New York Law Journal

CPLR 5518, 5519: Distinction, Stays and Mootness in Construction Cases, Part I

In addition to its inherent power to issue broad stays, two statutes confer authority upon the Appellate Division to grant interim injunctive relief during the pendency of an appeal (after the filing of the notice of appeal): the lengthy, widely known CPLR 5519 and the very brief, lesser familiar, CPLR 5518. Part I of this two-part article studies the distinctions between these statutes and their general applications.

By **Elliott Scheinberg** | January 13, 2021

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Part I of this two-part article studies the distinctions between these statutes and their general applications. Part II will focus on the consequences from a failure to seek injunctive relief during the pendency of an appeal to preserve the status quo in construction cases, recently treated in *City of Ithaca v. New York State Dept. of Envtl. Conservation*, 2020 NY Slip Op 06322 (3d Dept. 2020).

CPLR 5519(a)(1), CPLR 5518. CPLR 5519(a)(1) addresses automatic stays when the state or any officer or agency thereof files a notice of appeal.

CPLR 5518 provides: "The appellate division may grant, modify or limit a preliminary injunction or temporary restraining order pending an appeal or determination of a motion for permission to appeal in any case specified in section 6301."

The Practice Commentaries, C5518:1, David Siegel and Richard Reilly, explain the function of CPLR 5518: "[It] gives the appellate division during the appeal stage the same powers that the supreme court has during the action's pretrial and trial stage."

Foundationally, "a stay merely suspends further proceedings; it does not vitiate the effect of the order or judgment stayed." *Matter of Stepping Stones Assoc. v. Seymour*, 48 A.D.3d 581, 584 (2d Dept. 2008). "Until judicial relief to stay or vacate the order [i]s successfully obtained, defendant [i]s duty-bound to honor it." *Ulster Home Care v. Vacco*, 255 A.D.2d 73, 77-78 (3d Dept. 1999).

Matter of Pokoik v. Dept. of Health Services of County of Suffolk, 220 A.D.2d 13, 14-16 (2d Dept. 1996), involved "the scope of the [automatic] stay afforded by CPLR 5519(a)(1)" when the State or an agency thereof "serves upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal."

Pokoik explained that "decretal provisions of judgments and orders are of two basic kinds": "those that are immediately executed upon the promulgation of the judgment or order, and those that direct the performance of some act in the future and are thus executory, requiring voluntary or compelled compliance to cause them to become executed"—paraphrasing the decision, rather than quoting its key expressions, strips the energy from the court's opinion:

CPLR 5519(a), by its express terms, only provides a stay of proceedings to enforce the judgment or order appealed from. Thus, when a stay is obtained pursuant to this subdivision it has the effect of temporarily depriving the prevailing party of the ability to use the methods specified by law (e.g., CPLR art. 51, entitled "Enforcement of Judgments and Orders Generally") to enforce the executory provisions of the judgment or order appealed from ... [T]he taking of an appeal stays enforcement of an order or "judgment directing the performance of some act by [the State or] a municipality or one of its officials."

Those provisions of the judgment or order appealed from which are self-executing upon its promulgation and those provisions which have been brought to execution by voluntary or compelled compliance prior to the effective date of the stay are not undone (*City of Utica v. Hanna*, 249 N.Y. 26, 30 [Cardozo, Ch. J. ...). That is to say, an appeal by the State, a political subdivision thereof, or their officers or agencies does not suspend the operation of the order or judgment and restore the case to the status which existed before it was issued. *A motion decided by an order does not become undecided and the declaratory provisions of a judgment are not undeclared when a governmental party serves a notice of appeal therefrom* ... (emphasis provided).

[T]he scope of the automatic stay of CPLR 5519(a) is restricted to the executory directions of the judgment or order appealed from which command a person to do an act, and that the stay does not extend to matters which are not commanded but which are the sequelae of granting or denying relief. Thus, where an order merely denies a motion for summary judgment or to strike the case from the calendar, an appeal from that order will not stay a trial which is a consequence of the order but is not directed by it (e.g., *Shorten v. City of White Plains*, 216 A.D.2d 344, 631 N.Y.S.2d 519 ...).

Future acts which are not expressly directed by the order or judgment appealed from may nevertheless have the effect of changing the status quo and thereby defeating or impairing the efficacy of the order which will determine the appeal. In such cases, no automatic stay is available but the aggrieved party may apply to the appellate court to exercise either its inherent power to grant a stay of such acts in aid of its appellate jurisdiction ... or, in any case specified in CPLR 6301, its power to grant, limit, or modify a preliminary injunction or temporary restraining order pursuant to CPLR 5518.

