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ANALYSIS

Does Supreme Court Have Discretion To Disregard an Appellate Order To Enter Judgment?

The title of this article suggests a notion that, in light of the highly complex and sophisticated rules of appellate procedure, is absurd. However, this very issue lies at the heart of the majority's compelling opinion, penned by Presiding Justice Diane T. Renwick, in 'Favourite v Cico'.

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By Elliott Scheinberg | November 22, 2023 at 10:00 AM

The title of this article suggests a notion that, in light of the highly complex and sophisticated rules of appellate procedure, is absurd. However, this very issue lies at the heart of the majority's compelling opinion, penned by Presiding Justice Diane T. Renwick, in *Favourite v Cico*, 208 A.D.3d 99 [1st Dept 2022]: "This appeal raises the interesting question of whether a trial court has the discretion to grant a plaintiff leave to amend a complaint, pursuant to CPLR 3025 (b), after the Appellate Division has already ordered the complaint dismissed, with direction to enter judgment."

The Rules Governing the Duties of a Lower Court Upon Remand, Ministerial Acts

First, it is settled law that " '[a] trial court, upon remittitur, lacks the power to deviate from the mandate of the higher court" '…"An order or judgment entered by the lower court on a remittitur '*must conform strictly to the remittitur*'"…*The language in the decretal paragraph controls the extent of the remittitur*." *Daniele v. Pain Management Center of Long Island*, 189 A.D.3d 1351, 1352 [2d Dept. 2020]; *Stassa v. Stassa*, 63 N.Y.S.3d 463, 465 [2d Dept. 2017]; *Breidbart v. Wiesenthal*, 93 A.D.3d 751, 752[2d Dept. 2012] ("A trial court, upon remittitur from a higher court, must obey the mandate of the higher court."); *Trager v. Kampe*, 16 A.D.3d 426 (2d Dept. 2005] ("[W]hen the decision and order of this court [] was affirmed by the Court of Appeals, the proceeding 'had to be remitted by the Court of Appeals to the trial court, and on that remittitur the Supreme Court had to enter a judgment' . . . The petitioner's filing of a note of issue was contrary to the terms of the remittitur."); *Maracina v. Schirrmeister*, 152 A.D.2d 502, 544 N.Y.S.2d 13 (1st Dept. 1989) ("*Respondent cites no authority, and…none exists, to support the judge's disregard of the earlier order of this court. Trial courts are without authority to vacate or modify orders of the Appellate Division, or to reverse holdings of this court*."

As *Favourite* underscores: "Where an Appellate Division remits to the trial court below solely for the specified purpose of entering a final order, decree or judgment pursuant to the Appellate Division's direction, the order is held to be final, and the remission in such a case is considered one for purely 'ministerial' action."

Law of the Case, On the Merits

"The doctrine of law of the case is a judicially crafted policy that expresses the practice of courts generally to refuse to reopen what has been decided" (*People v. Evans*, 94 N.Y.2d 499, 503, 706 N.Y.S.2d 678, 727 N.E.2d 1232 (2000) . . .). This doctrine presents itself in two scenarios: (1) when a second court of the same hierarchical jurisdiction becomes

involved in the same matter *and* (2) *when a court, on remand, is presented with a ruling from a reviewing court* (*People v. Evans*, 94 N.Y.2d at 503–504, 706 N.Y.S.2d 678, 727 N.E.2d 1232).

The doctrine, however, only applies 'when the prior ruling directly passed *upon a question of law* that is essential to the determination of the matter …" *Gulf Coast Bank & Trust v. Virgil Resort Funding Group*, 201 A.D.3d 1086, 1088 (3d Dept. 2022).

