proceeding with the subject issue. By way of example, pendente lite spousal maintenance and child support orders made during the course of litigation plainly do not "necessarily affect" the final judgment because they are, by definition, intended to be temporary remedies pending an exposition of the parties' full financial portrait at trial. Other, "provisional remedies, such as, preliminary injunctions designed to retain the status quo during the pendency of the action , do not 'necessarily affect' the final judgment."[16] Such orders are "incidental order[s] which do[] 'not have any impact on the final judgment' [and are] not subject to review."[17] In such cases the losing party is not precluded from further developing the claim(s) during the pendency of the action.

Significantly, the Karger-test notwithstanding, the Court evinced no expressed or implied

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[14] Trocom Const. Corp. v. Consolidated Edison Co. of New York, Inc., 7 A.D.3d 434 (1st Dept.,2004).

[15] Frye v. U.S., 54 App.D.C. 46, 293 F. 1013 (App.D.C.,1923).

[16] Two Guys From Harrison-NY v. S.F.R. Realty Associates, 186 A.D.2d 186 (2nd Dept.,1992).

[17] Cicardi v. Cicardi 263 A.D.2d 686 (3rd Dept.,1999), citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 5501:4.

intent to divest its jurisprudence of precedential authority. Both tests put into narrative form the jurisprudential process, statutory and decisional, of CPLR 5501(a) and 3019, in administering "necessarily affects" to the categories covered in *Siegmund* – Karger's test articulates the procedure, Siegel's assumes it. Neither test is at odds with nor abrogates the Court's jurisprudence.

The key to comprehending and preserving the cohesiveness of Court's jurisprudence and this body of law is not to read CPLR 5501(a)(1) in a vacuum but in conjunction with CPLR 3019.

Matter of Aho

Prof. Siegel calls further attention to a procedural concern that now permeates appeals arising from interlocutory orders, which concern is beyond counsel's control. Because under *Matter of Aho* (Court of Appeals, 1976), the mere entry of the final judgment terminates the pending appeal from the earlier order, counsel must also perfect the appeal of the nonfinal matter before final judgment, which is feasible, however, counsel must then also assure that the appeal is disposed of before final judgment is rendered in the action, a plain impossibility because counsel does not control the appellate calendar.[18]

Conclusion

- The Court of Appeals clearly underscored that its jurisprudence retains its precedential authority regarding "necessarily affects" irrespective of whether "the prior nonfinal order dismissed a cause of action or counterclaim pleaded in a complaint or answer."[19]

- The foundation of the solution lies within CPLR 3019.

- The two tests are essentially identical. The Karger-test sheds no new practical light on "necessarily affects."

- The consensus among the scholars, as summed up by Siegel, must be heeded that counsel take a prophylactic direct appeal from all interlocutory orders: "If it's all that important [to preserve appellate review] and you can't be absolutely certain that the 'necessarily affects' standard will enable you to secure that review later, then exploit the [] option of taking an immediate appeal from the order now."[20]

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[18] New York State Law Digest.

[19] Siegmund, ibid.

[20] Siegel; ibid; Gleason, ibid; Newman and Ahmuty, ibid.