New York Law Journal

Appellate Updates, Part I

This article updates relevant issues examined in prior discussions.

By **Elliott Scheinberg** | October 16, 2019

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'Braun v. Cesareo'

"'Braun v. Cesareo': When CPLR 5701(a)(2) Intersects With CPLR 5501(a)(1) (https://www.law.com/newyorklawjournal/2019/09/13/braun-v-cesareo-when-cplr-5701a2-intersects-cplr-5501a1/)," NYLJ (Sept. 16, 2019), reviewed the issue of whether CPLR 5501(a)(1), which "brings up for review *any* non-final judgment or order which necessarily affects the final judgment," includes orders made ex parte or sua

sponte. The majority opinion concluded that it does include such orders. 170 A.D.3d 1540 (4th Dept. 2019).

The *Braun* issue arose, once again, in *Ahmed v. Ahmed*, 2019 NY Slip Op 06580 (2d Dept. 2019), wherein a unanimous court, citing *Braun* and its own precedent, *Shah v. Oral Cancer Prevention Intern.*, 138 A.D.3d 722, 723-24 (2d Dept. 2016), held that "sua sponte orders which necessarily affect the final determination are reviewable on appeal from the final judgment":

> CPLR 5701(a) states, in pertinent part, that appeals may be taken as of right from "any final or interlocutory judgment" (CPLR 5701[a][1]), as well as "an order ... where the motion it decided was made upon notice" (CPLR 5701[a][2]). Here the appeal is from a judgment—which clearly is appealable as of right. An appeal from a final judgment brings up for review any order which necessarily affects the judgment, as well as rulings by the court (CPLR 5501[a]), and such orders are not limited to those which decided motions made on notice.

Aggrievement

"CPLR 5511, The Pitfalls of Aggrievement, Beyond the Basics, Part I (https://www.law.com/newyorklawjournal/2018/08/30/cplr-5511-the-pitfalls-of-aggrievement-beyond-the-basics-part-i/)," NYLJ (Aug. 30, 2018) and "Part II (https://www.law.com/newyorklawjournal/2018/08/31/cplr-5511-the-pitfalls-of-aggrievement-beyond-the-basics-part-ii/)," NYLJ (Aug. 31, 2018), examined the varied issues associated with aggrievement. Two recent decisions, *Ahmed*, above, and *Porco v. Lifetime Entertainment Services*, 2019 NY Slip Op 07122 (3d Dept. 2019), tackled the topic. *Porco* is a very detailed examination of the many aspects of aggrievement.

The plaintiff, in *Ahmed,* commenced an action to quiet title to certain property and to recover damages for fraud. Defendants repeatedly thwarted compliance with discovery orders. Following plaintiff's enforcement motion, Supreme Court issued a sua sponte conditional strike order of defendants' answer, unless they meaningfully complied with discovery. The parties stipulated that the conditional strike order resolved the plaintiff's pending motion to compel the defendants to appear for depositions and produce their original deed to the premises for inspection.

The Supreme Court eventually struck the defendants' answer, and directed an inquest

"in light of the defendants' delays and possible spoliation of evidence." In a subsequent order, the Supreme Court denied defendants' motion to, in effect, vacate the strike order. Following an inquest, Supreme Court entered a judgment determining that plaintiff was the owner of the premises thereby canceling defendants' purported deed. Defendants appealed.

The Appellate Division ruled that the conditional strike order was brought up for review from the final judgment because the stipulation "did not stipulate to *the propriety* of the conditional strike order"—in other words, defendants did not stipulate to the substance of the order but only to its procedural determination. Furthermore, without using the term "subject of contest," *Ahmed,* citing *Merlino v. Merlino*, 171 A.D.3d 911 (2d Dept. 2019), affirmed the order on that ground.

Porco v. Lifetime Entertainment Services, LLC, 2019 NY Slip Op 07122 (3d Dept. 2019), required an examination of multiple aspects of aggrievement.

In 2013, plaintiff Christopher Porco commenced an action under Civil Rights Law §§50, 51 to enjoin defendant from broadcasting a movie about a crime for which he had been convicted. Defendant moved to dismiss the complaint for failure to state a cause of action. Supreme Court granted the motion, but its order was reversed on appeal.