While "the doctrine [of law of the case] applies to judicial determinations of law (Baldasano v Bank of N.Y., 199 AD2d 184, 185 (1st Dept. 1993) ['the doctrine applies only to legal determinations that were necessarily resolved on the merits in the prior decision'])," *Shah v. 20 E. 64th St.*, 198 A.D.3d 23, 40 (1st Dept. 2021); *Moon 170 Mercer v. Vella*, 161 A.D.3d 444, 446 (1st Dept. 2018) ("[W]e necessarily resolved the merits of Vella's arguments in the prior appeal…so his arguments are barred by the doctrine of law of the case"), the majority underscored that the Court of Appeals has long held "that an order of the Appellate Division which affirms or, on reversal or modification, directs the dismissal of the complaint in an action, without leave to replead, is a final determination *even if the dismissal is not based on the merits of the controversy*." [*Favourite* at 109].

Albeit without specifically using the term "law of the case" the majority applied the doctrine: "this court [had] dismissed the second amended complaint because of a pleading deficiency that plaintiffs lacked standing and capacity to sue. Standing and capacity related dismissals are not on the merits (*Landau v. LaRossa, Mitchell & Ross*, 11 N.Y.3d 8, 13-14, 862 N.Y.S.2d 316, 892 N.E.2d 380 [2008]), and *the proposed third amended complaint purportedly cured the defect, except that here there was no existing complaint to amend. Our dismissal presented a unique procedural scenario that deprived Supreme Court of discretion to grant leave to amend the second amended complaint.*" [*Favourite* at 108].

'Favorite v. Cico' Versus Decisional Authority That Holds That Entry of Judgment Following a Favorable Appellate Ruling Is a 'Mere Ministerial Act'

Favourite involves a lengthy factual and procedural history. The Appellate Division had previously reversed the Supreme Court's order, which denied the defendants' motion to dismiss the amended complaint, and further granting in part the plaintiffs' cross motion for leave to file a second amended complaint; critically, the order further "directed the clerk to enter judgment accordingly." *Favourite v. Cico*, 181 AD3d 426, 426 [1st Dept 2020].

Notwithstanding the liberal attitude towards amending complaints in CPLR 3025(b), the majority ruled, as stated above, "there was no existing complaint to amend. Our dismissal presented a unique procedural scenario that deprived Supreme Court of discretion to grant leave to amend the second amended complaint.

"*Given this court's outright dismissal of the claims based on a finding of lack of standing, there was no action pending when plaintiffs moved for leave to file the third amended complaint. Thus, the trial court lacked any discretion or authority to grant plaintiffs such leave, where we had properly dismissed the second amended complaint before plaintiffs filed the motion to amend* (*Carpenter v. Plattsburgh Wholesale Homes*, 83 A.D.3d 1175, 1177, 921 N.Y.S.2d 654 [3d Dept. 2011] [leave to amend denied where no action pending following dismissal]). That no judgment had been entered by the clerk, as mandated by our dismissal order, is of no moment. The entry of a subsequent judgment is a mere ministerial act (*Clapp v. Hawley*, 97 N.Y. 610 [1885] ["The entry of judgment is the act of the clerk..."]…). Our dismissal order was binding on the parties until vacated or set aside on further appeal … There was no further appeal of our decision. Hence, under the circumstances, plaintiffs' only remedy was to commence a new action, which they failed to do."

The Majority Challenges Their Dissenting Colleagues

The majority challenged their dissenting colleagues:

“The dissent posits that leave to amend the dismissed pleading was properly granted because defendants did not enter judgment. Although not explicitly stated, the dissent essentially argues that plaintiffs’ case cannot be terminated by an unconditional dismissal order because a ‘judgment’ was not entered by defendants, dismissing the action. The dissent fails to cite any legal support for this contention. Moreover, the dissent’s unsupported contention is contrary to applicable case law.”

The majority made a further unassailable observation that the dissent’s arguments “would lead to the absurd result of a party, and not the Appellate Division determining whether and when a case is dismissed, according to when the party choses to enter the judgment.”

