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Outside Counsel

'Powell v. City of New York': CPLR 4404(a), Preservation of Issues

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The recent case *Powell v. City of New York*, 146 A.D.3d 701 (1st Dept. 2017), is a brow furrowing lesson to the unwary would-be appellant that within the fundamental appellate principles of preservation of issues and aggrievement, perceived as absolute and immutable, lurks a potential trap. At *Powell*'s epicenter lies the perfect intersection of storms of CPLR 5701(a)(1) (appealability as of right), CPLR 4404(a), and CPLR 4406 (not cited in the decision), the latter two combining to bar an albeit properly preserved issue at trial from appellate review where a party has brought a post trial motion for a new trial or a directed verdict based on different grounds but did not raise the other unrelated preserved issue in the motion.

'Powell'

The appeal in *Powell* arose from a personal injury based upon premises liability. The trial court issued an order granting plaintiff's post trial motion, pursuant to CPLR 4404(a), to set aside the jury's verdict that the defendant (the City) was negligent, but that its negligence was not the proximate cause of the plaintiff's injuries. However, a prior appeal then reversed the trial court's order and reinstated the defense verdict with a direction to the Clerk of the Supreme Court to enter judgment dismissing the complaint. Plaintiff now appealed from the judgment that dismissed her complaint.

The First Department noted that, in the first appeal, wherein the City appealed the trial court's order setting aside the defense verdict, "plaintiff responded to the City's appeal [but] did not cross-appeal." The plaintiff argued that she could not have cross-appealed at that time because she had prevailed in setting aside the defendant's verdict and was therefore not aggrieved by the trial court's order in her favor; that it was only the judgment reinstating the defense verdict that first allowed her to challenge the evidentiary and other rulings subsumed in the now adverse judgment.

Aggrievement

The law of aggrievement is unyielding. Aggrievement is an essential and root of element of appellate jurisdiction[1] for which reason an appellate tribunal may dismiss an appeal sua sponte on this ground.[2] It is imperative to determine a party's status relative to an issue prior to any consideration of the merits of an appeal[3] because where there is no aggrieved party there is no genuine controversy and a court has no subject matter jurisdiction where there is no genuine controversy.[4]

CPLR 5701(a)(1)

The First Department further dismissed her appeal from the judgment because it was not appealable as of right pursuant to CPLR 5701(a)(1), which identifies the appeals that are appealable as of right:

> An appeal may be taken to the appellate division as of right in an action, originating in the supreme court … (1) *from any final … judgment except one entered subsequent to an order of the appellate division which disposes of all the issues in the action*.

In essence, the judgment from which the plaintiff appealed had been entered pursuant to the direction of the Appellate Division in connection with the City's prior appeal, and that this prior appeal disposed of all the issues in the action; that to consider this appeal on its merits, would place the Appellate Division "in the untenable position of reviewing its own order from the prior appeal."[5] Although an appeal from a final order or judgment of the Supreme Court also brings up for review certain evidentiary rulings made at trial (CPLR 5501(a)(3)), the Appellate Division continued: "Once this court decides the issues raised on appeal and directs the Clerk of the court from which the appeal originated to enter judgment, such judgment finally disposes of all the issues in the action (CPLR 5701(a)(1))." "Stated differently," the First Department added, "the [appealed from] judgment [adverse to the plaintiff] [wa]s not a judgment of the trial court bringing up interlocutory issues for review (compare CPLR 5701(a)(1) with 5501(a))."[6]

CPLR 4404(a), 4406

The *Powell* court further stressed: "[The] *sole* basis for the plaintiff's [post-trial] motion was that the jury's finding of no proximate cause was inconsistent with its finding of negligence on defendant's part —[she] did not move to set aside the verdict based upon erroneous evidentiary rulings." While the Appellate Division agreed with the plaintiff that there is no interlocutory appeal as of right from an evidentiary ruling during trial, the appellate court, nevertheless, stressed that she had the opportunity to raise those (properly preserved) evidentiary rulings in her motion to set aside the jury's verdict. In essence, by not raising those issues in her motion to set aside the jury's verdict, the plaintiff had abandoned them.

