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ANALYSIS

General Rules and Their Exceptions in Appellate Procedure

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Civil Appeals

By Elliott Scheinberg | February 13, 2024 at 09:58 AM

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Denial of a Motion To Reargue

The Rule: "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided…or to present arguments different from those originally asserted." *William P. Pahl Equipment v. Kassis*, 182 A.D.2d 22, 27 (1st Dep't 1992). "No appeal lies from an order made upon reargument and adhering to the prior determination in a decision." *New York & Presbyterian Hospital v. AIU Insurance,* 20 A.D.3d 515 (2d Dep't 2005); *Kitchen v. Diakhate*, 68 A.D.3d 570, 571, 889 N.Y.S.2d 846 (1st Dep't 2009).

Three Exceptions to the Rule

1. Where partial relief is granted.

Noble v. Noble, 43 A.D.3d 893 (2d Dep't 2007):

> Although Supreme Court stated that the defendant's motion for leave to reargue was denied, the court, in fact, for the first time, partially granted that branch of the defendant's motion which was for the distribution from escrow of certain sale proceeds, thereby, in effect, granting reargument. Thus, the order is appealable.

2. An order denying reargument is appealable as of right if it reviewed the merits and adhered to its determination.

Jones v. City of New York, 146 A.D.3d 690 (1st Dep't 2017):

> Although the motion court denied the motion to reargue as untimely, that part of the order is appealable because the court also addressed the merits of the motion and therefore effectively granted reargument.

Rodriguez v. Jacoby & Meyers, 126 A.D.3d 1183 (3d Dep't 2015), lv. denied, 25 N.Y.3d 912 (2015):

> As a general proposition, "no appeal lies from the denial of a motion to reargue"…Where, however, the court actually addresses the merits of the moving party's motion we will deem the court to have granted reargument and adhered to its prior decision notwithstanding language in the order indicating that reargument was denied…Accordingly, Supreme Court's April 2013 order is appealable as of right (CPLR 5701(a)(2)(viii)).

3. Where the original order was not appealed but where reargument is granted and the court changed its disposition, review is limited to whether discretion was providently exercised in granting the motion for leave to reargue and upon reargument making the appropriate disposition.

In *Tyagi v. Gadella*, 202 A.D.3d 561 (1st Dep't 2022), a medical malpractice action, the defendants moved for summary judgment to dismiss the plaintiffs' claims. Supreme Court, in its original order, granted defendants' motion. The plaintiffs moved to reargue:

> [A]lthough plaintiffs sought to clarify certain misstatements by the court in its original order, plaintiffs actually sought to make substantive changes to or amplify the original order. Accordingly, plaintiffs' entire motion is properly characterized as one for reargument (*Foley v. Roche,* 68 A.D.2d 558, 566 (1st Dep't 1979)). Moreover, in the absence of an appeal from the original order, review is limited to whether Supreme Court providently exercised its discretion in granting plaintiffs motion for leave to reargue and, upon reargument, making the appropriate disposition.

Ruling From a Motion in Limine Is Not Appealable Either as of Right or By Permission

"Generally, the function of a motion in limine is to permit a party to obtain a preliminary order before or during trial excluding the introduction of anticipated inadmissible, immaterial or prejudicial evidence or limiting its use. Its purpose is to prevent the introduction of such evidence to the trier of fact, most[ly] a jury." *State v. Metz*, 241 A.D.2d 192, 198, 671 N.Y.S.2d 79 (1st Dep't 1998). In *Shanoff v. Golyan*, 139 AD3d 932, 934 [2d Dept 2016], the Second Department held:

> The plaintiff could not have appealed from the order dated April 12, 2012, granting the motions in limine to preclude testimony regarding the post-operative care of the decedent, because that order concerned evidentiary rulings which are not appealable, either as of right or by permission.

"No appeal lies from an evidentiary ruling made before trial, either by right or by permission…Such a ruling is reviewable only in connection with an appeal from the judgment rendered after trial." *Madison 96th Associates v. 17 E. Owners*, 145 AD3d 646 [1st Dept 2016].

The Four Exceptions

1. The in-limine ruling is reviewable when the order also limits the issues to be tried.

United States Fidelity & Guaranty v. American Re-Insurance, 132 A.D.3d 604 (1st Dep't 2015):

> While [] evidentiary rulings made before trial are ordinarily reviewable only on appeal from the posttrial judgment, the ruling on appeal is an exception, since the trial court did not merely determine the admissibility of evidence but also limited the issues to be tried.

2. When the in-limine ruling affects the merits of the case.

Jeffers v. American University of Antigua, 190 A.D.3d 419 (1st Dep't 2021):

As a threshold matter, the order is appealable, because it decided a motion made on notice to enforce the preclusion order, and denied defendants' right to participate in the damages trial, thereby involving the merits of the controversy and affecting a substantial right (CPLR 5701(a)(2)(iv), (v)).

