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'Charalabidis v. Elnagar': 'Grisi' Redux, Part I

This article is the first of a two-part analysis of a reemerged issue, brought to the forefront by 'Charalabidis v. Elnagar' and 'Matter of Cassini', wherein two courts did not issue written decisions and orders following written motions thereby rendering those orders nonappealable.

By **Elliott Scheinberg** | November 30, 2020

Elliott Scheinberg

This article is the first of a two-part analysis of a reemerged issue, brought to the forefront by *Charalabidis v. Elnagar*, 188 A.D.3d 44 (2d Dept. 2020) and *Matter of Cassini*, 182 A.D.3d 1 (2d Dept. 2020), wherein two courts did not issue written decisions and orders following written

motions thereby rendering those orders nonappealable. *Charalabidis* was uniquely egregious in that therein a seasoned jurist, intimately familiar with the six most basic elements of CPLR 2219(a) that comprise the time and the form of an order, persistently thwarted every effort by the aggrieved party to bring that order up on appeal by refusing to properly sign the order in accordance with 2219(a). The facts unquestionably establish that the jurist's intent was to frustrate that party's statutory right to take an appeal from the adverse order because such an "order" is not an appealable paper. The aggrieved litigant sustained unrecoverable loss of time and money attributable to their multiple, futile efforts, motions and an eventual appeal, to secure their unconditional, nondiscretionary, fundamental statutory right to an appeal. The facts in *Cassini*, below, suggest no deliberate, improper conduct.

The Court of Appeals emphasized the criticalness of undeniable access to appellate review: "The invariable importance of the fundamental right to an appeal, as well as the distinct role assumed by the Appellate Divisions within New York's hierarchy of appellate review makes access to intermediate appellate courts imperative." *People v. Ventura*, 17 N.Y.3d 675, 679 (2011), citing the New York State Constitution, Article VI, §5 and CPLR 5501(c).

While a court may properly exercise its discretion to enjoin a party from making further motions without prior judicial approval based on a party's history of numerous frivolous motions, *Lipin v. Danske Bank*, 130 A.D.3d 470, 471 (1st Dept. 2015); *Renke v. Kwiecinski*, 126 A.D.3d 961, 962 (2d Dept. 2015), case law prohibits a court from outright denying a party the right to appeal, irrespective of the worthiness of the court's motive such as controlling its calendar.

Charalabidis mirrors the events of the landmark decision, *Grisi v. Shainswit*, 119 A.D.2d 418 (1st Dept. 1986), where a judge refused to sign an order or a transcript thereby stripping the aggrieved party of its statutory right to appeal.

'Grisi'

Facts. The defendants, in *Grisi*, served a request for a pre-motion conference, seeking permission to move to strike the note of issue and statement of readiness on the ground that the action was not ready for trial, alleging as the basis their entitlement to another physical examination and deposition of the plaintiff with respect to his newly asserted claim and to receipt of duly executed authorizations for the release of his employment and tax records. During a conference the court issued a preliminary order directing the plaintiff to provide the defendants with the requested authorizations. The application for a further deposition and physical examination was, however, denied. Notwithstanding the defendants' request, the judge refused to enter a written order to that effect. The court also refused the defendants' request that a court reporter record its determination. Efforts to have the Administrative Judge prevail upon the court to issue a written order or to permit a transcription of its denial of the defendants' application proved fruitless.

