CPLR 5514(a): The Uncertain Limitations Period Following Appeals By Improper Method[1]

Timely filing of a notice of appeal is nonwaivable and jurisdictional.[2] In 1976, the Court of Appeals, in *Park East Corp. v. Whalen*, 38 N.Y.2d 559, 345 N.E.2d 289, 381 N.Y.S.2d 819 (1976), unequivocally held that the calculation of the limitations period following an improper method of appeal, addressed in CPLR 5514(a), i.e., where a motion for leave to appeal is sought where an appeal was available as of right or where an appeal is taken as of right where a motion for leave was required, should be uniform with the time frame in CPLR 5513. The Court underscored its intent to rescue counsel from "unnecessary procedural traps for the unwary." Nevertheless, the Fourth Department, and more recently the First Department, demonstrate the continuing failure to apply the ruling thereby leaving the trap crater wide.

CPLR 5513 and 5514(a)

CPLR 5513(a) addresses the time to take an appeal as of right:

An appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

(b) Time to move for permission to appeal. The time within which a motion for permission to appeal must be made shall be computed from the date of service by a party upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry, or, where permission has already been denied by order of the court whose determination is sought to be reviewed, of a copy of such order and written notice of its entry, except that when such party seeking permission to appeal has served a copy of such judgment or order and written notice of its entry, the time shall be computed from the date of such service. A motion for permission to appeal must be made within thirty days.

CPLR5514(a) addresses the alternate method of appeal:

If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or of seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise.

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[1] This article appeared in the New York Law Journal, Aug. 15, 2012.

[2] Wei v. New York State Dept. of Motor Vehicles 56 A.D.3d 484, 865 N.Y.S.2d 920 (2nd Dept. 2008); Retta v. 160 Water Street Associates, L.P. 94 A.D.3d 623, 942 N.Y.S.2d 525 (1st Dept.,2012); Jones v. Coughlin 207 A.D.2d 1037, 617 N.Y.S.2d 704 (4th Dept. 1994).

In his Practice Commentaries to CPLR 5514, "C5514:1, Mistaking Method", Prof. David D. Siegel explains how CPLR 5514(a) saves a party who has mistakenly appealed by way of the wrong method, provided that the original application, albeit wrong, was timely taken:

> If the appellant mistakes the method appropriate to the particular situation, and appeals of right when permission is necessary or moves for permission when appeal lies of right, subdivision (a) of CPLR 5514, and in the permission category CPLR 5520(b) as well, permits correction of the mistake without forfeiture of the appeal. Assuming that the "wrong" step was taken within the applicable period--subdivision (a) has no forgiveness if nothing at all was done within the 30-day period as measured by CPLR 5513--it permits the right step to be taken during a fresh 30-day period.

However, the dichotomy between the statutes is stark: while 5513 requires service of a copy of the judgment or order as a predicate to the limitation period for taking an appeal, 5514(a) is a *fata morgana* forgivingly meting out a new 30 day period from which to pursue the procedurally proper appeal for the appellant who proceeded incorrectly but only from the date of the decision dismissing or denying the appeal – 5514(a) is silent as to service of the order denying or dismissing the incorrect appeal. What makes this a unique trap for the unwary is that the CPLR has conditioned the bar to compute time frames from the date of service of orders or judgments. The appellant who is unaware of his procedural misstep is likely to be equally unaware of this subtly fatal nuance and will thus not monitor court decisions daily, resulting in a forfeiture of the right to appeal. Prof. Siegel elaborates:[3]

> If the appeal was taken of right but required leave, subdivision (a) states that the new period, in which to seek leave, is measured from the "dismissal"; and that if leave was needlessly sought because appeal lay as of right, the new period is measured from the "denial" of the motion seeking leave. It would thus seem, on the face of subdivision (a), that the fresh 30-day period starts from the "dismissal or denial" itself, and not from the service of the order containing it. So pervasive, however, is the bar's assumption that it is service (of the dispositive order) that starts the 30-day period, see CPLR 5513 and its Commentaries, that the Court of Appeals has deemed it best to apply the same starting point to the corrective period allowed by CPLR 5514.

Park East Corp. v. Whalen

In *Park East*, the Court of Appeals delivered unwary counsel from this trap by equalizing the time frames between these statutes: the Court interpreted 5514(a) to require service of the denial or dismissal of the procedurally incorrect method as the predicate for the fresh 30-day

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[3] Prof. David D. Siegel,Practice Commentaries to CPLR 5514, "C5514:1, Mistaking Method."

limitation period:

> Literally and out of context, CPLR 5514 (subd. (a)) seems to require computation of the time to take an alternative method of appeal to begin on the date of the denial or dismissal of the first attempted appeal. However, we interpret CPLR 5514 (subd. (a)) similarly to the provision for all other appeal time limitations, so as to require computation of the time allowed to begin upon service of a copy of the order terminating the first attempted appeal with written notice of its entry. Such interpretation evidently conforms to the intention of the Legislature and harmonizes this statute's requirements with those of CPLR 5513 where service of a copy of the order with written notice of entry was deliberately adopted upon the recommendation of the Judicial Conference CPLR Advisory Committee (see McKinney's Cons.Laws of N.Y., Book 7B, CPLR 5513, Supplementary Practice Commentary for 1970 by Donald Zimmerman, Pocket Part (1975—1976), at pp. 248—249). Moreover, this achieves a uniform rule governing commencement of time requirements affecting appeals and it eliminates unnecessary procedural traps for the unwary while simultaneously insuring notification of termination of the first appeal attempt (contra, Dayon v. Downe Communications, 42 A.D.2d 889, 347 N.Y.S.2d 460).[4]

"Thus, the time for taking the right step is to be measured from the service of the order (with notice of entry) disposing of the wrong step."[5] One would think that this would have been the final word and that appellate courts would have so construed 5514(a) but not so.

Inconsistent Applications of *Park East*

Park East's unequivocal holding to the contrary notwithstanding, appellate courts have not applied the decision evenly or consistently within the same departments.

The First Department

In 1979, the First Department cited *Park East*, in *American Banana Co., Inc. v. Venezolana Internacional de Aviacion S.A. (VIASA)*, 69 A.D.2d 763, 415 N.Y.S.2d 2 (1st Dept.,1979):

> CPLR 5513(b) provides that a motion for leave to appeal must be made within thirty days of service of a copy of the order with notice of entry, but CPLR 5514 provides that if an appeal is taken and dismissed, the thirty days shall be computed

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[4] See Lazarcheck v. Christian 58 N.Y.2d 1033, 448 N.E.2d 1354, 1354, 462 N.Y.S.2d 443 (N.Y. 1983), which has not been cited anywhere held: "Motion to dismiss appeal granted and appeal dismissed...upon the ground that no appeal as of right lies, noting that petitioners-appellants have thirty days, pursuant to CPLR 5514(a), to make a motion for leave to appeal." it must be assumed that this holding is consistent with Park East.

[5] Prof. David D. Siegel,Practice Commentaries to CPLR 5514, "C5514:1, Mistaking Method."

from the dismissal. This has been interpreted to mean that computation of the time allowed begins upon service of a copy of the order terminating the first attempted appeal with written notice of its entry.

Nevertheless, in 2012, without explanantion, the First Department, in *Retamozzo v. Quinones*, 95 A.D.3d 652, 945 N.Y.S.2d 22 (1st Dept.,2012), dismissed an appeal based on a literal reading of 5514(a) rather than as interpreted in *Park East*:

> Because the order appealed from is appealable as of right (CPLR 5701[a][2]), plaintiff should have served and filed a notice of appeal instead of moving for leave to appeal. When the motion for leave to appeal was denied, in order to take advantage of the tolling provision provided in CPLR 5514(a), plaintiff should have served and filed a notice of appeal within the time set forth in CPLR 5513(a), computed from the date the motion for leave to appeal was denied. He did not and thus the appeal is untimely.

The Fourth Department

While in *Sawma v. Bane*, 197 A.D.2d 938, 604 N.Y.S.2d 844 (4th Dept. 1993), the Fourth Department, citing *Park East* and CPLR 5514(a), correctly held "Petitioner has 30 days from the service of our order with notice of entry to file and serve a notice of appeal", in no less than five other decisions, the Fourth Department has applied section 5514(a) literally rather than as interpreted by the Court of Appeals.[6] In each of these decisions the Fourth Department held: "Pursuant to CPLR 5514(a), petitioner will have 30 days from the date of our order denying this motion to file and serve a notice of appeal as of right."

There appears to be no rulings from the Second or Third Departments on this question.

Conclusion

Logic dictates that counsel who has taken an appeal via the erroneous procedural method will likely be unaware of the mistake. It follows that counsel may therefore not be vigilant in monitoring the calendar of decisions which failure will lead to the ensnarement in the trap sought to be eliminated by *Park East*. The lesson: counsel filing appeals need to diligently track appellate decisions prophylactically.

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[6] People ex rel. Tyler v. New York State Div. of Parole 207 A.D.2d 1039, 617 N.Y.S.2d 685 (4th Dept. 1994) (Motion for permission to appeal denied. Memorandum: Because petitioner's appeal lies as of right, petitioner has 30 days from the date of this order to file and serve a notice of appeal (see, CPLR 5514[a]; 5520 [b]).); Doggett v. Johnson, 191 A.D.2d 1049, 595 N.Y.S.2d 707 (4th Dept., 1993); Batista v. Walker 190 A.D.2d 1099, 594 N.Y.S.2d 1020 (4th Dept. 1993); People ex rel. Edwards v. Bellnier 186 A.D.2d 1092, 599 N.Y.S.2d 908 (4th Dept. 1992); People ex rel. Carr v. Mitchell 187 A.D.2d 1047, 592 N.Y.S.2d 937 (4th Dept. 1992).