Majority Cites Higher Authority: ‘Court of Appeals Considers an Appellate Division Dismissal Order To Be Final—Even Where Dismissal Is Not on the Merits and Even Where No Judgment Has Been Entered’

The majority emphasized settled law from the Court of Appeals:

“Indeed, it has long been settled that an order of the Appellate Division which affirms or, on reversal or modification, directs the dismissal of the complaint in an action, without leave to replead, is a final determination even if the dismissal is not based on the merits of the controversy. That is the approach that the Court of Appeals has consistently taken in sustaining the finality of dismissal orders not on the merits, including those where, like here, the plaintiff lacked legal capacity to sue (*MacEllven v. Lincoln Rochester Trust Co.*, 4 N.Y.2d 734, 171 N.Y.S.2d 858, 148 N.E.2d 907 [1958]; *Hirson v. United Stores Corp.*, 289 N.Y. 564, 43 N.E.2d 712 [1942]; Hastings v. Byllesby & Co., 286 N.Y. 468, 36 N.E.2d 666 [1941]; *Ranzal v. Hood*, 277 N.Y. 695, 14 N.E.2d 629 [1938]; cf. *Security-First Natl. Bank v. Lloyd-Smith*, 284 N.Y. 795, 31 N.E.2d 922 [1940] [Dismissal because plaintiff was not the real party in interest]). *The order dismissing the complaint is held to be final because it completely disposes of the particular action, and the fact that it is not a decision on the merits is held not to detract from its finality* (see e.g. *Matter of Mount Pleasant Cottage School Union Free School Dist. v. Sobol*, 78 N.Y.2d 935, 573 N.Y.S.2d 639, 578 N.E.2d 437 [1991] [order dismissing the complaint because a necessary party defendant had not been joined]).

“*Thus, contrary to our dissenting colleagues’ allegations, a judgment need not be entered for the case to be conclusively adjudicated* (see e.g. Aspen Specialty Insurance v. Ironshore Indemnity, 144 A.D.3d 606, 42 N.Y.S.3d 121 [1st Dept. 2021][sic] [declaratory judgment action no longer pending where it had been marked as disposed]; *Burns v. Pace University*, 25 A.D.3d 334, 809 N.Y.S.2d 3 [1st Dept. 2006], lv denied 7 N.Y.3d 705, 819 N.Y.S.2d 872, 853 N.E.2d 243 [2006] [action deemed “terminated” pursuant to CPLR §205(a) *when the court dismissed the action based on the plaintiff's failure to appear at the court's old case calendar and the entry of the subsequent judgment in the case was a mere ministerial act*]; *Pi Ju Tang v. St. Francis Hospital,* 37 A.D.3d 690, 830 N.Y.S.2d 311 [2nd Dept. 2007] [same]). Where an Appellate Division remits to the trial court below solely for the specified purpose of entering a final order, decree or judgment pursuant to the Appellate Division’s direction, the order is held to be final, and the remission in such a case is considered one for purely ‘ministerial’ action (see e.g. *Harvey v. Members Employees Trust for Retail Outlets*, 96 N.Y.2d 99, 103 n.1, 725 N.Y.S.2d 265, 748 N.E.2d 1061 [2001] [“The Appellate Division order is final and subject to review by this court because the remittal to Supreme Court contemplates purely ministerial action (generally, Karger, Powers of the New York Court of Appeals §17, at 79–81 (3d ed.)]”); *Spiegel v. Ferraro*, 73 N.Y.2d 622, 543 N.Y.S.2d 15, 541 N.E.2d 15 [1989]; *Matter of Schneider*, 298 N.Y. 532, 80 N.E.2d 667 [1948]).

“The Court of Appeals considers an Appellate Division dismissal order to be final—even where dismissal is not on the merits and even where no judgment has been entered. Our dissenting colleagues take the untenable position that whether the Court of Appeals considers an Appellate Division dismissal order final is irrelevant as to whether a case is still pending at the trial level, ‘because the Appellate Division is not bound by this jurisdictional requirement.’ If, from the perspective of the Court of Appeals, a case is no longer active and pending, and thus satisfies the finality requirement on civil matters, it makes no sense—not just logically but as a matter of public policy, court efficiency and consistency—that a case still would be considered pending before any other court, including the trial court.

