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Court Holds Interlocutory Orders Appealable After Judgment

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By **Elliott Scheinberg** | September 10, 2020

Knapp v. Finger Lakes NY, Inc., 2020 NY Slip Op 03353 [4th Dept. 2020] presents a cogent analysis of the not uncommon confluence of statutes and case law on the appealability of an interlocutory order that is issued after entry of the judgment. A background review of the applicable law is helpful.

CPLR 4404 addresses post-trial motions irrespective of whether the cause of action was triable of right by a jury or not triable of right by a jury. CPLR 4406 warns that motions for CPLR 4404 relief must state all grounds in a single set of papers, in one motion. See, E. Scheinberg, CPLR 4404(a), Interest of Justice, *Powell v. City of NY; Cole v. Cole,* Multiple Preservations, NYLJ July 31, 2020.

CPLR 5701(a) allows "an appeal [to] be taken to the appellate division *as of right* in an action...: 1. from any final or interlocutory judgment except one entered subsequent to an order of the appellate division which disposes of all the issues in the action."

CPLR 5701(a)(2), in pertinent part, further allows an appeal to be taken *as of right* "from an order ... *where the motion it decided was made upon notice*" and which also satisfies one of eight other criteria, the most notable of which generally are CPLR 5701(a)(2)(iv), an order that "involves some part of the merits" and CPLR 570l(a)(2)(v), an order that "affects a substantial right." Richard C. Reilly and Prof. David Siegel, note in their Practice Commentaries, C5701:4: "The principal sources are items (iv) and (v) on the paragraph 2 list. Item (v) especially, which makes an order appealable if it merely 'affects a substantial right,' can probably absorb most of the other entries on the list and do the job alone."

CPLR 5501(a) provides, as pertinent here, that "an appeal from a final judgment brings up for review: 1. *any non-final judgment or order which necessarily affects the final judgment* ..." An appeal from an interlocutory order, while optional, is logistical and subject to, for example, implied severance (*Burke v. Crosson*, 85 N.Y.2d 10 [1995].) See, E. Scheinberg, Finality and Implied Severance, Interlocutory Orders, Final Orders, NYLJ, February 11, 2020.

These three statutes then face the passion and turbulence of *Matter of Aho,* 39 N.Y.2d 241 [1976], which, as of the time of this writing, has been cited 2,700 times for the principle that "any right of direct appeal from an intermediate order terminates with entry of final judgment." *Siegmund Strauss, Inc. v. E. 149th Realty Corp.*, 81 AD3d 260, 266 [1st Dept. 2010], affd as mod, 20 NY3d 37 [2012]; *HSBC Bank USA, N.A. v. Tigani*, 2020 NY Slip Op 03900 [2d Dept. 2020]; *Estate of Savage v. Kredentser*, 180 AD3d 1264 [3d Dept. 2020]. The issue in the interlocutory order is brought up for review if it necessarily affects the final judgment pursuant to CPLR 5501(a)(1) (*Tigani*, above).

Post Judgment Orders

This leaves the situation where an interlocutory order is issued after the final judgment has been entered. The appeal, in *Dietz Intern. Pub. Adjusters, Inc. v. Frankart Distributors, Inc.*, 157 AD2d 625 [1st Dept. 1990], from an order denying the defendant's motion, pursuant to CPLR 4404(a), to set aside the jury verdict on liability and damages which

order permitted the plaintiff to recover, in quantum meruit, the value of services rendered and punitive damages or to direct judgment notwithstanding the verdict, was unanimously dismissed as non-appealable.

The final judgment was entered on Oct. 1, 1987, after the date of the order appealed from, Jan. 21, 1987. The First Department, citing *Matter of Aho,* held that, although the order appealed from had not been entered until Jan. 27, 1988, it was superseded by the final judgment and the right to directly appeal therefrom terminated.

In *Crawford v. New York City Dept. of Info. Tech. and Telecom.*, 136 AD3d 591 [1st Dept. 2016], the First Department, dismissed an appeal from an order, which granted respondent's cross motion to seal the papers it filed in opposition to the CPLR article 78 petition and the papers that petitioners filed in reply. Citing *Matter of Aho,* the court held that the petitioners' right to appeal from the order terminated with the entry of the final judgment; the order was a nonfinal, intermediate order, because it did not dispose of the petition seeking certain documents, for which reason the doctrine of implied severance did not apply (*Burke v. Crosson*, 85 N.Y.2d 10, 15–17 [1995]).

The court rejected the petitioners' suggestion that the rule stated in *Matter of Aho* was inapplicable to sealing orders. Citing *Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 81 A.D.3d 260, 266–267 [1st Dept. 2010], mod on other grounds 20 N.Y.3d 37 [2012], the First Department incidentally added that "the *Aho* rule is applicable even if the order appealed from does not necessarily affect the final judgment."