Mandamus is the appropriate remedy where the act is "nondiscretionary and nonjudgmental," "a purely ministerial act," "a clear legal right." Since the defendants wanted to appeal from the denial of their application, and no appeal lies from a ruling, as

distinct from an order (CPLR 5512[a]), the defendants commenced a proceeding seeking a judgment in the nature of a writ of mandamus directing the court to issue a written order reflecting its denial of their application:

> Mandamus is the appropriate, albeit extraordinary, remedy to compel a body or officer, including a judicial officer, to perform "a purely ministerial act where there is a clear legal right to the relief sought." (Matter of Legal Aid Soc. of Sullivan County v. Scheinman, 53 N.Y.2d 12, 16 ...).
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> The ministerial act must be "nondiscretionary and nonjudgmental" and "premised upon specific statutory authority mandating performance in a specific manner" ... A court cannot be commanded to exercise its discretionary functions in a prescribed manner ... The right to performance "must be so clear as not to admit of reasonable doubt or controversy." (Matter of Burr v. Voorhis, 229 N.Y. 382, 387; Matter of Association of Surrogates & Supreme Ct. Reporters within City of N.Y. v. Bartlett, 40 N.Y.2d 571, 574.)
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> [P]etitioners are unable to point to any authority, statutory or otherwise, which mandates that a court issue a separately signed, written order embodying its ruling on an oral application. Ordinarily, in such circumstances, we would dismiss the petition for want of a showing of a clear legal right to the relief sought. The reality, though, is that the application was orally presented, not by design, but only because petitioners were denied the opportunity to move formally on papers. In this connection, we note a growing tendency in the Supreme Court civil trial parts to condition the making of a written motion on prior judicial approval. In certain instances a refusal to allow the motion is accompanied by an express, but oral, denial of the motion. In others, the request is simply refused, effectively resulting in a denial of the motion. In either event, there is no record available for appellate review. In some instances, as here, there is not even a written order. Our difficulty with this practice is that it tends to frustrate a litigant's statutorily provided right of appeal from an intermediate order (CPLR 5701[a][2]).
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> It hardly bears repeating that courts have the inherent power, and indeed responsibility, so essential to the proper administration of justice, to control their calendars and to supervise the course of litigation before them. (Headley v. Noto, 22 N.Y.2d 1, 4; Cohn v. Borchard Affiliations, 25 N.Y.2d 237, 249–250 ...). Indeed, a statutory enactment infringing upon the power of the courts in this regard might well be constitutionally suspect. (Plachete v. Bancroft, Inc., 3 A.D.2d 437, 438.)

Grisi took note "of the crushing volume of motions—including the patently meritless, frivolous and untimely—with which a judge presiding over a civil part under the individual assignment system is confronted":

> Doubtless, there are instances, especially where a note of issue has been filed and trial is imminent, where the motion and the appeal from an adverse determination are calculated to delay and hinder the expeditious disposition of the case. We recognize that if the trial and disposition of cases were to be deferred routinely pending appellate review of interlocutory orders the system would collapse of its own weight.

Mandamus granted. *Grisi,* nevertheless, focused on a party's superseding "fundamental rights" "to appellate review" "no matter how pressing the need for the expedition of cases," the interdiction against frustrating those rights and the corrective measures to be taken because "the right to take an appeal from an intermediate order is statutory (generally, CPLR 5701[a][2])" and granted the a writ of mandamus directing the judge either to entertain the petitioners' motion in writing, or afford them and their adversaries the opportunity to be heard on the record with respect thereto:

> A party cannot be deprived of his right to be heard on a substantive matter not involving a trial ruling by the simple expedient of denying him the right to make a written motion or a record, thereby foreclosing the opportunity for appellate review. At the very least, in instances where the court, in its discretion, refuses to entertain a written motion, the denial of which would be otherwise appealable had the motion been made in writing, the putative moving party should be afforded the opportunity to make a record reflecting the respective positions of the parties on the particular issue and the court's reasoning and decision, as well as a recitation of the facts and documentation that were considered in the court's determination.
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> We note that the Uniform Civil Rules for the Supreme Court and the County Court make provision for the transcription of the court's directions at a preliminary conference and expressly state that the transcript "shall have the force and effect of an order of the court" (22 N.Y.C.R.R. 202.12(e)). So that there will be no question as to the appealability of such disposition, however, we would also require that where a party presents a written order embodying the court's determination spread on the transcript that such order be signed.
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> We are aware that on another occasion ... we held that a precalendar conference order not made on notice of motion and without supporting papers was non-appealable. We then suggested that in such cases appellate review could be had, if otherwise available, if the party adversely affected by the order formally moved to vacate or modify it. The determination of that motion would then be appealable. Such a procedure ... would be wasteful in an individual assignment system, the hallmarks of which are judicial flexibility and continuity of supervision.