In declaratory judgment actions in which such a discretionary stay or injunction commanding or prohibiting specified acts might prove insufficient to maintain the status quo, the appellant may apply to this court, in extraordinary circumstances, to exercise its inherent power to suspend the operation of the declaratory judgment itself pending the appeal.

See also *Baker v. Bd. of Educ. of W. Irondequoit School Dist.*, 152 A.D.2d 1014 (4th Dept. 1989) ("neither a discretionary stay nor an automatic stay under CPLR 5519 stays all proceedings in the action; it stays only proceedings to enforce the order or judgment appealed from.").

"The scope of the stay authorized by [CPLR 5519](c) is coextensive with the stay authorized by [CPLR 5519](a), namely, a stay of enforcement proceedings only, not a stay of acts or proceedings other than those commanded by the order or judgment appealed from." *Schwartz v. New York City Hous. Auth.*, 219 A.D.2d 47, 48-49 (2d Dept. 1996).

In *Matter of Kar-McVeigh v. Zoning Bd. of Appeals of Town of Riverhead*, 93 A.D.3d 797 (2d Dept. 2012), the Supreme Court denied the respondents/defendants' motion to dismiss the petition/complaint, and directed them to serve and file an answer to the petition/complaint and the administrative return within 10 days of the date of that order, and to include certain specified documents in the return. Rather than serving and filing an answer or a return within that period of time, the respondents/defendants appealed from the order denying their motion within the same period of time.

Supreme Court granted the petitioner/plaintiff's motion for the entry of a judgment on the petition/complaint upon the default of the respondents/defendants in serving and filing an answer and return pursuant to the order.

Citing *Pokoik*, the Appellate Division noted that, while the automatic stay provisions do not extend to matters "which are not commanded but which are the sequelae of granting or denying relief," "the portion of the order which directed the respondents/defendants to serve and file an answer constituted an executory directive subject to the automatic stay provisions of CPLR 5519(a)(1)." Accordingly, once they served and filed the notice of appeal from the order, their failure to comply with the order did not constitute a default, and the Supreme Court erred in granting the default judgment.

Stays and Their Impact on Trials. As stated in *Pokoik*: "[W]here an order merely denies a motion for summary judgment or to strike the case from the calendar, an appeal from that order will not stay a trial which is a consequence of the order but is not directed by it." Other decisions are illustrative.

In *Shorten v. City of White Plains*, 216 A.D.2d 344 (2d Dept. 1995), the defendant City of White Plains, a political subdivision of the state, appealed from an order which denied its motion for summary judgment. Prior to jury selection, the trial court told the parties that proceedings were "stayed for all purposes" by virtue of the 5519(a)(1) automatic stay. The plaintiff-respondent sought vacatur of the perceived automatic stay. The Appellate Division "denied the motion as unnecessary":

> The plain language of [CPLR 5519(a)(1)] makes it clear that only "proceedings to enforce the judgment or order" are stayed and not all proceedings in the action. Since the trial of this action is not a proceeding to enforce the order which denied the City's motion for summary judgment, the statutory stay provisions of 5519(a)(1) clearly do not operate to prevent the trial from going forward ... Accordingly, there is no stay of trial for this court to vacate.

In *Matter of Pickerell v. Town of Huntington*, 219 A.D.2d 24 (2d Dept. 1996), the Town of Huntington moved for summary judgment and the claimants cross-moved for partial summary judgment to dismiss the Town's first affirmative defense and to set the matter down for an immediate trial on the issue of damages. The Supreme Court denied the Town's motion, granted the cross-motion, and directed that the matter proceed to trial. Prior to trial, the Town served a notice of appeal.

The issue before the Appellate Division was the scope of the automatic stay obtained by the Town pursuant to CPLR 5519(a)(1). *Pickerell,* applying *Pokoik,* broke it down, explaining that, since the provisions of the order denying the Town's motion for summary judgment and granting the branches of the claimants' cross-motion which were for partial summary judgment and to dismiss the Town's first affirmative defense were self-executing, they were effective upon the promulgation of the order and were thus not subject to the automatic stay.