CPLR 4404(a) addresses a motion by any party or on the court's own initiative for a new trial or a directed verdict where "the verdict is contrary to the weight of the evidence, in the interest of justice … ." Case law from the Second Department holds that a motion for a new trial in the interest of justice "encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct [by attorneys or jurors,[7] or a party[8]], newly discovered evidence, and surprise."[9] (There are additional grounds under this category.[10, 11] However, not all evidentiary issues may be included in a 4404(a) motion.

Section 4404(a) must also be read in tandem with overarching CPLR 4406, styled the "single post-trial motion":

> In addition to motions made orally immediately after decision, verdict or discharge of the jury, there shall be only one motion under this article with respect to any decision by a court, or to a verdict on issues triable of right by a jury; and each party shall raise by the motion or by demand under rule 2215 every ground for post-trial relief then available to him.

Unlike most statutes that reference a statute to a related statutory warning, 4406 is not referenced in CPLR 4404(a). (It is therefore critical to read the entire Article in the CPLR.)

Prof. David D. Siegel states:[12]

> There are several grounds listed under CPLR 4404 for a post-trial motion, but only one such motion is allowed. Hence a party bent on any motion under CPLR 4404 should see to it that all possible grounds are joined. * * * The contemplation of CPLR 4404-4406 is of a formal, written motion. Allowable "in addition" are the oral motions made immediately after the verdict or decision. In many if not most cases, of course, the oral motions are the only ones used. If a written one is used, however, the restrictions of CPLR 4405 and 4406 must be observed.

In essence, the evidentiary challenges, and all other possible challenges, had to have been raised in the plaintiff's motion following the verdict or they are held abandoned. By not having raised the evidentiary issues on the prior appeal, the issues were fully and finally framed on appeal and no new issues could now be submitted. Significantly, while CPLR 4406 is the backbone of *Powell*, it is not cited therein. *Powell* essentially converts the motion into an appellate brief.

Further Conundrum

The Appellate Division also stated: "These [evidentiary] issues could have also been raised [in her respondent's brief] *to support her position* in the prior appeal"—thus approving to be done indirectly what she could not have done directly. This is disconcerting in light of the one-motion rule in CPLR 4406, which functions as a jurisdictional bar to subsequent consideration of the issue.

Since the plaintiff did not cross-appeal in the prior appeal, above—as she was then not yet aggrieved—the theory of first "rais[ing] [her challenge to the evidentiary issues] *to support her position* in th[at] prior appeal" would, in actuality, at best, have amounted to a thinly veiled functional equivalent of an (improper) cross appeal.

Conclusion

Powell leaves the reader with furrowed brows locked in place. Can identification, in a 4404(a) motion, of every issue that counsel intends to raise on appeal safeguard against a *Powell* determination?

Powell requires review by the Court of Appeals, which may breathe renewed life into §§4404(a) and 4406, notwithstanding the fundamental principle of statutory construction that "[t]he intent of the Legislature is controlling and must be given force and effect, regardless of the circumstance that inconvenience, hardship, or injustice may result,"[13] as the court did in *Park East v. Whalen*, 38 N.Y.2d 559 (1976), where it construed CPLR 5514(a) in a manner othewrise inconsistent with the principles of statutory construction so as to, inter alia, rescue counsel from "unnecessary procedural traps for the unwary."[14]

Endnotes:

1. *Mixon v. TBV*, 76 A.D.3d 144 (2d Dept. 2010); *Burmester v. O'Brien*, 166 A.D.932 (2d Dept. 1915).

2. *Klinge v. Ithaca College*, 235 A.D.2d 724 (3d Dept. 1997); *Leeds v. Leeds*, 60 N.Y.2d 641 (1983).

3. *Lincoln v. Austic*, 60 AD2d 487 (3d Dept. 1978).

4. *Security Pacific Nat. Bank v. Evans*, 31 A.D.3d 278 (1st Dept. 2006), appeal dismissed, 8 N.Y.3d 837 (2007), dissent.

