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ANALYSIS



## Abandonment and Waiver of Issues on Appeal



Abandonment of an issue on appeal occurs in a variety of ways by the carelessness or hyper-zealousness of a would-have-been appellant.



January 12, 2023 at 10:00 AM



Civil Appeals



By Elliott Scheinberg | January 12, 2023 at 10:00 AM



Abandonment of an issue on appeal occurs in a variety of ways by the carelessness or hyper-zealousness of a would-have-been appellant.

Appeal from “each and every branch” of the order or the judgment; do not enumerate each order and branch thereof in the notice of appeal.

“CPLR 5515(1) requires that a notice of appeal designate the judgment or order, or specific part of the judgment or order, from which the appeal is taken. This requirement is jurisdictional. By taking an appeal from only a part of a judgment or order, a party waives its right to appeal from the remainder thereof.” *Levitt v. Levitt*, 97 A.D.3d 543 (2d Dept. 2012); *O’Neill v. O’Neill*, 174 A.D.3d 1526 (4th Dept. 2019).

It is imprudent to take an appeal wherein the notice of appeal painstakingly enumerates every order and every issue in each order with specificity rather than fully satisfying CPLR 5515 by the simple expedient of stating that the appeal is taken from “each and every branch of the order or the judgment.” Thus any issue inadvertently not identified in the laborious magnum opus is deemed abandoned and precluded from appellate review.

An issue not briefed in the main brief on appeal is deemed abandoned; a brief that does not seek reversal or modification of an order or does not challenge that order.

An issue not briefed in the main brief on appeal is deemed abandoned. *Haher v. Pelusio*, 156 A.D.3d 1381 744 (4th Dept. 2017); *People v. Shackelton*, 117 A.D.3d 1283 (3d Dept. 2014); *Jemima O. v. Schwartzapfel, P.C.*, 178 A.D.3d 474 (1st Dept. 2019); *Elam v. Ryder Sys., Inc.*, 176 A.D.3d 675 (2d Dept. 2019).

A brief that does not request modification or reversal of any portion of the underlying order must be dismissed. *Ashfaq v. Ice Cream Depot Corp.*, 209 AD3d 704, 706 (2d Dept. 2022).

**Does failure to raise issues in a post-trial brief constitute an abandonment of a claim?**

Failure to describe a cause of action in a post-trial brief, *Curanovic v. Cordone*, 134 A.D.3d 978 (2d 2015), or to submit a post-trial brief at all, *Silverman v. Silverman*, 304 A.D.2d 41, 46 (1st Dept. 2003), does not constitute an abandonment of a claim. However, failure to assert a claim even as late as in a post-trial submission may constitute an abandonment of the claim. In *Fisher v. Fisher*, 122 A.D.3d 1032 (3d Dept. 2014), the wife faulted the court for failing to direct that the husband select a particular pension payout option. Since she had made no request for such a directive, either during the course of the trial or in her post-trial submissions, the issue was “not properly before [the court].”

**The extraordinary instance where an argument was rejected because it was not included in the table of contents or as a point heading in the main brief pursuant to the local rules of the court**

In an extraordinary instance, an argument was rejected as not properly before the court (abandoned) because it was not included in the table of contents or as a point heading in the main brief pursuant to the local rules of the court “as required by this Court's rules (Rules of App Div., 1st Dept. [22 NYCRR] §600.10[d][2][i], [iv]).” *DaSilva v. Everest Scaffolding*, 136 A.D.3d 423 (1st Dept. 2016). Notably, §600.10 is currently listed as “[Reserved], Currentness. Editorial Note: This rule was updated pursuant to court order dated June 22, 2018.”