However, the portion of the order that granted the claimants' cross-motion to set the matter down for an immediate trial on damages on a specified future date did constitute an executory directive subject to the automatic stay. Accordingly, the Town's pretrial notice of appeal automatically stayed the trial.

Pickerell also distinguished itself from *Shorten*: The order in *Shorten* "merely denied a motion" by the City for summary judgment and did not contain a directive that the case proceed to trial; the trial, "although a natural consequence of the order [sequelae] denying summary judgment, was not directed by that order and thus was not automatically stayed by the service of the City's notice of appeal." See *Pokoik*, *Kar-McVeigh* and *Tax Equity Now.*

Appellate Division's Inherent Power To Stay a Trial. In *Schwartz*, above, the Supreme Court denied the City Housing Authority's motion for summary judgment to dismiss a complaint. The Housing Authority moved to stay the trial pending appeal of the denial of summary judgment. Citing *Shorten* and *Pokoik*, the Appellate Division denied the stay:

> We treat the alternative branch of the motion as one addressed to this court's inherent power to grant a stay of acts or proceedings, which, although not commanded or forbidden by the order appealed from, will disturb the status quo and tend to defeat or impair our appellate jurisdiction.

5519(a)(1) Automatic Stay Does Not Apply to Affirmative Directives in the CPLR. In *Tax Equity Now NY v. City of New York*, 173 A.D.3d 464 (1st Dept. 2019), the First Department, citing *Pokoik,* held that "[t]he filing of a notice of appeal [by a 5519(a)(1) designated government agency or officer] of an order denying a motion to dismiss does not trigger the automatic stay with respect to litigation obligations provided for in the CPLR, such as the obligation to answer and comply with discovery requests":

> While the automatic stay applies to stay "proceedings to enforce the judgment or order appealed from pending the appeal," which include executory directions that command a person to do an act beyond what is required under the CPLR, the automatic stay does not extend to matters that are the 'sequelae' of granting or denying relief. The inclusion in an order of affirmative directives on matters addressed in the CPLR does not trigger the stay as to the CPLR obligations.

See also *Pokoik*, *Kar-McVeigh* and *Pickerell.*

In *Rotondo v. Reeves*, 192 A.D.2d 1086 (4th Dept. 1993), defendants moved pursuant to CPLR 3211(a)(7) to dismiss plaintiffs' complaint. Supreme Court only dismissed one cause of action. Plaintiffs subsequently moved for a default judgment on the ground that defendants failed to serve an answer within 10 days of service of the order determining the motion to dismiss (CPLR 3211(f)). In opposition, defendants contended that the 5519(a)(1) automatic stay excused their failure to serve an answer. Supreme Court's denial of plaintiffs' motion for a default judgment was reversed as 5519(a)(1) "stays only proceedings to enforce the order or judgment"; 3211(f) does not involve a proceeding to enforce the order that determined the motion to dismiss. Furthermore, defendants never requested additional time to serve an answer and never offered a reasonable excuse for their default (CPLR 3012(d)).

No 5519(a)(1) automatic stay when an order or judgment prohibits conduct as it does not direct an executory act; prohibitory injunctions are self-executing and need no enforcement procedure to compel inaction. *State v. Town of Haverstraw*, 219 A.D.2d 64 (2d Dept. 1996) held that a 5519(a)(1) automatic stay is not available to the state, etc., when it appeals an order or judgment that prohibits certain conduct on its part because executory directives, which direct the performance of a future act, are different from orders or judgments which prohibit future acts; prohibitory injunctions are self-executing and need no enforcement procedure to compel inaction on the part of the person or entity restrained.

The objective of 5519(a)(1) is to maintain the status quo pending the appeal: "Mandatory injunctions are automatically stayed because in commanding the performance of some affirmative act they usually result in a change in the status quo. A prohibitory injunction, on the other hand, is one that operates to restrain the commission or continuance of an act and to prevent a threatened injury, thereby ordinarily having the effect of maintaining the status quo."

The temporary restraining order, in *Haverstraw*, "operated to restrain the plaintiffs from enforcing a landfill closure order which was confirmed by the Supreme Court and upheld on appeal ... A change in the status quo [wa]s precisely what [wa]s desired; the landfill [wa]s open and should [have been] closed." The Appellate Division thus granted leave to appeal and exercised its power pursuant to CPLR 5518 to vacate the temporary restraining order pending the appeal.