In 2017, plaintiffs served an amended summons and complaint adding Christopher's mother, Joan Porco, as a plaintiff, asserting claims on her behalf, which claims defendant moved to dismiss as barred by the statute of limitations. Plaintiffs cross-moved for leave to serve a second amended complaint and opposed defendant's motion on the grounds that the claims asserted by Joan were timely under the relation back doctrine or, alternatively, a question of fact existed as to whether defendant "republished" the movie, thereby starting a new statute of limitations period.

In a February 2018 order, although Supreme Court held that plaintiffs could not rely on the relation back doctrine, it agreed with plaintiffs that discovery was needed to resolve the republication issue. Supreme Court thus denied defendant's motion "without prejudice to making a motion for similar relief at the conclusion of discovery" and granted plaintiffs' cross motion. Plaintiffs appealed.

The Appellate Division addressed aggrievement as the threshold matter.

Christopher Porco was not aggrieved because defendant's motion sought dismissal of only those claims asserted by Joan. Defendant sought no relief against Christopher and no relief was granted against Christopher. Christopher thus had no basis to appeal the order.

Furthermore, Supreme Court's denial of defendant's motion without prejudice to renew upon completion of discovery neither granted defendant any affirmative relief against Joan nor withheld any affirmative relief requested by Joan; the only affirmative relief sought by Joan was for leave to serve a second amended complaint, which the court granted and was not contested on appeal. Since Joan was not granted incomplete relief, the exception to the aggrievement requirement did not apply.

It is noteworthy that decisional authority holds that "an order denying a motion without prejudice to renew is appealable as of right." *Moleon v. Kreisler Borg Florman Gen. Const. Co.*, 304 A.D.2d 337 (1st Dept. 2003); *Diaz v. Jadan*, 116 A.D.3d 600 (1st Dept. 2014); *Barrett v. Grenda*, 154 A.D.3d 1275 (4th Dept. 2017) ("Concluding that the motion was 'premature' in the absence of discovery, Supreme Court denied it without reviewing the substantive contentions advanced therein. [T]he court erred in denying the motion. [T]he order is appealable despite the fact that the court denied the motion without prejudice ...")

In not oft encountered reasoning, *Porco* cited the rule that aggrievement does not occur when a party's interests are only remotely or contingently affected by an order. Although Joan's claims were subject to dismissal in the future given that Supreme Court denied defendant's motion without prejudice to renew, it is possible that defendant may never seek to renew its motion. And, even if defendant did move to renew, the Appellate Division could "only surmise at this juncture how the court would decide it."

Finally, Joan's dissatisfaction with the court's rationale concerning the relation back doctrine did not render her an aggrieved party. Accordingly, the appeal was dismissed. The Appellate Division did, however, add an important footnote, that had defendant taken an appeal or a cross appeal, Joan could have raised her relation back doctrine argument as an alternative ground for affirmance. Alternatively, assuming

Supreme Court ultimately granted a motion to renew by defendant and dismissed Joan's claims, she would not have been precluded from seeking appellate review (CPLR 5501, 5701).

Judicial Notice

In the April 2, 2018 issue of the Law Journal, this column discussed "The Breadth of Judicial Notice on Appeal, Dehors-the-Record Data (https://www.law.com /newyorklawjournal/2018/03/30/the-breadth-of-judicial-notice-on-appeal-dehors-the-record-data/)." Briefly, judicial notice may be taken at any appellate stage, even the Court of Appeals. *Cohen v. State*, 94 N.Y.2d 1, 7 (1999) ("At this appeal stage of the controversy, we take judicial notice that the 1999-2000 budget negotiations concluded in early August 1999 with Legislative concordance and Gubernatorial acquiescence ..."); *Caffrey v. N. Arrow Abstract & Settlement Services*, 160 A.D.3d 121, 126-27 (2d Dept. 2018):

> As a general rule, the factual review power of the Appellate Divisions is confined to the content of the record compiled before the court of original instance and does not include matter dehors the record (CPLR 5526 ...) However, the general rule is not inviolate, as courts may take judicial notice of a record in the same court of either the pending matter or of some other action ... Judicial notice may be taken by a court at any stage of the litigation, even on appeal.
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> Nevertheless, a court should not take judicial notice of any court-generated document without affording the parties an opportunity to be heard on whether notice should be taken, and, if so, the significance of its content (CPLR 4511[a], [b] ...).