3. When the in-limine ruling limits the legal theories of liability to be tried or the scope of the issues at trial.

Harris v. Rome Memorial Hospital, 219 AD3d 1129, 1131 [4th Dept 2023]:

"Generally, an order ruling [on a motion in limine], even when made in advance of trial on motion papers constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission" (*Dischiavi v. Calli,* 125 A.D.3d 1435, 1436, 3 N.Y.S.3d 491 [4th Dept. 2015]…; *Scalp & Blade v. Advest*, 309 A.D.2d 219, 223, 765 N.Y.S.2d 92 [4th Dept. 2003]). There is, however, "a distinction between an order that 'limits the admissibility of evidence,' which is not appealable…and one that 'limits the legal theories of liability to be tried' or the scope of the issues at trial, which is appealable" (*Scalp & Blade*, 309 A.D.2d at 224, 765 N.Y.S.2d 92; *Dischiavi*, 125 A.D.3d at 1436, 3 N.Y.S.3d 491).

Rott v. Negev, 102 A.D.3d 522, 957 N.Y.S.2d 860 (1st Dep't 2013):

Contrary to Negev's position, the subject ruling is appealable, as the in limine order dismissing plaintiff's claim for lost rental income did not "merely determine[] the admissibility of evidence," it "limit[ed] the scope of issues to be tried"…In the absence of a proffer as to how plaintiff intended to establish lost rental income and to show that the loss was proximately caused by defendants' conduct, the trial court properly precluded plaintiff from offering evidence on this claim.

Hogan v. Zibro, 190 A.D.3d 1124 (3d Dep't 2021):

Regarding the March 2019 order, although Supreme Court decided a motion in limine, it ultimately dismissed one of defendant's counterclaims. Accordingly, the March 2019 order is appealable as of right

4. When the in-limine order is the functional equivalent of a motion for partial summary judgment.

Charter School for Applied Technologies v. Board of Education for City School District of City of Buffalo, 105 A.D.3d 1460, 1464 (4th Dep't 2013):

With respect to the judgment in appeal No. 2, we reject defendant's contention that the court erred in denying its motion in limine prior to the trial on damages. Defendant's motion to preclude plaintiffs from introducing any evidence with respect to damages was " 'the functional equivalent of a motion for partial summary judgment'"…which was untimely.

Also, *Franklin v. Prahler*, 91 A.D.3d 49 (4th Dep't 2011).

Motion in Limine and Expert Testimony

The exceptions also apply to expert testimony. Accordingly, no appeal lies from an order regarding a motion to permit or to preclude expert testimony; such an order is appealable when it limits the scope of the issues or the legal theories of liability. *Burdick v. Tonoga*, 191 A.D.3d 1215 (3d Dep't 2021); *C.H. v. Dolkart*, 174 A.D.3d 1098 (3d Dep't 2019).

Preservation of Issues, Issues Raised First Time on Appeal: the Rule

“It is settled that a ruling on an application must be reviewed in respect of the arguments made before the motion court and not on the basis of some novel contention.” *Wald v. Marine Midland Business Loans*, 270 A.D.2d 73, 75, 704 (1st Dep’t 2000).

“The very theory and constitution of a court of appellate jurisdiction only is the correction of errors which a court below may have committed; and a court below cannot be said to have committed an error when their judgment was never called into exercise, and the points of law were never taken into consideration, but was abandoned by the acquiescence or default of the party who raised it.” *Flake v. Van Wagenen*, 54 N.Y. 25, 27 (1873).

“The preservation requirement serves the added purpose of alerting the adverse party of the need to develop a record for appeal.” *People v. Hunter*, 17 N.Y.3d 725, 728 (2011).

Misicki v. Caradonna, 12 N.Y.3d 511, 519–20 (2009):

While appellate judges surely do not “‘sit as automatons’ ” (Smith, J., dissenting at 525, 882 N.Y.S.2d at 385, 909 N.E.2d at 1222, quoting Karger §17:1, at 591, 882 N.Y.S.2d at 385, 909 N.E.2d at 1222), they are not freelance lawyers either. Our system depends in large part on adversary presentation; our role in that system “is best accomplished when [we] determine[ ] legal issues of statewide significance that have first been considered by both the trial and the intermediate appellate court” (*People v. Hawkins*, 11 N.Y.3d 484, 493, 872 N.Y.S.2d 395, 900 N.E.2d 946 (2008, Kaye, Child. J.)).

