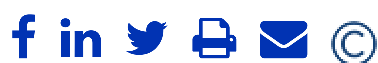

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ANALYSIS

Letter Ruled Appealable, a Further Relaxation of CPLR 5512

This column notes a recent decision, 'Naramore v. Mount Sinai Health System', where the Appellate Division reviewed an otherwise nonappealable paper.

June 11, 2024 at 10:00 AM

By Elliott Scheinberg | June 11, 2024 at 10:00 AM

This column notes a recent decision, *Naramore v. Mount Sinai Health System*, 2024 NY Slip Op 02757 [1st Dept 2024], where the Appellate Division reviewed an otherwise nonappealable paper.

An appellant must satisfy three jurisdictional predicates before the Appellate Division may entertain the merits of the appeal: aggrievement (CPLR 5511); appealable paper (CPLR 5512) and timeliness (CPLR 5513).

"An initial appeal shall be taken from the *judgment or order* of the court of original instance." (CPLR 5512). "A decision is not an appealable paper." *Howell v. State*, 169 A.D.3d 1208, n. 1 (3d Dep't 2019); *BNG Properties v. Sanborn*, 153 A.D.3d 1221 (2d Dept 2017); *Render v. Gizzo*, 129 A.D.3d 1488, 1489 (4th Dept 2015). "Appeal dismissed, without costs, by the Court of Appeals, sua sponte, upon the ground that no appeal lies from a decision." *Sims v Coughlin*, 86 NY2d 776 [1995]; *Gunn v. Palmieri*, 86 NY2d 830 [1995].

In *Buljeta v. Fuchs*, 209 A.D.3d 730 [2d Dept 2022], the Appellate Division rejected the mother's contention that the Family Court should have entertained a motion to disqualify the father's counsel as "the letter from the Family Court's court attorney, which indicated that the court would not entertain such a motion, is not reviewable."

On March 27, 2020, this column, in the article, "CPLR 5512(a): Hallmarks, Essential Requirements, Substance, Other Indicia of an 'Order'", examined the then-recent broadening of the term "appealable paper," in *Spectrum News NY1 v. New York City Police Department*, 179 A.D.3d 578 [1st Dept 2020] and *Nicol v. Nicol*, 179 A.D.3d 1472 [4th Dept 2020]. Both decisions are also reviewed here.

Nomenclature of the Paper Is Not Determinative, 'Hallmarks of an Order'

The nomenclature "decision" is not determinative of whether a paper is an appealable paper or not, citing its 2019 decision, *Matter of Samantha F. [Edwin F],* 169 A.D.3d 549 [1st Dept 2019], appeal dismissed 33 N.Y.3d 1042 [2019]: "[T]here are instances where this Court has deemed a paper denominated as a 'decision' to nonetheless be appealable because it contained all *the hallmarks of an order* that is not the situation here."

Although the paper in *Samantha F.* had been denominated a decision, it was, nonetheless, deemed an appealable paper because it bore the standard language advising that any appeal from the "order" must be taken within 30 days (Family Ct. Act (FCA) §1113), and was, "in substance, an order finding that the children had been abused/neglected (FCA §1051[a]), which is appealable as of right (FCA §1112[a])."

Notably, appeals from the Family Court are separately governed by Article 11 of the Family Court Act. The requirement in FCA §1113, that "all such orders shall contain the following statement in conspicuous print: 'pursuant to Section 1113 of the family court act, an appeal must be taken within 30 days of receipt of the order by appellant in court, 35 days from the mailing of the order to the appellant by the clerk of the court, or 30 days after service by a party or attorney for the child upon the appellant, whichever is earliest'" has no counterpart in the CPLR (CPLR 2219(a)).

Indicia of a Judgment or Order

In *Graziano v. County of Albany* [*as Election Commissioner of the County of Albany and as Member of the Board of Elections of the County of Albany*] 12 A.D.3d 819 [3dDep't 2004], the petitioner appealed from a letter decision of the Supreme Court, which declined to award him additional counsel fees.