Two contrasting decisions are brought to our attention: *Newton v. McFarlane*, 174 A.D.3d 67 (2d Dept. 2019) and *Fink v. Al-Sar Realty*, 2019 NY Slip Op 06922 (4th Dept. 2019). A brief review of judicial notice of documents is helpful.

Judicial notice may be taken of a record in the same court of either the pending matter or of some other action. *Chateau Rive v. Enclave Development Associates*, 22 A.D.3d 445 (2d Dept. 2005); *Reed v. Wolff*, 242 A.D.2d 375 (2d Dept. 1997) (The

Appellate Division took judicial notice of the argument regarding standing that had been addressed by the parties in a companion case.) In *In re Wesley R.*, 307 A.D.2d 360 (2d Dept. 2003), the Second Department took judicial notice of the circumstances surrounding a subsequent evaluation of a child, foster parents, aunt, and uncle that had been arranged without a court order, to the extent that the information was revealed in the record of a companion appeal.

Material Dehors the Record

In granting a motion to set aside a jury verdict, the First Department held that it was "entitled" to take judicial notice of the transcript that defendants did not submit to the motion court. *Santos v. National Retail Transp.*, 87 A.D.3d 418 (1st Dept. 2011).

In *60 Mkt. St. Assoc. v. Hartnett*, 153 A.D.2d 205 (3d Dept. 1990), aff'd, 76 N.Y.2d 993 (1990) (Appellate Division took judicial notice of condemnation proceedings by which the County had taken title to a building because it was a matter of public record, even though the information was not in the record).

In *Wimbledon Fin. Master Fund, Ltd. v. Weston Capital Mgt.*, 160 A.D.3d 596 (1st Dept. 2018), the First Department took "judicial notice of a second amended complaint, and defendants' motion to dismiss the breach of fiduciary duty and aiding and abetting breach of fiduciary duty causes of action in the second amended complaint, which ha[d] been repleaded." In *Federated Project and Trade Fin. Core Fund v. Amerra Agri Fund, LP*, 106 A.D.3d 467 (1st Dept. 2013), the First Department also took judicial notice of an amended complaint after the court denied defendant's motion to dismiss the breach of contract cause of action, and found that it rendered the appeal, based on the original complaint, moot.

Wimbledon and *Federated* present another notable point. While *Wimbledon* held that although a "second-amended complaint, [] takes the place of the amended complaint, [thereby] render[ing] the [] appeal from the order based on the first amended complaint academic," it, nevertheless, allowed the appeal because "the parties charted their own course by proceeding as if the instant appeal [wa]s not rendered moot, and we address all but the arguments pertaining to the since-repleaded breach of fiduciary duty and aiding and abetting breach of fiduciary duty causes of action" (*Wimbledon* cited *Guibor v. Manhattan Eye, Ear & Throat Hosp.*, 56 A.D.2d 359, 361

(1st Dept. 1977), aff'd 46 N.Y.2d 736 (1978), for this proposition), *Federated* held that "the amended complaint [] render[ed] th[e] appeal, based on the original complaint, moot."

The Court of Appeals has recognized "a narrow exception," which allows the consideration on appeal of reliable documents, the existence and accuracy of which are not disputed, even to modify or reverse the order under review. *Brandes Meat v. Cromer*, 146 A.D.2d 666 (2d Dept. 1989), citing *Crawford v. Merrill Lynch, Pierce, Fenner & Smith*, 35 N.Y.2d 291 (1974). See *Des Fosses v. Rastelli*, 283 App.Div. 1069, 1070 (1954) ("This court has taken judicial notice of the deed in the foreclosure action ... recorded April 15, 1953"), aff'd 308 N.Y. 850 (1955)). In *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13 (2d Dept. 2009), cited in the earlier article, the Appellate Division took judicial notice of "public documents that are generated in a manner which assures their reliability" such as "material derived from official government websites."

We are now ready for *Newton v. McFarlane*, 174 A.D.3d 67 (2d Dept. 2019) and *Fink v. Al-Sar Realty*, 2019 NY Slip Op 06922 (4th Dept. 2019).