Not long after *Herbert,* the First Department, in *Hochberg v. Davis*, 171 A.D.2d 192 (1st Dept. 1991), again "caution[ed] the courts to ensure that the fundamental rights to which a litigant is entitled are not ignored, "no matter how pressing the need for the expedition of cases." See *Amiantite, S.p.A. v. Tawfik*, 186 A.D.2d 70, 70 (1st Dept. 1992); *Costigan & Co., P.C. v. Costigan*, 304 A.D.2d 464 (1st Dept. 2003); *Lipson v. Dime Sav. Bank of New York, FSB*, 203 A.D.2d 161, 162 (1st Dept. 1994).

'Matter of Cassini'

This situation, too, was avoidable, in *Cassini.* While the court orally denied Marianne's [petitioner-appellant's] oral application for an adjournment at the start of the trial, it failed to issue a properly written order on her written motion for an adjournment of the trial:

> The court should have, but did not, issue a written order denying Marianne's written motion for an adjournment. Because the court did not issue a written order determining the written motion for an adjournment, Marianne was not able to pursue an appeal as of right from the oral determination denying her request for an adjournment. While Marianne did purportedly appeal from, and also sought leave to appeal from, an order dated June 9, 2016 [that the trial would proceed "whether the parties are represented by counsel or not"), her appeal purportedly taken as of right was dismissed and that branch of her motion which was for leave to appeal was denied by decision and order on motion of this Court dated August 9, 2016.
>
> Since Marianne did all that she reasonably could to preserve her right to appeal from the Surrogate's Court's denial of her written request for an adjournment of the trial, we cannot say that the court's five-month delay in issuing a formal written denial rendered her motion moot and impervious to appellate review.

In *Grisi* and later, in *Herbert v. City of New York*, 126 A.D.2d 404, 406 (1st Dept. 1987), the First Department further decried the practice of seeking judicial approval before being allowed to make a motion (barring of course, repeated frivolous motions, *Lipin*, *Renke*, above):

• *Grisi*: "Finally, we note that this decision should not be construed as encouraging the practice of conditioning the making of written motions on prior judicial consent. We believe that under the present system that determination is best left to the discretion of the particular trial court. We merely require that when a request to make a formal motion is refused or the motion is considered on the merits, but orally, a record, as already indicated, be made."

• *Herbert*: "As we noted in *Grisi*, the fundamental right of a litigant to pursue an appeal pursuant to CPLR 5701(a)(2) should not be frustrated by judicial resort to expedients, even when a court's use of expedients stems from its very legitimate concerns with calendar control and the discouragement of excessive motion practice. Thus, in *Grisi*, we held that a court may not preclude an appeal by denying a litigant the opportunity to submit a written motion or to make a reviewable record."

See also *People v. Thomas*, 34 N.Y.3d 545, 598 (2019), cert denied sub nom. *Thomas v. New York*, 140 S.Ct. 2634 (2020).

Part II studies *Charalabidis v. Elnagar*, wherein the Second Department broadened the *Grisi* analysis by incorporating a review of CPLR 2219, which saved the day for the aggrieved litigant.

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'Charalabidis v. Elnagar': 'Grisi' Redux, Part II

This article is the second of a two-part analysis of a reemerged issue, brought to the forefront by 'Charalabidis v. Elnagar' and 'Matter of Cassini', wherein two courts did not issue written decisions and orders following written motions thereby rendering those orders nonappealable.

