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ANALYSIS

'Opalinski': CPLR 2221(e)(2), Postjudgment Motions To Renew, Finality, Appeals

Finality of litigation is interwoven into the timeliness of 2221(e)(2)-motion filings. This is the theme in 'Opalinski'.

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Civil Procedure

By Elliott Scheinberg

This article is in honor and in memory of Angela Susan Scheinberg, to whom I was married on 9/11. Angela was a paradigm of kindness, virtue and integrity. I also honor every American murdered that day.

CPLR 2221(e)(2) provides, in pertinent part, that a motion for leave to renew "shall demonstrate that there has been a change in the law that would change the prior determination." Unlike CPLR 2221(d)(3), which imposes a 30-day time period for leave to reargue to be made before the expiration of the time in which to take an appeal, 2221(e)(2) imposes no time limit. *Redeye v. Progressive Ins. Co.*, 158 A.D.3d 1208, 1209 (4th Dep't 2018).

"After entry of a final judgment, a motion for leave to renew pursuant to CPLR 2221(e)(2) based upon 'a change in the law that would change the prior determination' must be made, absent circumstances set forth in CPLR 5015 [newly discovered evidence, fraud, lack of jurisdiction, etc.], before the time to appeal the final judgment has expired" (*Eagle Ins. Co. v. Persaud*, 1 A.D.3d 356, 357, quoting CPLR 2221(e)(2); *Washington Mut. Bank, FA v. Itzkowitz*, 47 A.D.3d 923, 923 (2d Dep't 2008)."). *Opalinski v. City of New York*, 205 AD3d 917 (2d Dep't 2022); *Nash v. Port Authority. of New York and New Jersey*, 22 N.Y.3d 220, 224 [2013] ("[Plaintiff's] judgment had become final when the Port Authority failed to appeal within the requisite time period. But the discussion does not end there. Although a court determination from which an appeal has not been taken should 'remain inviolate,' that rule applies [a]bsent the sort of circumstances mentioned in CPLR 5015."); CPLR 5015 is the exclusive expedient.

Finality of litigation is interwoven into the timeliness of 2221(e)(2)-motion filings. This is the theme in *Opalinski*.

"A clarification of decisional law is a sufficient change in the law to support renewal." *Dinallo v. DAL Elec.*, 60 A.D.3d 620 (2d Dep't 2009); see *Opalinski v. City of New York*, 164 A.D.3d 1354, 1355 (2d Dep't 2018); Siegel and Connors, Practice Commentaries, C2221:9A Time To Make Renewal Motion ("such as a new statute taking effect or a definitive ruling on a relevant point of law issued by an appellate court that is entitled to stare decisis. See Siegel & Connors, New York Practice §449 (6th ed. 2018)." *Opalinski* involved a change in decisional law.

Finality of Proceedings Is Inviolate

The case must still be sub judice to file a motion for leave to renew based on a change in the law. A change in the law occurring after the case has gone to final judgment, with the appeal time having expired, cannot as a general rule be made the basis to change the result of the case. See *Dinallo* [at 621] ("[A] motion for leave to renew based upon a change in the law must be made prior to the entry of a final judgment or before the time to appeal has expired ... and a clarification"). "Allowing a motion for renewal in these circumstances would provide an end run around the time period for taking an appeal and upset the rule of finality applicable to final dispositions." Siegel and Connors, C2221:9A, above; see, 8 N.Y. Prac., Civil Appellate Practice §5:6 (3d ed.), Davies, Stecich and Gold.