In *Newton*, the mother had filed two prior modification petitions. While neither petition nor the orders resolving them had been included in the original papers furnished to the Appellate Division, the appellate court, citing *Caffrey*, nevertheless, took judicial notice of these documents because they were records of the Family Court.

Fink had a different outcome. There, plaintiff commenced a Labor Law and common-law negligence action seeking to recover damages for injuries sustained when he fell from a ladder. Supreme Court granted plaintiff's motion for partial summary judgment on the issue of liability pursuant to Labor Law §240(1), denied those parts of defendants' cross motion seeking summary judgment dismissing the Labor Law §§240(1) and 241(6) claims, and granted those parts of defendants' cross motion seeking summary judgment dismissing the Labor Law §200 claim and the common-law negligence causes of action. Defendants appealed.

The foregoing review of judicial notice of documents not in the record notwithstanding, the Third Department dismissed the defendants' appeal for "failure

to provide an adequate record (CPLR 5526), including the failure to include the operative complaint which defendants [sought] to dismiss in their cross motion."

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Appellate Updates, Part II

This is a continuation of an article updating relevant issues examined in prior discussions.

By **Elliott Scheinberg** | October 17, 2019

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This article updates relevant issues examined in prior discussions.

'Spinelli v. Spinelli'

The Appellate Division aptly described *Spinelli v. Spinelli*, 2019 NY Slip Op 06553 (3d Dept. 2019) as a "unique case," which is a simultaneous lesson in proper appellate practice and in how appellate practice can be a trap for the uninitiated. Although the Appellate Division stated that it was "precluded from revisiting the equitable distribution award by the wife's failure to appeal from the judgment [of divorce]," the

relief reflects the appellate court's kind heart, a/k/a interests of justice.

After trial, Supreme Court issued a decision finding that the husband had, inter alia, engaged in an ongoing pattern of conversion of marital assets and continuous wasteful dissipation of marital assets, which prevented the court from determining the value of the parties' business and accompanying debt and resulted in the husband reaping all of the benefits of the business while burdening the wife with much of the debt.

A judgment of divorce was entered which, inter alia, ordered the husband to pay the premiums necessary to maintain a certain life insurance policy for the benefit of the wife and the children, which policy had lapsed prior to the entry of judgment. The court also ordered that the husband receive 25% of the wife's retirement accounts and that the husband's retirement accounts be divided equally.

Neither party perfected an appeal from the judgment. The parties engaged in negotiations regarding the lapsed insurance policy, and the fact that the value of his retirement account was approximately one-half of the value submitted to, and considered by, Supreme Court when it entered judgment.

The wife moved for an order, inter alia, compelling the husband to provide life insurance and redistributing the retirement accounts. Although the husband asserted that he was attempting to comply with the judgment by obtaining a new life insurance policy, the parties eventually agreed that the husband was uninsurable due to his advanced age and the state of his health. The husband filed a cross motion seeking an order directing immediate payment to him of his 25% interest in the wife's retirement accounts. During the pendency of the motions, the wife obtained two policies insuring the husband, one for $100,000 and one for $150,000, with annual premiums of $2,950 and $4,445, respectively.

By amended order, Supreme Court, inter alia, ordered the husband to pay the annual premiums for both of the new policies until the parties' youngest child graduates from college—not to exceed four years after his graduation from high school—and then continue to pay the premium for the $100,000 policy for an additional 10 years and, further, reaffirmed its division of the retirement assets. The wife appealed contending that the order failed to comply with the judgment in two principal

respects: by failing to ensure that the husband provided life insurance and by depriving her of the intended share of the retirement accounts. She argued for "reversal" and "urged the appellate court to make her whole by refashioning the equitable distribution award." The Appellate Division stated: "We are precluded from revisiting the equitable distribution award by the wife's failure to appeal from the judgment."

The wife's counsel emphasized that he provided Supreme Court with proof that the life insurance policy had lapsed before it rendered its decision to which the Appellate Division responded: "There were two proper means available to correct that error—a post-trial motion made within 15 days after decision (CPLR 4404[b]; 4405) or appeal from the judgment. The wife did neither; therefore, she was bound by the judgment, subject to correction of a mistake that does not affect a substantial right of a party (CPLR 5019[a])."