By **Elliott Scheinberg** | December 01, 2020

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Part II of this column continues the appellate rebuke of judges who deliberately frustrate the statutory right of aggrieved parties to take an appeal by refusing to sign their names to orders they have issued. In *Charalabidis v. Elnagar*, 188 A.D.3d 44 (2d Dept. 2020), a scholarly exegesis

written by Justice Mark Dillon, the Second Department not only applied the case law discussed in Part I of this column, but also added depth to the analysis by way of an extensive review of CPLR 2219.

'Charalabidis'

Facts. Defendants, in *Charalabidis*, moved, pursuant to former Code of Professional Responsibility DR 5-105(a) (22 NYCRR 1200.24[a]), to disqualify plaintiffs' counsel because of a conflict of interest attributable to counsel's simultaneous representation of the plaintiff-driver and her two plaintiff-passengers. That the nature of the relief sought by defendants' was neither argued and preserved by plaintiffs, nor addressed and dismissed, sua sponte, by the Supreme Court or the Appellate Division on the grounds of the "general prohibition on one litigant raising the legal rights of another" *Socy. of Plastics Indus., Inc. v. County of Suffolk*, 77 NY2d 761, 773 (1991); *Matter of In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY3d 377, 408 (2017), is beyond the scope of this article.

Since the parties were midtrial, Supreme Court speedily considered the timing and merits of the motion, following which it orally granted the defendants' relief to disqualify plaintiffs' counsel, while also striking the action from the trial calendar.

Nevertheless, despite plaintiffs' efforts and applications to make the order appealable, the judge unyieldingly continued to refuse to either sign the transcript or an order. Plaintiffs' counsel had submitted a copy of the stenographer's certified transcript for the judge's signature. When the judge refused to sign a "So Ordered" copy of the transcript plaintiffs' counsel complained to the Administrative Judge that such refusal blocked their taking an appeal. Plaintiffs' next submitted a proposed order with notice of settlement, pursuant to 22 NYCRR 202.48, which included a copy of the certified transcript: "The court failed or refused to sign the proposed order, either in the form presented by plaintiffs or in any modified or alternative form."

Plaintiffs' moved, pursuant to CPLR 2221, for leave to reargue or, alternatively, pursuant to CPLR 2219 and 22 NYCRR 202.48 to compel the justice to issue an appealable order, and if reargument were to be denied, the court "should either so order the transcript or sign the order that was previously submitted, so that plaintiff is not deprived of the right to appeal." The plaintiffs appealed from the order as denying that branch of their motion pursuant to CPLR 2219 and 22 NYCRR 202.48 to compel the court to issue an appealable order. As discussed below, this was error. As in *Grisi,* plaintiffs were required to bring an Article 78 proceeding in the nature of a mandamus.

CPLR 2219. Justice Dillon began his analysis by distinguishing a ruling, a decision, and an order: (1) "a decision resolves an issue on its merits but does not order any party to do or refrain from doing anything; (2) an order implements a decision by requiring a party to act or refrain from acting consistent with the decision; and (3) decisions may not be appealed, as appeals may only be taken from orders and final judgments (CPLR 5501[a]; 5512[a] ...)." Furthermore, "a ruling, which is not a product of a motion made on notice but a mere determination of an issue made during depositions, trials, or other proceedings, is not appealable (CPLR 5501 ...), although rulings that have been objected to and preserved may be reviewed on an appeal from a final judgment (CPLR 5501[a][3])."