The exceptions to the preservation rule generally relate to new arguments that could not have been obviated or cured by factual showings or legal countersteps such as questions of law (*See*, §30, “The New York Civil Appellate Citator” (NYSBA 2022, 2 vols).

Telaro v. Telaro, 25 N.Y.2d 433 (1969), rearg. denied, 26 N.Y.2d 751):

It should [] be noted that the general rule concerning questions raised neither at the trial nor at previous stages of appeal is far less restrictive than some case language would indicate. Thus, it has been said: ‘if a conclusive question is presented on appeal, it does not matter that the question is a new one not previously suggested. No party should prevail on appeal, given an unimpeachable showing that he had no case in the trial court.’ . . . Of course, where new contentions could have been obviated or cured by factual showings or legal countersteps, they may not be raised on appeal. But contentions which could not have been so obviated or cured below may be raised on appeal for the first time.

Wells Fargo Bank v. Islam, 174 A.D.3d 670 (2d Dep’t 2019):

“An exception to the general [preservation] rule has…been applied, subject to certain qualifications, that a newly raised point of law may be entertained on appeal where it is one which is decisive of the appeal and which could not have been obviated ‘by factual showings or legal countersteps’ if it had been raised below.”

Mootness, the Rule

“Mootness is a doctrine related to subject matter jurisdiction and thus must be considered by the court sua sponte.” *Matter of Grand Jury Subpoenas for Locals 17, 135, 257 and 608 of the United Brotherhood of Carpenters and Joiners of America*, AFL-CIO, 72 N.Y.2d 307, 311 (1988).

“Where…a judicial determination carries immediate, practical consequences for the parties, the controversy is not moot.” *Tiemann Place Realty v. 55 Tiemann Owners*, 141 A.D.3d 56 (1st Dep’t 2016).

"[A]n appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment." *Coleman ex rel. Coleman v. Daines*, 19 N.Y.3d 1087, 1092 (2012).

"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." *Bruenn v. Town Board of Town of Kent*, 145 A.D.3d 878 (2d Dep't 2016).

"Although the question of mootness is not raised by the parties, the prohibition against deciding 'academic, hypothetical, moot, or otherwise abstract questions is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common-law judiciary'…and we can and should resolve it sua sponte." *People ex rel. Allen v. Warden, GMDC, New York State Division. of Parole*, 61 A.D.3d 541, 542 (1st Dep't 2009).

"When a matter becomes moot a court is deprived of an actual controversy, the essential wherewithal of a court's jurisdiction . . . and for that reason the issue of mootness may be raised at any time." *Cerniglia v. Ambach*, 145 A.D.2d 893, 894 (3d Dep't 1988).

The Four Exceptions to the Mootness Rule

Issues that "fall into an exception to the mootness doctrine (1) are likely to reoccur; (2) typically evade review; and (3) involve "significant or important questions not previously passed on'" (*Matter of Hearst v. Clyne*, 50 N.Y.2d 707, 714–715 (1980) . . .)," *In re F.W.*, 183 A.D.3d 276 (1st Dep't 2020).

An additional exception occurs where an expired order "still imposes significant enduring consequences upon respondent, who may receive relief from those consequences upon a favorable appellate decision." *Veronica P. v. Radcliff A.*, 24 N.Y.3d 668, 671-72 (2015). In *Veronica P.,* Judge Sheila Abdus-Salaam, writing for the Court of Appeals, enumerated instances of enduring consequences:

> *[I]n a future legal matter, an opposing party might be permitted to use the order of protection to impeach respondent's credibility (Bickwid, 87 N.Y.2d at 863–864 [finding that the impeachment potential of the adjudication being appealed supported the conclusion that the appeal was not moot]). Furthermore, since the order of protection remains in a police computer database, albeit not in an active file (Executive Law §§221–a (1); 221–a (6); also 9 N.Y.C.R.R. 486.2(g)), respondent may face additional law enforcement scrutiny and an increased likelihood of arrest in certain encounters with the police (9 N.Y.C.R.R. 486.3(n) [declaring information obtained from the database to be relevant to the decision to arrest an individual]).*
>
> *Beyond its legal consequences, the order of protection places a severe stigma on respondent, and he can escape that stigma by prevailing on appeal (Rubenstein, 23 N.Y.3d at 577–578). [T]he order essentially labels respondent a family offender and at least implies that he has committed an assault or harassment offense against his aunt. It follows that, should the order come to the attention of respondent's business contacts, social acquaintances or other members of the public, those individuals would almost certainly view him as a domestic violence offender—a decidedly pejorative label—and cease their dealings with him. Perhaps most importantly, potential employers might ask respondent whether an order of protection has ever been entered against him, and he may be ethically or legally bound to answer in the affirmative, significantly curtailing his chances of getting a job.*

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