ANALYSIS

CPLR 5511: Relief to Nonparties, to a Nonappealing Child

This article discusses 'Johnson v. Johnson', which remedied such a concern even though the attorney for the child did not appeal from the order, as well as an understanding of aggrievement, CPLR 551, as it relates to nonparties and to nonappealing parties is instructive.

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Civil Procedure

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In “CPLR 5511: Aggrievement Following A Successful Child Custody Award”, NYLJ, Sept. 16, 2015, this column addressed case law holding that, although a child’s name does not appear in the caption, that child is very much aggrieved by an improvident custody order, as child custody is a matter of public policy, *Merrill Lynch, Pierce, Fenner & Smith v. Benjamin*, 1 AD3d 39, 44 [1st Dept 2003]; *Matter of Gartmond v. Conway*, 40 AD3d 1094, 1095 [2d Dept 2007]. Parody of reasoning dictates that children are similarly aggrieved by an inadequate support award because that, too, is a matter of fundamental public policy. *Roe v. Doe*, 29 N.Y.2d 188 (1971); *Thomas B. v. Lydia D.*, 69 A.D.3d 24 (1st Dep’t 2009). However, must the child, i.e., the attorney for the child, initiate the appellate process in order to correct the inadequate award or can the Appellate Division remedy it by way of another procedural tool?

Enter *Johnson v. Johnson*, 172 A.D.3d 1654 [3d Dept 2019], which remedied such a concern even though the child—the attorney for the child—did not appeal from the order, discussed below. First, an understanding of aggrievement, CPLR 551, as it relates to nonparties and to nonappealing parties is instructive.

The Three Jurisdictional Predicates Needed To Appeal

An appellant must satisfy three jurisdictional predicates before the Appellate Division may reach the merits: the would-be appellant must be aggrieved [CPLR 5511]; the appealable paper may only be an order or judgment [CPLR 5512]; and a timely filing of the notice of appeal [CPLR 5513]. The first sentence in CPLR 5511 states: “An aggrieved party or a person substituted for him may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party.”

Aggrievement

“The root of our jurisdiction is by an appeal by the person aggrieved.” *Burmester v. O’Brien*, 166 AD 932 [2d Dept 1915]. “The scope of appellate review upon a timely appeal is essentially limited to the provisions of the judgment which actually aggrieve the appellant (*Hecht v. City of New York,* 60 NY2d 57); moreover, the requirement that an appellant be an aggrieved party is jurisdictional and subject to the Court’s threshold review even if the issue has not been raised by the respondent.” *Klinge v. Ithaca College*, 235 A.D.2d 724, 726 [3rd Dept 1997]; *Glickman v. Sami*, 146 A.D.2d 671 [2nd Dept 1989].

"A party is aggrieved when he or she has a direct interest in the controversy which is affected by the result and when 'the adjudication has a binding force against the rights, person or property of the party," *Matter of Stewart v. Chautauqua County Board of Elections*, 69 A.D.3d 1298, 1304 [4th Dept 2010], aff'd, 14 N.Y.3d 139 [2010]; *DiMare v O'Rourke*, 35 A.D.3d 346 [2nd Dept 2006], which arises when: (1) a party has petitioned for relief that is denied in whole or in part; or (2) when someone asks for relief against him or her, which the person opposes, and the relief is granted in whole or in part. *Mixon v. TBV*, 76 A.D.3d 144 [2nd Dept 2010]. "A party is not aggrieved by an order which does not grant relief the party did not request." *Spielman v. Mehraban*, 105 AD3d 943 [2d Dept 2013].

Court's Reasoning or Adverse Language in Ruling Does Not Control, Remote or Contingent Consequences from Judgment, Prejudice in Future Proceeding Not Deemed Aggrievement

Aggrievement does not hinge upon a court's reasons underpinning why relief was granted or denied. *Dolomite Products Company v. Town of Ballston*, 151 AD3d 1328 [3d Dept 2017]; *Brown v. Condzal*, 137 AD3d 667 [1st Dept 2016]. Not the words selected by the judge, but the action taken by the court, is what is operative and significant. *Switzer v. Merchants Mut. Cas. Co.*, 2 NY2d 575 [1957]; *Wells Fargo Bank, NA v. Ostiguy*, 119 AD3d 1266 [3d Dept 2014]. An appellant who received all the relief it requested is not aggrieved, even though the court may have made some finding of fact or ruling of law with which the appellant is dissatisfied. *Benedetti v. Erie County Medical Center*, 126 AD3d 1322 [4th Dept 2015].