The decision next analyzed the six mandatory elements of CPLR 2219(a):

• an order must be in the form of a writing so as to remove any possibility of the parties later disputing the substance of what the court decided (Rep Prepared by the Comm on CPLR, Bill Jacket, L 1996, ch. 38).;

• an order "shall be signed with the judge's signature or initials by the judge who made it.";

• the judge's signature or initials must be dated in order to assure that it was executed after the submission of all relevant papers (Glickman v. Sami, 146 A.D.2d 671) and memorializes the administrative history of the action.;

• a written order must identify the issuing court, so as to identify the proper appellate court to which any appeal lies (CPLR 5515[1]). The requirement also assures that the court's determination is within the subject matter jurisdiction of the identified trial court.;

• an order must recite the papers reviewed in determining the motion to assure the parties that all papers that have been submitted for consideration have been considered. Furthermore such recitation requirement fulfills the purpose of defining the scope of the record on appeal (CPLR 5526). If an order reveals that not all of the known submitted papers have been considered, an aggrieved party is alerted to the error and can potentially seek reargument of the motion on the ground that the court misapprehended the relevant facts or seek resettlement of the record for an appeal.

[*Singer v. Board of Educ. of City of N.Y.*, 97 A.D.2d 507 (2d Dept. 1983), which is cited cited in *Charalbidis*, held: "an order which does not contain a recital of the papers used is, nevertheless, an appealable order ..."]

• an order shall "give the determination or direction in such detail as the judge deems proper" (CPLR 2219(a]); "a court owes litigants some explanation of its determinations and clarity of its directives, but has broad discretion in determining the level of detail that it provides ... The quantum of detail is case specific and discerning which case calls for a heightened level of detail is part of the subjective art of judging. *S. Bank N.A. v. Majid*, 174 A.D.3d 665, 667 (2d Dept. 2019) ("CPLR 2219(a) allows broad leeway as to the form of an order ['permitting the court to "give the determination or direction in such detail as the judge deems proper'..."):

"Additionally, in the event of an appeal, some discussion by a court of its reasoning in granting or denying a motion is helpful to the Appellate Division in reviewing whether the trial court's determination was correct under the law or a provident exercise of discretion under the facts. Orders that merely grant or deny a motion in one word or one sentence, without explanation, leave to the lawyers, litigants, and appellate courts the guesswork of why a motion was decided as it was. A cogent, even if terse, explanation of the court's reasoning may lead the unsuccessful party to recognize the flaws in its position and deter it from pursuing a costly appeal."

This is essentially the principle of allowing an appellate court to exercise meaningful appellate review.

22 NYCRR 202.8[g] and 202.48. *Charalabidis* next addressed 22 NYCRR 202.8[g] and 22 NYCRR 202.48. Section 202.8[g] directs that "[u]nless the circumstances require settlement of an order, a judge shall incorporate into the decision an order effecting the relief specified in the decision":

> We discourage courts from using the short phrase 'So Ordered' at the conclusion of a decision/order in lieu of a fuller explanatory decretal paragraph, as the mere declaration of 'So Ordered' requires the attorneys, litigants, and appellate court to refer back to the body of the decision to divine from its discussion the exact ordered directive that is intended which, in some instances, might not always be clear or agreed upon by the parties.

Section 202.48 states that a decision on a motion can be converted into an order by the execution of a proposed order with notice of settlement; such an order must meet the same unyielding criteria of CPLR 2219(a) as an order rendered by a court upon directly determining a motion.

The value of oral determinations. Observing that CPLR 2219 gets violated when jurists render oral determinations on the record, in the courtroom, on the return date of a motion or on a later conference date, Justice Dillon offered instances when such determinations can be "advisable and helpful to parties, and nothing in this opinion and order should be interpreted as seeking to discourage the practice":

> One such example is when a motion is pending for injunctive relief, and a party may be tangibly affected by the presence or absence of a temporary restraining order. In such instances, a determination rendered in open court on the return date, lifting or continuing a temporary restraining order and granting or denying a preliminary injunction, provides the parties with the certainty of a determination without the delay that would result by issuing a later written decision and order. Indeed, CPLR 2219(a) specifically directs that motions relating to provisional remedies shall be determined within 20 days, rather than the 60–day deadline that governs other types of motions, increasing the value of oral determinations where possible.
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> Matrimonial cases provide another example, where a party in need of immediate pendente lite relief from a monied spouse for paying a mortgage, electric bill, for food, or other expenses benefits from the speed of an expedited oral determination, rather than waiting for a written order to be received at some later time.
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> Motions made shortly before a trial date, or in cases entitled to a trial preference, may also lend themselves to the prompt disposition that results from an oral determination on the record in open court.