5. See *Rose v. Bristol*, 222 N.Y. 11 (1917) ("[T]he Appellate Division has affirmed its own judgment. It has heard and decided an appeal from itself. That is something which it had no power to do. It could, of course, have granted a reargument; but neither in form nor in substance is that what it did. It did not reopen the earlier appeal; it heard a new one. It did not grant a favor; it yielded to a claim of right."); *Greenburgh Eleven Union Free School Dist. v. Natl. Union Fire Ins. Co. of Pittsburgh, PA*, 2 A.D.3d 109 (1st Dept. 2003), lv. dismissed 1 N.Y.3d 622 (2004), notes that, pursuant to CPLR 5524(b), the court's order, upon remittance, "shall be authority for any further proceedings.").

6. *Cotgreave v. Public Adm'r of Imperial County*, 91 A.D.2d 600 (2d Dept. 1982) (It is axiomatic that an evidentiary ruling made during the course of trial is not separately appealable); *City of Elmira v. Larry Walter*, 111 A.D.2d 553 (3d Dept. 1985) (evidentiary rulings are not appealable independent of a final judgment).

7. *Gomez v. Park Donuts*, 249 A.D.2d 266 (2d Dept. 1998).

8. *Peters v. Wallis*, 135 A.D.3d 922 (2d Dept. 2016).

9. *Morency v. Horizon Transp. Services*, 139 A.D.3d 1021 (2d Dept. 2016), lv. to appeal dismissed, 28 N.Y.3d 947 (2016); *Russo v. Levat*, 143 A.D.3d 966 (2d Dept. 2016); *Allen v. Uh*, 82 A.D.3d 1025 (2d Dept. 2011).

10. John R. Higgitt, Supplementary Practice Commentaries, 2016, C4404:4A:

Morency v. Horizon Transportation Services, Inc., 139 A.D.3d 1021 (2d Dept. 2016) (trial court's error in permitting a party to impeach the credibility of a witness called by the party with evidence of the witness' criminal history and prior bad acts.); *Vallone v. Saratoga Hospital*, 141 A.D.3d 886 (3d Dept. 2016); *DiLallo v. Katsan Limited Partnership*, 134 A.D.3d 885 (2d Dept. 2015) (a faulty jury charge); *Ioffe v. Seruya*, 134 A.D.3d 993 (2d Dept. 2015) (improper comments of the trial court that deprived the losing party of a fair trial.)

11. *Carey & Assoc. v. 521 Fifth Ave. Partners*, 130 A.D.3d 469 (1st Dept. 2015) ("Plaintiff has abandoned its appeal with respect to [those issues] as it did not address the dismissal of those claims in its appellate briefs."); *Miedema v. Miedema*, 144 A.D.3d 803 (2d Dept. 2016) ("Since the father's brief fails to set forth any argument with respect to the order dated October 21, 2014, the appeal from that order must be dismissed as abandoned."); *People v. Shackelton*, 117 A.D.3d 1283 (3d Dept. 2014) ("Inasmuch as he has failed to brief this contention on appeal we deem any argument in that regard to be abandoned."); *Becker-Manning v. Common Council of City of Utica*, 114 A.D.3d 1143, 980 N.Y.S.2d 651 (4th Dept. 2014) ("Plaintiff in its main brief does not challenge that determination by the court and thus, having failed to present any argument with respect to that dispositive determination, plaintiff is deemed to have abandoned any contentions with respect to its propriety.").

12. Practice Commentaries, CPLR 4406.

13. McKinney's Statutes Law §92:

> Generally, in the construction of statutes, the intention of the Legislature is first to be sought from a literal reading of the act itself or of all the statutes relating to the same general subject-matter. In this respect, the legislative intent is to be ascertained from the words and language used in the statute, and if language thereof is unambiguous and the words plain and clear, there is no occasion to resort to other means of interpretation. What the Legislature intended to be done can only be ascertained from what it has chosen to enact, and it is only when words of the statute are ambiguous or obscure that courts may go outside the statute in an endeavor to ascertain their true meaning. * * * The rules of construction are not permitted to override the doctrine that the intent of the Legislature is the primary object of all statutory construction, and no statute may be construed so strictly

> as to result in perversion of the legislative intent. However, the court cannot, through construction, enact an intent the Legislature totally failed to express, and courts may not read into a law any word or provision unless good grounds appear for thinking that the lawmakers intended to include something which they have failed to plainly express.

14. At 560; see E. Scheinberg, "CPLR 5514(a): The Uncertain Limitations Period Following Appeals by Improper Method," NYLJ, Aug. 15, 2012.

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