The Appellate Division dismissed the appeal on jurisdictional grounds because the letter decision did not contain the indicia of a judgment or order: it "contain[ed] no language that it is either a judgment or order of the court and [] no order was entered thereon (CPLR 5512[a]), this court lacks jurisdiction and the appeal must be dismissed. See also *Washington v. Annucci*, 153 A.D.3d 1504 [3d Dept 2017].

Where the Decision 'Meets the Essential Requirements of an Order'

In *Nicol v. Nicol*, 179 A.D.3d 1472 [4th Dept 2020], the plaintiff "*appealed from a decision* denying his motion [for] a downward modification of his child support obligation, enforcement of certain terms of the parties' separation and settlement agreement, and attorney's fees." "Although not raised by the parties and although '[n]o appeal lies from a mere decision'", the majority opinion in the Fourth Department, in reliance on *Matter of Louka v. Shehatou*, 67 A.D.3d 1476 (4th Dept. 2009), "concluded that *the paper appealed from meets the essential requirements of an order*, *and we therefore treat it as such.*"

The court modified the order, inter alia, remitting the matter to Supreme Court for further proceedings in accordance with the memorandum.

Justice Brian F. DeJoseph dissent rejected "this 'essential requirements' standard" as violative of the "clear [statutory] directive" which "defines [an appealable paper] either as an order or a judgment, not a decision that has some elements of an order", a "settled principle" "in all of the other departments, as well as in the Court of Appeals."

Specifically, the record included a decision that was *denominated* only as a decision without any ordering paragraphs. DeJoseph further noted that the plaintiff's notice of appeal explicitly appealed "from the decision":

> [T]he majority believe[s] that the decision is an appealable paper because it meets "the essential requirements of an order"…[T]he majority relies on *Matter of Louka v. Shehatou*, 67 A.D.3d 1476 (4th Dept. 2009)), wherein this court determined that a letter would be treated as an order inasmuch as "the referee filed the letter with the Family Court clerk and…the letter resolved the motion and advised the father that he had a right to appeal"… *Although the decision here was filed and resolved the motion, there was no directive in the decision that plaintiff had the right to appeal from it*. [I] submit that almost all written decisions at least attempt to resolve the issues presented by the parties and many of those decisions are also filed.

It seems as though the law in the Fourth Department has now effectively changed. [A]n appeal may lie from a mere decision if it was filed and if it resolved the issues presented by the parties, the appealable paper no longer needs to be labeled as an order and it no longer needs any ordering paragraphs, and the appellant can still appeal even if he or she refers to the paper on appeal as a "decision" in the notice of appeal.

'Spectrum News', Appeal from an 'Interim Decision'

In *Spectrum News NY1 v New York City Police Department*, 179 A.D.3d 578 [1st Dept 2020], the news agency filed a FOIL request for unredacted videos from the NYPD's voluntary body camera program begun in 2014. NYPD denied the request, claiming that unredacted files were exempt from disclosure under FOIL. Spectrum commenced an Article 78 proceeding seeking a judgment compelling the NYPD to comply with its request.

In a previous interim order, not the subject of this appeal, Supreme Court directed a hearing on whether compliance with Spectrum's request would be unduly burdensome on the NYPD.

The Supreme Court issued "an interim decision," which was not the product of a motion for relief. The "interim decision" permitted certain redaction of faces of persons other than officers and the redaction of certain communications between officers. Then, without conducting the hearing, Supreme Court granted petitioner leave to appeal from the "interim decision."

The First Department declined to hear the appeal as it was taken from an "interim decision," a nonappealable paper, which "deprive[d] the court of jurisdiction and require[d] dismissal of Spectrum's appeal, albeit without prejudice. Where a party brings an appeal from a nonappealable paper, this court regularly dismisses the appeal for lack of jurisdiction [cites omitted]."