Indeed, our dissenting colleagues offer no case directly on point to support such an extraordinary proposition—that a trial court is not bound by the Appellate Division's unconditional dismissal order. Instead, the dissent proffers an irrelevant statement of the law: 'It is only after a decision has been rendered on the merits that 'new life' may not be breathed into it through permissive pleading, even upon a showing of merit."

That is not, however, the issue before this court. No one disputes that an Appellate Division's unconditional order that dismisses a case for non-merit reasons could be revived. What is in dispute here is whether such a dismissed case can be "breathed new life" by moving to amend a pleading that had been dismissed. The clear answer is no."

Decisional Authority at Supreme Court Level Similarly Holds Entry of Judgment Is a Ministerial Act Once There Has Been a Judicial Adjudication

Further authority that entry of judgment is a ministerial act may further be drawn from matrimonial matters. *Cornell v. Cornell*, 7 NY2d 164, 169-70 [1959], rearg denied, remittitur amended, 7 NY2d 987 [1960]:

"[The rule is that] death of either party abates a marital relationship because the marriage relation sought to be dissolved no longer exists, [however,] 'if the facts justifying the entry of a decree were adjudicated during the lifetime of the parties to a divorce action, so that a decree was rendered or could or should have been rendered thereon immediately, *but for some reason* was not entered as such on the judgment record, the death of one of the parties to the action subsequently to the rendition thereof, but before it is in fact entered upon the record, does not prevent the entry of a decree nunc pro tunc to take effect as of a time prior to the death of the party.'

"Here there was a final adjudication made during the lifetime of the parties, in that the decision of the Special Term granting the divorce and directing the entry of interlocutory judgment was filed, the interlocutory judgment was entered and the three months specified therein elapsed without the court otherwise ordering against the entry of a final judgment. No order against the entry of final judgment has ever been made. Consequently, as has been previously stated, all that remained was *the mere ministerial act of entering the final judgment to conform to the adjudication of the substantive rights of the parties which had already been made was expressed in the decision of the court* and the interlocutory judgment that were already on record." *McKibbin v. Jenkin*, 41 AD3d 795, 796 [2d Dept 2007] (same); *Charasz v. Rozenblum*, 128 AD3d 631, 632 [2d Dept 2015] (same).

Conclusion, an Analogy From the Rules of Civil Contempt

Parity of reasoning from the rules governing civil contempt supports the majority opinion—this should not be construed as a suggestion that any jurist should be held in contempt for an erroneous decision.

In *El-Dehdan v. El-Dehdan*, 26 NY3d 19, 29 [2015], the Court of Appeals "described the elements necessary to support a finding of civil contempt. First, 'it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect' … Second, '[i]t must appear, with reasonable certainty, that the order has been disobeyed.' Third, 'the party to be held in contempt must have had knowledge of the court's order, *although it is not necessary that the order actually have been served upon the party.*' Fourth, 'prejudice to the right of a party to the litigation must be demonstrated.'"; *Dotzler v. Buono*, 144 AD3d 1512, 1513-14 [4th Dept 2016]; *Rozenberg v Perlstein*, 200 AD3d 915 [2d Dept 2021]; *Mundell v. New York State Deptartment of Transportation*, 185 AD3d 1470, 1471 [4th Dept 2020]; *Matter of Nilesha RR.*, 172 AD3d 1793, 1798 [3d Dept 2019].

Since a lay litigant may be held in civil contempt based on no more than mere knowledge of a valid order without actual service of that order having been effected upon them, should not jurists be held to the same standard, if not a higher one, that knowledge of an appellate ruling in their case, especially where the action has been finally terminated, requires strict compliance with such ruling , irrespective of whether the prevailing party performed a follow up ministerial task? The mere presentment of the appellate order/ruling ought to preclude a lower court from acting in a manner inconsistent with the ruling.

Favourite will be examined by the Court of Appeals in 2024.

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