Order Discharging Patient 'Forthwith' From a State Psychiatric Center Does Not Trigger the 5519(a)(1) Automatic Stay as It Is Self-Executing, Not Executory. In *In re Nile W.*, 64 A.D.3d 717 (2d Dept. 2009), Creedmoor Psychiatric Center admitted Nile W., for involuntary care and treatment of depression and drug addiction. Upon becoming a voluntary patient, Nile requested her release. Creedmoor commenced a proceeding, under Mental Hygiene Law §9.13, for her continued retention for involuntary care and treatment.

During the hearing, Nile's attorney orally moved the court for summary judgment dismissing Creedmoor's application. The Supreme Court issued an order directing Nile's immediate release. The court crossed out a provision in the pre-typed order providing for a temporary stay of release. Creedmoor served Nile with a notice of appeal.

Creedmoor moved to vacate so much of the order as denied its application to invoke the 5519(a)(1) automatic stay to prevent Nile's release. The Supreme Court denied the motion, finding that an automatic stay was not available under the circumstances, and that the issue was moot since the patient had been released. Creedmoor appealed.

Although Nile had been released from Creedmoor, the issue fell within an exception to the mootness doctrine since it is likely to recur, typically evades judicial review, and is substantial and novel. *Matter of Hearst v. Clyne*, 50 N.Y.2d 707, 714-15 (1980).

As the scope of the automatic stay is limited "to the executory directions ... which command a person to do an act," the order releasing Nile "forthwith" was immediately self-executing upon its promulgation, requiring no performance of a future act no automatic stay was available. Accordingly, the Supreme Court properly denied Creedmoor's motion to vacate.

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CPLR 5518, 5519: Distinction, Stays and Mootness in Construction Cases, Part II

Part II of this two-part article will focus on the consequences from a failure to seek injunctive relief during the pendency of an appeal to preserve the status quo in construction cases, recently treated in 'City of Ithaca v. New York State Dept. of Envtl. Conservation'.

By **Elliott Scheinberg** | January 14, 2021

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In addition to its inherent power to issue broad stays, two statutes confer authority upon the Appellate Division to grant interim injunctive relief during the pendency of an appeal (after the filing of the notice of appeal): the lengthy, widely known CPLR 5519 and the very brief, lesser familiar, CPLR 5518.

Part I of this article studied the distinctions between these statutes and their general applications. Part II, here, focuses on the consequences from the failure to seek injunctive relief during the pendency of an appeal to preserve the status quo in construction cases.

'Chief among the factors bearing on mootness is a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation'. "Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy." *Matter of Dreikausen v. Zoning Bd. of Appeals of City of Long Beach*, 98 N.Y.2d 165, 172-73 (2002); *Matter of Citineighbors Coalition of Historic Carnegie Hill ex rel. Kazickas v. New York City Landmarks Preserv. Com'n*, 2 N.Y.3d 727, 728-29 (2004). Significantly, "the determination of mootness may necessarily be fact-driven." *Dreikausen*, 98 N.Y.2d at 173.

Mootness is not necessarily assured even where structures have been fully or substantially completed as "relief remains [or is] at least theoretically available even after completion of the project. Simply put, structures changing the use of property most often can be destroyed." *Dreikausen*, 98 N.Y.2d at 172; *Matter of Kowalczyk v. Town of Amsterdam Zoning Bd. of Appeals*, 95 A.D.3d 1475, 1477 (3d Dept. 2012).

Work Completed, 'Race To Complete the Structure'. "Recognizing that a race to completion [of a structure] cannot be determinative, and cannot frustrate appropriate administrative review, courts have found several factors significant in evaluating claims of mootness. Chief among those factors is a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation (see e.g. *Matter of Imperial Improvements v. Town of Wappinger Zoning Bd. of Appeals*, 290 A.D.2d 507 (2d Dept. 2002) (no injunction or stay sought); *Matter of Fallati v. Town of Colonie*, 222 A.D.2d 811 (3d Dept. 1995) (no injunction sought before Appellate Division); *Matter of Naselli v. Gribuski*, 206 A.D.2d 838 (4th Dept.1994) (no injunction or stay sought); *Matter of Stockdale v. Hughes*, 189 A.D.2d 1065 (3d Dept.1993) (Levine, J.) (same); see also *Ughetta v. Barile*, 210 A.D.2d 562 (3d Dept.1994), lv. denied 85 N.Y.2d 805 (1995) (proceeding commenced after construction completed))." *Dreikausen*, 98 N.Y.2d at 173 (parallel citations omitted).