CPLR 2219 and oral determinations. Next reviewed was CPLR 2219 in the context of oral determinations. Therein the stenographic transcript of the proceeding becomes the written version of the order subject to the mandates of CPLR 2219(a):

Trial judges and justices, in creating the transcribed record, must be mindful of all other requirements of CPLR 2219 that the court reporter cannot satisfy, including:

- language that the determination is an "order," rather than a mere decision, if an order is what is intended;

- a full recitation of the papers reviewed by the court in reaching its determination;

- sufficient direction and detail as to what is being ordered; and

- the affixation of the judge or justice's signature or initials upon the transcript, the absence of which is fatal. The court reporter's certification as to the truth and accuracy of the transcript does not substitute for the statutory obligation that the judge sign his or her name or initials to the document.

- Therefore, when the transcript is to become the written version of an order determining a motion, arrangements must be made for the transcript to be provided to the judge or justice for signature or initials.

Only when the transcript is actually signed or initialed by the judge with the direction that the transcript be entered does it meet the requirements of CPLR 2219(a) to be enforceable as an order, and only then upon its entry does the transcript become an "appealable paper".

Alternatively, when a transcript is used, a party may, as was also done here, provide a copy of it to the judge with a proposed order for signature, with notice of settlement to all parties (22 NYCRR 202.48[a]). Under this method, the transcript need not be signed and can be treated as a mere decision, but the accompanying proposed order, once signed or initialed, becomes enforceable under CPLR 2219(a) and constitutes an appealable paper (CPLR 5512[a]).

Mandamus as the remedy for a court's refusal to sign an order. While expressing its "understand[ing] [surrounding] the reluctance of the trial bar to ever commence [mandamus] proceedings against the judges assigned to their cases," the Appellate Division, nevertheless underscored that "absent meaningful assistance from the administrative judge ... where plaintiffs made several unsuccessful attempts to obtain an appealable paper, their only alternative was to commence a proceeding pursuant to CPLR article 78 in the nature of mandamus" "to compel the court to perform a ministerial act for which there was a clear [nondiscretionary] right (CPLR 7801; *Matter of Legal Aid Socy. of Sullivan County v. Scheinman*, 53 N.Y.2d 12, 16; [also *Grisi*])," not pursuant to CPLR 2219(a) and 22 NYCRR 202.48, in order to secure an appealable paper. (*Charalabidis* cited case law of analogous circumstances where mandamus had been specifically applied to compel the determination of outstanding motions.)

Plaintiffs' failure to commence an Article 78 proceeding resulted in the expiration of the statute of limitations because an Article 78 proceeding must be commenced within four months "after the respondent's refusal, upon the demand of the petitioner or the person whom he [or she] represents, to perform its duty" (CPLR 217[1]); the court's order denying that branch of plaintiffs'

motion pursuant to CPLR 2219 and 22 NYCRR 202.48 to compel the court to sign and issue an appealable paper was entered Dec. 19, 2017, accordingly the Article 78 proceeding should have been brought no later than April 19, 2018, which deadline had passed.

CPLR 4213. *Charalabidis* also reminds the bar that "the requirements of CPLR 2219 should not be confused with the separate requirements of CPLR 4213, which independently regulates decisions rendered by courts upon the conclusion of non-jury trials and hearings."

Conclusion

The Appellate Division, nevertheless, found an escape valve for the plaintiffs:

> Although, in the absence of a mandamus proceeding, we are obligated to affirm the order insofar as appealed from, we note that on this record, there is no signed enforceable order by which the original counsel for the plaintiffs has been disqualified and, therefore, the time to appeal any such future order has not yet begun to run.

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