In *Olney v. Town of Barrington*, 162 AD3d 1610, 1611 [4th Dept 2018], defendants were held not aggrieved, "The fact that the judgment may remotely or contingently affect interests which [the party] represents does not give them a right to appeal." Also, *In re Landis*, 114 AD3d 458, 459 [1st Dept 2014]. However, "an appeal may be taken when the judgment does not grant complete relief to the successful party [w]hen, for example, a specific finding at [the] trial [level] might prejudice a party in a future proceeding by way of collateral estoppel." *Matter of Feldman v. Planning Board of Town of Rochester*, 99 AD3d 1161, 1165 [3d Dept 2012].

The Intervenor

An intervenor becomes a party to the underlying proceeding for all purposes, including aggrievement. *Dolomite Products v. Town of Ballston*, 151 AD3d 1328 [3d Dept 2017].

A Mortgagee, Although a Technical Nonparty, May Prosecute an Appeal

A technical nonparty may have standing to prosecute an appeal, even absent a motion for leave to intervene, a notice of appearance, answer or motion extending the time to answer (CPLR 320, 1003, 1012, 1013) where it is "expressly bound" by the order under review. In *Stewart v. Stewart*, 118 AD2d 455 [1st Dept 1986], a divorce proceeding, the husband moved for an order directing a private sale of the former marital residence and enjoining a judicial sale. The bank interposed an affidavit, without intervening or formally appearing in the action, asserting that the court lacked the authority to enjoin a judicial sale. Special Term enjoined a judicial sale and directed the private sale of the apartment within 60 days.

Three months thereafter, the mortgagee-bank, the technical nonparty, filed an order to show cause to vacate the injunction. The motion court, sua sponte, inter alia, conditionally vacated the injunction extending the time for a private sale. The bank appealed contending that the court had no authority to enjoin a third party from exercising its rights, in the absence of a proper motion for a preliminary injunction pursuant to CPLR Article 63. The bank, as a technical nonparty, was held to have had standing to appeal.

Also see, *Brady v. Ottaway Newspapers, Inc.*, 97 AD2d 451 [2d Dept 1983], affd, 63 NY2d 1031 [1984]; *Petroski v. Petroski*, 6 AD3d 1194 [4th Dept 2004].

On Rare Occasions, Relief May Be Granted to a Nonappealing Party

Neither CPLR 5522 (Disposition of appeal) nor any other statutory or constitutional authority permits an appellate court to exercise any general discretionary power to grant relief to a nonappealing party. *Citnalta Construction v. Caristo Associates Electric Contractors*, 244 A.D.2d 252 (1st Dep't 1997). However, "on rare occasions, the grant of full relief to the appealing party may necessarily entail granting relief to the nonappealing party." *Cover v. Cohen*, 61 N.Y.2d 261 (1984); *Hecht v. City of New York*, 60 N.Y.2d 57 (1983).

In a later decision, *511 West 232d Owners v. Jennifer Realty*, 98 N.Y.2d 144, n.3 (2002), the Court of Appeals seemingly relaxed the standard for making such an award: "An exception exists only for cases where granting relief to a nonappealing party is necessary to give *meaningful* relief to the appealing party."

In *Mixon*, the Second Department held: (1) "an appellate court's reversal or modification of a judgment as to an appealing party will not inure to the benefit of a nonappealing coparty…unless the judgment was rendered against parties having a united and inseverable interest in the judgment's subject matter, which itself permits no inconsistent application among the parties" [at 155]; and (2) "in rare instances, a person against whom no relief was sought may be aggrieved by the granting of relief to an adversary against a party with whom he or she is united in interest" [n.2].

In matters involving motions for summary judgment, the Appellate Division, in *Wilson v. Buffa*, 294 A.D.2d 357 (2d Dep't 2002), noted: "It is settled law that the Appellate Division may grant relief to a nonappealing party on a summary judgment motion by virtue of its statutory authority to search the record under CPLR 3212(b)."

A Nonappealing Party May Re-Seek Renewal of Relief Below Based Upon Appellate Court's Decision to Codefendant

In *Koscinski v. St. Joseph's Medical Center*, 47 A.D.3d 685 (2d Dep't 2008), an action to recover damages for medical malpractice, the plaintiff failed to comply with an order directing him to file a note of issue by a date certain. Thereafter, the plaintiff moved to restore the case "to active status." That motion was opposed by the defendant St. Joseph's Medical Center [] and by the defendant Richard Radna. Both the hospital and Radna also separately cross-moved, on identical grounds, to dismiss the complaint as to each of them. The Supreme Court granted the plaintiff's "motion to restore and vacate dismissal" and denied the cross motions to dismiss.

Only Radna appealed from that order. The Appellate Division reversed and, inter alia, denied the plaintiff's motion to restore the case "to active status," granted Radna's cross motion to dismiss the complaint insofar as asserted against him.