The Court of Appeals further noted that "courts also have retained jurisdiction notwithstanding substantial construction completion," *Dreikausen*, 98 N.Y.2d at 173:

> • "novel issues or public interests such as environmental concerns warrant continuing review (*Matter of Friends of Pine Bush v. Planning Bd. of City of Albany*, 86 A.D.2d 246 (3d Dept.1982), affd. 59 N.Y.2d 849 (1983); *Vitiello v. City of Yonkers*, 255 A.D.2d 506 (2d Dept.1998) (SEQRA challenge, plaintiffs unsuccessfully sought preliminary relief); *Matter of Watch Hill Homeowners Assn. v. Town Bd. of Town of Greenburgh*, 226 A.D.2d 1031 (3d Dept.), lv. denied 88 N.Y.2d 811 (1996) (same));" and
>
> • "where a challenged modification is readily undone, without undue hardship (e.g. *Matter of Michalak v. Zoning Bd. of Appeals of Town of Pomfret*, 286 A.D.2d 906, 731 N.Y.S.2d 129 (4th Dept.2001) (cellular tower antennas replaced)).

Bad faith is another consideration. *Dreikausen*, 98 N.Y.2d at 173:

> Factors weighing against mootness may include whether a party proceeded in bad faith and without authority (e.g. *Matter of Parkview Assoc. v. City of New York*, 71 N.Y.2d 274, cert. denied and appeal dismissed 488 U.S. 801 ... (1988) (municipal equitable estoppel case, invalidity of building permit readily discoverable); *Matter of Uciechowski v. Ehrlich*, 221 A.D.2d 866 (3d Dept. 1995) (earthen berms constructed in violation of town official's directive)).

Can the work be readily undone without substantial hardship? *In Matter of Town of Mt. Pleasant v. Delaney*, 149 A.D.3d 1086 (2d Dept. 2017), the Second Department noted the absence of bad faith. Furthermore: (1) the work could not readily be undone without substantial hardship; (2) respondent, Ferncliff Manor, and its disabled residents would suffer substantial prejudice if the petitioner prevailed; and (3) the proceeding was not an exception to the mootness rule, that it did not present any recurring novel or substantial issues that are sufficiently evanescent to evade review otherwise. *Citineighbors*, 2 N.Y.3d at 729.

In *Matter of Mirabile v. City of Saratoga Springs*, 67 A.D.3d 1178 (3d Dept. 2009), the Appellate Division noted its displeasure with the appellant for not offering any explanation for not seeking a stay barring any further work on the project after Supreme Court had rendered its decision and the temporary stay had been lifted.

While the respondents' characterized the construction of the project as "well under way," the Appellate Division concluded that, on that record, construction of the facility had not proceeded beyond the point where it could not be "readily undone, without undue hardship." Moreover, petitioners, over respondents' objection, had sought an expedited hearing of the appeal and had moved expeditiously to perfect it. Accordingly, the appeal was not moot.

Appeals Dismissed as Moot for Failure To Seek Injunctive Relief Where the Structure Had Been Completed, Substantially Complete or Operational. The following appeals were dismissed as moot because the appellants had not only failed to move in the Appellate Division for a preliminary injunction "to preserve the status quo pending the determination of the appeal" but also the construction had been completed:

• In *Sierra Club v. New York State Dept. of Envtl. Conservation*, 169 A.D.3d 1485 (4th Dept. 2019), respondents, Greenridge entities, bought a coal burning power plant, which they sought to renovate and operate by using natural gas and biomass. Respondent NYS Department of Environmental Conservation, the lead agency on the environmental review of the proposed operations pursuant to the State Environmental Quality Review Act ((SEQRA) ECL art 8), issued an amended negative declaration based on revisions to certain air permits issued to Greenridge. Thereafter, the NYS Department of Public Service allowed construction of a natural gas pipeline necessary to operate the plant.

Alleging deficiencies in the SEQRA review, petitioners commenced an Article 78 proceeding to vacate the air permits. Significantly, the petitioners waited to serve motion papers for temporary injunctive relief. Shortly after oral argument, respondents informed the court that construction was completed and that the plant resumed operations. The court dismissed the amended petition as moot.