On appeal, the husband asserted that Supreme Court had the authority to correct the error in the judgment that resulted from the award of the lapsed insurance policy. The wife had acknowledged that the husband could not provide a $500,000 replacement policy, even if ordered to do so, and, thus, requested alternative relief.

"In this unique case," the Appellate Division stated, "based on the parties' respective positions, we agree that the substantial rights of the parties would not be affected by correction of the judgment to provide a suitable replacement for the insurance policy. The wife represents, without contradiction, that the $100,000 and $150,000 replacement policies had also lapsed; therefore, Supreme Court's well-intentioned order directing the husband to pay the premiums on these policies afforded the wife no benefit. Moreover, the parties conceded the impracticability of the husband obtaining meaningful life insurance coverage given his age and medical history."

"In light of these considerations," the Appellate Division computed and ordered the husband to pay the wife a sum equal to the premiums that he would have paid on the lapsed $500,000 insurance policy, plus its cash value, plus statutory interest.

Failure To Perfect an Appeal

The parties' failure to perfect an appeal, in *Spinelli*, justifies a brief review of the risks attendant to taking an appeal, i.e., filing a notice of appeal, not perfecting the appeal

without taking any of the three easy steps set forth by the Court of Appeals, below, and then seeking the same relief in a subsequent appeal are set forth in *Rubeo v. Natl. Grange Mut. Ins. Co.*, 93 N.Y.2d 750 (1999) and in *Bray v. Cox*, 38 N.Y.2d 350 (1976). In essence, "a prior dismissal for want of prosecution acts as a bar to a subsequent appeal as to all questions that were presented on the earlier appeal [because] if no penalty were imposed for failing to prosecute an earlier appeal, litigants could use the appellate process as a means of 'delaying enforcement of judgments and the inevitable payment of just debts and obligations ... Further [] as a prudential matter, an appellant should not "have two opportunities to appeal to this [C]ourt on identical issues," *Rubeo*, 93 N.Y.2d at 754 (citing *Bray*, 38 N.Y.2d at 353). Significantly, "the dismissal of an appeal for want of prosecution to be on the merits of all claims which could have been litigated had the appeal been timely argued or submitted" (*Bray*, 38 N.Y.2d at 355), meaning that the dismissal delivers a res judicata punch. See *Malay v. City of Syracuse*, 25 N.Y.3d 323 (2015).

The foregoing notwithstanding, the *Rubeo* court left the door open for subsequent appellate review: "The message is clear and consistent: The filing of an appeal is not inconsequential. An appeal left untended may be dismissed as abandoned, and appellant *may* be precluded from later appealing the same issue." *Rubeo*, 93 N.Y.2d at 757. Appellate decisions have simultaneously walked through this open door (*Prisco v. Prisco*, 131 A.D.3d 524 (2d Dept. 2015) ("As a general rule, we do not consider any issue raised on a subsequent appeal that was raised, or could have been raised, in an earlier appeal that was dismissed for lack of prosecution, although we have the inherent jurisdiction to do so."); *Budoff v. City of New York*, 164 A.D.3d 737 (2d Dept. 2018)), and have declined to extend this judicial discretion: "[T]he plaintiff, could have been raised [the specified issues] on his appeal from the amended judgment of divorce []. By decision and order on motion of this Court [] that appeal was dismissed for failure to timely perfect. The dismissal of that appeal constituted an adjudication on the merits with respect to all issues which could have been reviewed on that appeal ... We decline to exercise our discretion in the instant appeal to determine the merits of these issues." *Cohen v. Cohen*, 172 A.D.3d 999, 1001-02 (2d Dept. 2019) (citing *Rubeo*).

The Court of Appeals offered ready guidance, set forth in three easy steps, as how to

avoid this situation: "[P]laintiff could have avoided his present predicament in several ways. He could have timely perfected his original appeal. He could have moved the Appellate Division for an extension of time to perfect that appeal ... If plaintiff knew that he could not perfect the first appeal in a timely manner, he could have withdrawn it ..." *Rubeo*, 93 N.Y.2d at 755

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