The viability of a motion for leave to renew is dependent upon whether the case is still sub judice. "*Glicksman* (*v. Board of Educ. Cent. Sch. Bd. of Comsewogue Union Free Sch. Dist.*, 278 A.D.2d 364, 365 [2d Dept. 2000]) reaffirms that the law remains unchanged and that a motion to renew based upon a change in the law must still be made while the case is sub judice, i.e., still pending in the court

system." *Odessa Med. Supply v. Govt. Employees Ins. Co.*, 18 Misc.3d 722, 725 (Civ. Ct 2007). The complaint, in *Glicksman*, had been dismissed and no appeal was taken from the judgment of dismissal. Six months later the plaintiff moved for leave to renew based on a change in decisional law. The motion was anchored in the July 20, 1999 amendment to CPLR 2221 which amended subdivision (d), (e) and (f). The motion court granted renewal. The Second Department reversed and continued the preamendment rule of finality, "there was no indication in the legislative history of any intent to change the long-standing rule regarding finality of judgments and that a motion to renew may not be made after judgment was entered and no appeal was pending ... the law remains unchanged that a motion to renew based upon a change in the law must still be made while the case is sub judice, i.e., still pending in the court system. (*Daniels v. Millar Elev. Ind., Inc.*, 44 A.D.3d 895 (2nd Dep't 2007); *Eagle Ins. Co. v. Persaud*, 1 A.D.3d 356 [2d Dept. 2003].)"

In *Redeye v. Progressive Insurance Company*, 158 A.D.3d 1208 (4th Dep't 2018), the Fourth Department studied the case law preceding the 1999 amendment adding CPLR 2221(e) and concluded, "as explained in *Glicksman*, there is no indication in the legislative history of an intention to change the rule regarding the finality of judgments." Accordingly, since there were no longer any pending proceedings when the *Redeye*-plaintiff made the motion for leave to renew based on a change in the law, the motion was untimely. *Redeye* underscored the admonition in *In re Huie*, 20 N.Y.2d 568, 572 (1967), "that denying as untimely a motion for leave to reargue based on a change in the law might at times seem harsh, [but] there must be an end to lawsuits and the time to take an appeal cannot forever be extended." *Huie* had added [at 572]: "Absent the sort of circumstances mentioned in CPLR 5015, such as newly discovered evidence, fraud, lack of jurisdiction, etc., a determination of a court from which no appeal has been taken ought to remain inviolate."

In an order dated April 2, 1998, the Supreme Court, in *Daniels v. Millar El. Indus.*, 44 A.D.3d 895 (2d Dep't 2007), granted the motion of the defendant third-party plaintiff to dismiss the complaint pursuant to CPLR 3404, dismissal of abandonment of cases. Eight years later, in 2006, the plaintiff moved "to reargue and or renew" her opposition to the prior motion, and to restore the action to active status. Noting the absence of circumstances set forth in CPLR 5015, the Appellate Division, citing *Huie*, *Eagle* and *Glicksman*, held her motion for leave to renew untimely because it was made after the time to appeal the final order has expired. Plaintiff had also failed to demonstrate any valid grounds for restoring her action.

Notably, CPLR 2221(e)(2) dovetails with "the rule 'that a court applies the law as it exists at the time of appeal, not as it existed at the time of original determination." *Asman v. Ambach*, 64 N.Y.2d 989, 990 (1985).

'Opalinski'

In *Opalinski v. City of New York*, 205 A.D.3d 917 (2d Dep't 2022), the plaintiff commenced an action, in 2009, alleging common-law negligence and violations of Labor Law §§200, 240(1) and 241(6). With respect to the cause of action pursuant to Labor Law §241(6), the plaintiff's bill of particulars alleged violations of 12 NYCRR 23-1.12(a) and (c) and 23-1.10(b)(1).

On a prior appeal, in 2013, *Opalinski v. City of New York*, 110 A.D.3d 694, 695-96 (2d Dep't 2013), the Appellate Division had affirmed an order of the Supreme Court granting the defendants' motion for summary judgment to dismiss the cause of action alleging a violation of Labor Law §241(6). In April 2014, a judgment was entered in favor of the defendants dismissing the complaint in its entirety (the final judgment).