Petitioners filed a notice of appeal but similarly not seek an order from the Appellate Division to enjoin plant operations. The appeal was dismissed as moot because litigation over the construction was rendered moot when the progress of the work constituted a change in circumstances that would prevent the court from "rendering a decision that would effectively determine an actual controversy"; the plant had already been operating lawfully at a considerable cost to Greenridge.

Other relevant considerations include whether work was undertaken without authority or in bad faith, whether work was substantially completed or could be undone without undue hardship notwithstanding. However, "the primary factor in the mootness analysis is the challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation"; "generally, a petitioner seeking to halt a construction project must move for injunctive relief at each stage of the proceeding," *Weeks Woodlands Ass'n, v. Dormitory Auth. of State*, 95 A.D.3d 747 (1st Dept. 2012), affd, 20 N.Y.3d 919 (2012):

> The plant had been operating lawfully. Failure to preserve the status quo was entirely the fault of petitioners, who waited until the last possible day to commence the proceeding, failed to request a TRO, failed to pursue an injunction with any urgency, waited until the last possible day to take an appeal, spent nine months perfecting the appeal, and failed to seek injunctive relief from this Court until approximately one year after the entry of the judgment, in a transparent

> attempt to avoid dismissal of this appeal." As a result, the plant "was fully constructed and has been operational for almost two years [, and] [t]hus, the petitioners failed to preserve their rights pending judicial review.

Greenridge did not undertake the project in bad faith as it performed no work until the SEQRA review was completed and all approvals and permits were issued.

• In *City of Ithaca v. New York State Dept. of Envtl. Conservation*, 2020 NY Slip Op 06322 (3d Dept. 2020), the Department of Environmental Conservation (DEC) granted Cargill Incorporated a permit to construct a surface shaft. Petitioners commenced an Article 78 proceeding challenging DEC's determination. Supreme Court denied the motion. In a subsequent judgment, the court dismissed the petition. Petitioners appealed.

The Appellate Division noted that, during the pendency of the underlying proceeding and the appeal, the construction had been completed to the point that it could not be safely halted and that substantial construction costs have been incurred. Furthermore, there was no indication that petitioners promptly sought injunctive relief to maintain the status quo or that Cargill proceeded with the construction in bad faith or without the authority.

• In *Matter of Graf v. Town of Livonia*, 120 A.D.3d 944 (4th Dept. 2014), petitioners sought to annul the Town's Zoning Board determination that the sawmill project proposed by the timber company constituted a permissible "[a]gricultural or farming operation" within the meaning of the Zoning Code.

• In *Matter of Molloy v. Fraser*, 74 A.D.3d 1207 (2d Dept. 2010), the appellants challenged a zoning board determination for a use variance permitting the continuation of an arts council in a residential zone. During the pendency of the appeal the new arts center was completed and a certificate of occupancy was issued.

• *In Matter of Yeshiva Gedolah Academy of Beth Aaron Synogogue v. City of Long Beach*, 118 A.D.3d 901 (2d Dept. 2014), involved a hybrid proceeding: (1) pursuant to Article 78, in the nature of mandamus, to compel the Treasurer of the City of Long Beach (TCLB) to convey certain real property to the petitioner/plaintiff; and (2) an action pursuant to RPAPL Article 15 for a judgment declaring that any claims to the property that were adverse to that of the petitioner/plaintiff were extinguished. The petitioner/plaintiff appealed from an order and judgment of the Supreme Court, which, in essence, dismissed the Article 78 and the action.

Petitioner/plaintiff failed to preserve the status quo pending the determination of the appeal by not making a motion pursuant to CPLR 5518 to prohibit development of the property. Moreover, nonparty 405 Hotel, LLC, purchased and redeveloped the property, and operated a hotel thereon. This change in the circumstances rendered the appeal academic as it prevented the Appellate Division "from rendering a decision that would effectively determine an actual controversy."

• *In Matter of Wallkill Cemetery Assn. v. Town of Wallkill Planning Bd.*, 73 A.D.3d 1189 (2d Dept. 2010), petitioners failed to move in the Supreme Court and in the Appellate Division for an injunction to enjoin the construction of the asphalt plant. In the interim, the plant had been constructed and operational for almost two years.

• In *Matter of Raab v. Silverstein*, 106 A.D.3d 746 (2d Dept. 2013), petitioner failed to move in the Supreme Court and in the Appellate Division to enjoin the construction of the second story addition. In the interim, after the Supreme Court's determination, a building permit was issued to Silverstein for the construction, which was substantially completed.