The Fourth Department, in *Paul Revere Life Ins. Co. v. Campagna*, 233 A.D.2d 954 [4th Dept. 1996], cited *Dietz* in support of its ruling: "Although the order on appeal was entered after entry of the final judgment, that order is subsumed in the judgment and the right to appeal directly therefrom terminated."

In *Taylor v. Birdsong*, 158 AD3d 1281 [4th Dept. 2018], the plaintiff appealed from an order that denied her motion pursuant to CPLR 4404(a) to set aside a jury verdict and grant her a new trial on the issue whether she sustained a serious injury within the meaning of Insurance Law § 5102(d), and also from that branch of the order that granted a motion by one of the defendants for a directed verdict on the issue of negligence.

The Fourth Department, citing another First Department decision, *Thoreson v. Penthouse Intern.*, Ltd., 179 AD2d 29 [1st Dept. 1992], affd, 80 NY2d 490 [1992] and *Paul Revere* held: "Although the order on appeal was entered after entry of the final judgment, that order is subsumed in the judgment and there is no right to appeal directly therefrom." The judgment, in *Thoreson,* had been entered on or about November 8, 1990. The appeal from the order, entered January 3, 1991, which denied defendants' motion to vacate the award of punitive damages (CPLR 4404 [b]) was dismissed as subsumed in the judgment (CPLR 5501[a][1]).

'Knapp'

Barely two years after its decision in *Taylor v. Birdsong,* the Fourth Department, in *Knapp,* compellingly abandoned the reasoning in *Paul Revere* holding instead that "an order otherwise appealable as of right (CPLR 5701[a]) entered after the entry of a final judgment is not subsumed in the judgment, but rather is independently appealable."

The plaintiffs, in *Knapp,* commenced an action to recover damages for, inter alia, diversion of trust funds in violation of Lien Law article 3-A. Following a jury trial, the jury found, inter alia, that the plaintiffs had sustained no damages attributable to the defendants' admitted Lien Law violation. The plaintiffs moved pursuant to CPLR 4404 to set aside the verdict with respect to the Lien Law cause of action and for judgment in their favor, or, alternatively, for a new trial. A final judgment was entered August 21, 2018, and an order denying the plaintiffs' CPLR 4404 motion was entered January 3, 2019. The plaintiffs appealed from the order, but not the judgment.

The Appellate Division examined whether a party may appeal directly from an order denying a CPLR 4404 motion when that order was entered after entry of a final judgment. Referring to *Paul Revere* and *Taylor,* the court stated: "In some of our previous cases, we have concluded that such an order is 'subsumed in the judgment and the right to appeal directly therefrom terminated ... We now conclude that the rule in *Paul Revere Life Ins. Co.* is inconsistent with the statutory framework and with Court of Appeals precedent and should no longer be followed. We hold that an order otherwise appealable as of right (CPLR 5701[a]) entered after the entry of a final judgment is not subsumed in the judgment but is independently appealable."

The court observed that an appeal may be taken as of right from an order that, inter alia, "involves some part of the merits," "affects a substantial right," or "refuses a new trial" (CPLR 5701[a][2][iii]-[v]) as further affected by *Aho,* to wit, "when a court enters an 'intermediate order' and subsequently enters a final judgment, entry of the judgment terminates the right to appeal from the order and "the intermediate order merges into the final judgment." So that "although the right of appeal terminates, the order is not beyond review" because "the appeal from the final judgment 'brings up for review,' inter alia, 'any non-final judgment or order which necessarily affects the final judgment' or 'any order denying a new trial' (CPLR 5501[a][1], [2]). Thus, CPLR 5501 (a) salvages the ability of aggrieved parties to seek review of the intermediate order on appeal.

Knapp further emphasized, "on the other hand, orders entered after the entry of a final judgment cannot conceptually merge into the judgment. The rule in *Aho* applies only to an 'intermediate order', which the Court of Appeals has defined as an order 'made after the commencement of the action and before the entry of judgment... Consequently, inasmuch as the right of appeal from a post-judgment order remains in effect, we conclude that the appeal from the order here is properly before us."

The plaintiffs, in *Knapp,* however, suffered an anticlimactic ending. Their procedural victory notwithstanding, the Appellate Division declined to hear their appeal on the merits because they failed to submit an adequate record that included a full trial transcript. How

important it is to remember CPLR 5528, the Unified Rules and the potential consequences from filing an inadequate, insufficient record.

Conclusion

While the appeals from the judgment and the interlocutory order would likely have been heard together, but for the CPLR 5528 failure, an alternate solution would have been to take an appeal from both the order and the judgment (in the words of the titan, Prof. David Seigel, "Appeal everything!") and also file a motion below to amend the judgment so as to include the order.

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