On June 17, 2015, the plaintiff served a copy of the final judgment with notice of its entry upon the defendants' attorneys. On the same day, the plaintiff moved pursuant to CPLR 2221(e)(2) for leave to renew his opposition to that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law §241(6), based upon a purported change in the law, and upon renewal, for leave to amend his bill of particulars to assert a claim that he had not previously asserted, namely, a violation of 12 NYCRR 23-1.5(c)(3) (the first renewal motion). The purported change in the law was based on a decision from the First Department, dated March 19, 2015, which held that §23-1.5(c)(3) of the Industrial Code (12 NYCRR) was sufficiently specific to support a Labor Law §241(6) cause of action (*Becerra v. Promenade Apts.*, 126 A.D.3d 557, 558 (1st Dep't 2015)). The Supreme Court denied the plaintiff's motion, and the plaintiff appealed (the second prior appeal).

While the second prior appeal was pending, on Dec. 30, 2015, the Second Department determined that §23-1.5(c)(3) of the Industrial Code was "sufficiently concrete and specific to support [a] plaintiff's Labor Law §241(6) cause of action" (*Perez v. 286 Scholes St.*, 134 A.D.3d 1085, 1086). On Sept. 19, 2018, the Second Department affirmed the order appealed from in the second prior appeal because at the time the plaintiff made the first renewal motion, the argument of a change in law, *Becerra*, was based on First Department law—*Becerra* had not constituted a change in the Second Department (*Opalinski v. City of New York*, 164 A.D.3d 1354, 1355).

On Oct. 26, 2018, the plaintiff moved in the Second Department for leave to appeal to the Court of Appeals from the Second Department's decision and order in the second prior appeal. On that same date, the plaintiff again moved in the Supreme Court pursuant to CPLR 2221(e)(2) for leave to renew his opposition to that branch of the defendants' motion [] for summary judgment dismissing the cause of action alleging a violation of Labor Law §241(6), based upon a purported change in the law, the Second Department's decision in *Perez*, and, upon renewal, for leave to amend his bill of particulars to assert a violation of 12 NYCRR 23-1.5(c)(3). The Supreme Court denied the motion, and the plaintiff appealed yet another time.

Still no success for the plaintiff. Significantly, the plaintiff's second motion for leave to renew was made after the entry of the final judgment. The Second Department echoed settled law regarding finality, above, "After entry of a final judgment, a motion for leave to renew pursuant to CPLR 2221(e)(2) based upon a 'change in the law that would change the prior determination' must be made, absent circumstances set forth in CPLR 5015, before the time to appeal the final judgment has expired (*Matter of Eagle Ins. Co. v. Persaud*, 1 A.D.3d 356, 357, quoting CPLR 2221(e)(2); *Washington Mut. Bank, FA v. Itzkowitz*, 47 A.D.3d 923; …)," none of which 5015-circumstances was applicable to the plaintiff in *Opalinski*.

Moreover, since the plaintiff served a copy of the final judgment with written notice of its entry upon the defendants' attorneys by regular mail on June 17, 2015, the time to appeal from the final judgment had expired on July 22, 2015 (CPLR 5513(a), (d)). Therefore, the plaintiff's second motion for leave to renew, dated October 26, 2018, was untimely.

Moreover, the Second Department emphasized that "the fact that the plaintiff's motion for leave to appeal to the Court of Appeals from this Court's decision and order in the second prior appeal was pending and undecided at the time the plaintiff made his second motion for leave to renew did not operate to extend the time to appeal from the final judgment." Citing the CPLR 5015 exceptions to the rule, above, the Second Department stressed *Huie*, *Redeye*, etc., that the harshness of the result notwithstanding "there must be an end to lawsuits and the time to take an appeal cannot forever be extended."

Elliott Scheinberg *is a member of the New York State Bar Association, Committee on Courts of Appellate Jurisdiction. He is the author of The New York Civil Appellate Citator (NYSBA, 2d ed., 2 vols. 2022) and Contract Doctrine and Marital Agreements in New York (NYSBA, 4th ed., 2 vols. 2020). He is also a Fellow of the American Academy of Matrimonial Lawyers.*

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