• *Weeks Woodlands Ass'n v. Dormitory Auth. of State*, 95 A.D.3d 747 (1st Dept. 2012), affd, 20 NY3d 919 (2012): Five months before oral argument, bonds in the amount of $102,200,000 had been issued to finance the project, approximately $30 million of the bond proceeds had been drawn down, and, according to the main respondents' initial brief, "excavation and foundations [were] complete, the erection of the steel superstructure [was] 70% complete, the installation of the concrete slabs on the basement floor [was] complete and the concrete slabs on the ground floor [were] 50% complete."

Weeks went further still, stating that petitioners' "fail[ure] to seek injunctive relief from the [Appellate Division]," for over a year, on any of the occasions when Supreme Court denied them relief, rendered petitioners "*themselves complicit in the project's having reached its advanced stage*."

Sierra, above, construed *Weeks* to hold that "a petitioner seeking to halt a construction project must 'move for injunctive relief at each stage of the proceeding.' "

• The petitioner, in *Matter of Dowd v. Planning Bd. of Vil. of Millbrook*, 54 A.D.3d 339 (2d Dept. 2008), did not seek injunctive relief until 10 months after the order and judgment granting the motion of the village Planning Board to dismiss the Article 78 proceeding pursuant to CPLR 3211(a)(5) as time-barred, and dismissing the proceeding challenging the Planning Board's grant of preliminary subdivision approval.

During those 10 months, final approval was given for the subdivision, and since that time, the project had been substantially completed. Specifically, the existing home on one of the lots was renovated and sold, the applicants obtained all the building permits necessary to construct homes on the three other lots, and construction of those homes was well under way, at considerable cost to the applicants. The appellants failed to timely do all that they could to safeguard their interests; their appeals were dismissed as academic.

Appeals Not Moot Where Efforts for Injunctive Relief Were Made. The appeal in *Matter of Pyramid Co. of Watertown v. Planning Bd. of Town of Watertown*, 24 A.D.3d 1312 (4th Dept. 2005), lv. dismissed 7 N.Y.3d 803 (2006), was deemed viable because the petitioners had attempted to maintain the status quo at multiple junctures during the proceeding, including applications to Supreme Court before and after issuance of the

judgment and by way of a motion to the Appellate Division pending appeal for a cease and desist order from all activities on the project site in order to preserve the status quo. See *Weeks* and *Sierra*, supra.

Appeals Dismissed as Moot in other Cases for Failure To Seek a Stay. The same line of reasoning has been applied to nonconstruction cases. The First Department, in *Cuevas v. 1738 Assoc.*, 111 A.D.3d 416 (1st Dept. 2013), dismissed an appeal challenging a deposition as moot because the deposition had already taken place and the appellant failed to make any attempt to stay the deposition in order to maintain the status quo prior to the appeal.

Similarly, in *Moss v. Med. Liab. Mut. Ins. Co.*, 211 A.D.2d 854 (3d Dept. 1995), plaintiff, a physician formerly insured under a professional liability policy issued by the defendant-carrier, sought a declaration that certain language in the policy mandated that defendant not make any payment to the Dunns, the prevailing parties in a medical malpractice action against him, because he had not so consented.

During the pendency of his appeal from the underlying malpractice action, plaintiff brought an action and sought a preliminary injunction preventing defendant-carrier from paying the Dunns. Supreme Court granted the injunction on condition that plaintiff post an undertaking, which he declined to do, for which reason no injunction was issued. Supreme Court's decision in the underlying action was subsequently affirmed.

Both parties moved for partial summary judgment. Supreme Court construed the policy as including an implied provision of reasonableness and that, since plaintiff had exhausted the appeal process regarding his liability, his consent to make payment was unreasonably withheld. An order and judgment were entered that defendant's only obligation with respect to the malpractice action was to pay the Dunns. Plaintiff appealed.

Plaintiff's appeal was moot because he had taken no action, pending appeal, to maintain the status quo ("CPLR 5518, 5519"), and defendant had, in the interim, paid the Dunns and received a release of their claims against plaintiff; accordingly, plaintiff no longer had any protectable interest that could be affected by a decision in his favor, citing *Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714 (1980).

Conclusion

The lesson in construction cases is to err on the side of caution and follow the advice in *Sierra:* "a petitioner seeking to halt a construction project must move for injunctive relief at each stage of the proceeding."

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