**Abandonment where an appellant from an interlocutory order did not perfect the appeal, did not seek an enlargement of time to perfect or did not withdraw the appeal; the consequences.**

An appeal is dismissed and the issues are deemed abandoned where the party taking an appeal from an interlocutory order has neither timely perfected the appeal, timely sought an enlargement of time to perfect it, nor has timely withdrawn it. That appellant is precluded from appealing the same issue at a later date. *Rubeo v. National Grange Mut. Ins. Co.*, 93 N.Y.2d 750 (1999). While such an adjudication may be deemed to be “on the merits of all claims which could have been litigated had the appeal been timely argued or submitted,” *Bray v. Cox*, 38 N.Y.2d 350 (1976), the Appellate Division, nevertheless, has inherent jurisdiction to hear the same issues in a subsequent appeal. Citing *Rubeo, 2005-2011 Realty v. Brailovskiy*, 186 A.D.3d 788, 789 (2d Dept. 2020) held: “As a general rule, we do not consider an issue raised on a subsequent appeal that was raised, or could have been raised, in an earlier appeal which was dismissed for lack of prosecution, although we have inherent jurisdiction to do so.” See also *Budoff v. City of New York*, 164 A.D.3d 737 (2d Dept. 2018).

**Failure to address an issue in one's brief; agreeing not to take a certain position at trial.**

Failure to address an issue in the appellant's brief results in an abandonment of that issue. *Haher v. Pelusio*, 156 A.D.3d 1381 (4th Dept. 2017); *Elam v. Ryder Sys.*, 176 A.D.3d 675 (2d Dept. 2019); *Jemima O. v. Schwartzapfel, P.C.*, 178 A.D.3d 474 (1st Dept. 2019).

**Agreeing not to take a certain position at trial or to limit a position at trial.**

Agreeing not to take a certain position at trial or to limit a position at trial results in a waiver of that issue. *Metlife Auto & Home v. Pennella*, 10 A.D.3d 726 (2d Dept. 2004); *Bullaro v. Lido Dunes*, 150 A.D.3d 952, 953 (2d Dept. 2017).

In *Parris-Kofi v. Redneck*, 204 A.D.3d 1180, 1181, n.1 (3d Dept. 2022), the Third Department ruled, "Defendants made reference to Supreme Court's dismissal of their cross claim against Baysah in the 'Questions Presented' portion of their brief. However, defendants made no further mention of this issue and, indeed, advanced no substantive arguments in connection therewith. As such, we deem this issue abandoned."

Where a would-have-been appellant neither submitted its own brief nor joined another brief.

Another unfortunate method of having one's appeal abandoned, no matter how viably robust the merits might have been, occurs when the would-have-been appellant has neither submitted its own brief or when it was not included in any other appellant's brief such that the other appellant's brief did not cover the would-have-been appellant. In essence, a wannabe appellant cannot expect to gratuitously ride the coattails of another brief and expect to reap its benefits.

The action, in *Ocwen Loan Servicing v. Ponce*, 206 AD3d 1005, 1005-06 (2d Dept. 2022), was commenced against the defendants Pedro Ponce and L & K Investors, LLC (the defendants) to foreclose a mortgage on real property. Ponce answered the complaint. In an order, the Supreme Court granted the plaintiff's motion, inter alia, for summary judgment on the complaint insofar as asserted against Ponce and for an order of reference. Both defendants moved to dismiss the complaint on the procedural ground that the plaintiff failed to comply with Kings County Supreme Court Uniform Civil Term Rules, Part F, Rule 8. The defendants appealed the Supreme Court's denial of their motion. The appeal by L & K Investors, LLC, was dismissed as abandoned, as the appellant's brief had been submitted only on behalf of defendant-Ponce. See also *Matthews v. Geothermal Energy Options*, 209 A.D.3d 635 (2d Dept. 2022) ("The appeal by the third-party defendant Florence R. Matthews must be dismissed as abandoned, since the appellate brief has been submitted only on behalf of the plaintiff third-party defendant."); *OneWest Bank N.A. v. Muller*, 189 A.D.3d 853 (2d Dept. 2020) ("The appeal by the defendants Kathryn Muller and Mark Zander, as executors and heirs of the estate of Arthur J. Zander, and Margaret Orling and Jane Sussman, as heirs of the estate of Arthur J. Zander, must be dismissed as abandoned, since the appellate brief has been submitted only on behalf of the defendants Peter Zander and David Zander, as heirs of the estate of Arthur J. Zander."); *Platt v. New York City Health and Hosps.*, 105 A.D.3d 1026, 1027 (2d Dept. 2013) ("The appeal by the City of New York must be dismissed as abandoned, as the appellant's brief has been submitted only on behalf of the defendant New York City Health and Hospitals Corporation.")

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