Based upon the reversal in Radna's favor, the hospital moved in the Supreme Court for leave to renew its cross motion to dismiss the complaint insofar as asserted against it. The Supreme Court granted renewal and granted the hospital's prior cross motion to dismiss the complaint insofar as asserted against it. The Appellate Division affirmed:

> [T]he hospital's failure to appeal did not preclude it from seeking renewal of its cross motion to dismiss the complaint. Although, as a general rule, an appellate court will not grant any affirmative relief to a non-appealing party…this principle does not bar a non-appealing defendant from seeking renewal of a cross motion to dismiss the complaint insofar as asserted against it based upon an appellate court's decision to grant dismissal of the complaint as to a codefendant.

'Dauria v. Castlepoint Insurance', 120 A.D.3d 1016 (1st Dep't 2014)

Castlepoint Insurance Company (Castlepoint) issued a homeowner's policy to plaintiffs, the Daurias, based on an application prepared and submitted on their behalf by defendant broker Frank Campo. After a fire, Castlepoint rescinded the policy claiming that the premises contained a basement apartment, which rendered it a "three family" dwelling as

opposed to the “two family” designation listed on the insurance application. Plaintiffs sued Castlepoint for breach of contract, and against Campo for negligence and breach of contract in failing to procure the proper insurance policy and to properly process plaintiffs’ application.

Campo moved to dismiss claiming that he was never advised or had reason to believe that the premises was a three-family dwelling. Mr. Dauria argued that Campo had privately admitted that he had “messed up,” and that an investigator for Allstate, the prior insurer, had advised Campo that the house was a three-family home.

The motion court granted Campo’s and plaintiffs’ motions for summary judgment, and denied Castlepoint’s motion. The court, in effect, found that Castlepoint had not established that plaintiffs had made a material misrepresentation in their insurance application because three-family dwellings were not listed as an “unacceptable exposure” in Castlepoint’s underwriting guidelines, and the policy did not exclude three-family dwellings from coverage. Plaintiffs did not appeal from the grant of summary judgment as to Campo.

The Appellate Division reversed and granted Castlepoint summary judgment based on the material misrepresentation by the insureds. However, after the appellate decision in the Castlepoint appeal was issued, plaintiffs moved below to renew Campo’s motion to dismiss, which was denied on procedural grounds.

> Although the grant of a dismissal to a co-defendant at the appellate level may form the basis of a renewal motion (in the court below) by a nonappealing defendant on the ground of “law of the case” … *Dauria* was not a case where two codefendants were so similarly situated that this Court’s order with respect to one defendant directly impacts the other defendant. The issue of Campo’s liability is not identical to the issue of Castlepoint’s liability, and plaintiffs had not shown that the factual or legal basis for the order dismissing the claims against Campo has been overturned (compare Ramos v. City of New York, 61 A.D.3d 51 (1st Dep’t 2009)).

[Author’s note: The dissent by Justice Rosalyn Richter is a must read.]

Children Seeking Appellate Review from Orders and Judgments That Only Affect Their Parents

The children in *Kessler v Fancher*, 112 AD3d 1323 [4th Dept 2013] were held not aggrieved by orders that dismissed petitions filed by one parent alleging violations of custody or seeking personal orders of protection against the other parent.

In *In re Alexander Z.*, 151 AD3d 421 [1st Dept 2017], the First Department dismissed the children’s appeal because they were not aggrieved by the finding of neglect against their mother. The Court did, however, note that the children “may have been aggrieved by the order of disposition, which placed the[m] into their father’s custody with supervision by petitioner agency for 12 months.” *In re Geovany S.,* 143 AD3d 578 [1st Dept 2016], a three-sentence fact bare decision, held “The appellant children are not aggrieved by the finding against respondent that he derivatively neglected them.” *Gevonay* and *Alexander Z.* are counterintuitive because the children, in each case, were the victims of the neglect.

‘Because Child Support Is Intended for the Benefit of the Child, Not the Custodial Parent, This Is Not a Circumstance In Which We Are Giving Relief to a Nonappealing Party’

Johnson v. Johnson, 172 A.D.3d 1654 [3d Dept 2019] addressed, inter alia, temporary child support, to which the parties had stipulated. Thereafter, the husband moved for, inter alia, a downward modification of that stipulated temporary order because the wife had begun working. After the trial, as pertinent here, Supreme Court imputed income to the husband and carved out a new support order. The husband appealed. Significant, here, is that the wife did not challenge the order. The Appellate Division applied the Child Support Standards Act and recalculated the statutory child support, noting [n.3]:

> We are mindful that the wife did not challenge Supreme Court's child support award … Importantly, because child support is intended for the benefit of the child, not the wife, this is not a circumstance in which we are giving relief to a nonappealing party (cf. Hecht v City of New York, 60 NY2d 57, 60 [1983]).

Sotto voce in the footnote is the Appellate Division's awareness that child support is a matter of fundamental public policy *Roe v. Doe*, 29 N.Y.2d 188 (1971); *Thomas B. v. Lydia D.*, 69 A.D.3d 24 (1st Dep't 2009).

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