Spectrum emphasized that the interim decision "did not result in an order being issued" rather "the court was limiting the scope of the hearing."

'Louka', Letter Determining a Motion Treated as an Order

In *Louka v. Shehatou*, 67 AD3d 1476 [4th Dept 2009], the father appealed from an "order" of the Family Court that denied his motion to vacate an amended order entered upon his default, which order granted the mother sole legal and physical custody of the children and permanently terminated all of the father's prior custodial and visitation rights.

The Fourth Department began by emphasizing that "although the determination of the father's motion was contained in a letter, no order [had been] entered thereon":

> We further note however, that the referee filed the letter with the Family Court Clerk and that the letter resolved the motion and advised the father that he had a right to appeal. Thus, by an order of this court…in connection with the mother's motion to dismiss this appeal, we determined that the letter would be treated as an order.

In *He v. Realty USA*, 150 AD3d 1418 [3d Dept 2017], the appellate court had previously affirmed the dismissal of the plaintiff's claims as time barred and frivolous and remitted the matter for the determination of a counsel fees award for the defendants.

In a "letter order," the Supreme Court awarded the defendants $18,524.96 in costs and fees. Thereafter, Supreme Court executed a "formal order and judgment awarding it." The plaintiff appealed from the "letter order and the order and judgment." Affirmed.

Letter Orders That Necessarily Affect the Final Order

In *Reynoso v. Dennison*, 10 N.Y.3d 799 (2008), the Court of Appeals, sua sponte, dismissed an appeal from a letter upon the ground that it "is not a judgment or an order from which an appeal to the Court of Appeals may be taken (CPLR 5512[a]; 5601)."

Two decisions, from two Departments, *Banker v. Banker*, 56 A.D.3d 1105 [3d Dept 2008] and *Hageman v. Santasiero*, 277 A.D.2d 1049 [4th Dept 2000], addressed letter orders that necessarily affected the final order or judgment.

The judgment of divorce, in *Banker v. Banker*, 56 A.D.3d 1105 [3d Dept 2008], incorporated but did not merge an oral stipulation of settlement which provided that the parties would subdivide a parcel of property. The plaintiff moved to enforce the stipulation. The Supreme Court ordered the defendant to obtain subdivision approval from the Town Planning Board. The Planning Board denied the defendant's subdivision application upon discovering that the property was encumbered by a restrictive covenant against further subdivision.

The Appellate Division noted, although the Planning Board later reversed its denial of the application on the basis that the Town should not enforce a private covenant, it was undisputed that the landowners who benefited from the covenant were unwilling to waive it, thereby rendering subdivision infeasible as it would subject the parties to suit.

The defendant moved to reargue and/or renew the order that directed him to obtain subdivision approval and for a hearing to determine equitable distribution. The Supreme Court did not rule on the defendant's motion but reserved decision on all pending matters until an appraisal of the property was completed. It subsequently appointed an appraiser and ordered a hearing to permit the parties to cross-examine the appraiser, but made it clear that no other testimony or evidence of valuation would be permitted.

Following the hearing, the court determined the interests of the parties in the property to be 83% for plaintiff and 17% for defendant.

The Appellate Division held:

> [T]he issues that defendant raises on appeal are properly reviewable as they were issues decided by nonfinal letter orders which necessarily affected the [] final order appealed from (CPLR 5501[a][1]…).

Hageman v. Santasiero, 277 A.D.2d 1049 [4th Dept 2000] involved a medical malpractice action. Prior to trial, defendant Health Care Plan Inc. (HCP) moved for summary judgment pursuant to Public Health Law §4410.

The Supreme Court reserved decision but ruled that HCP could not be referred to as a defendant during trial. Judgment was entered in favor of defendant-physicians upon a jury verdict of no cause of action. Thereafter, the court ruled by letter order that the summary judgment motion was moot. The plaintiff appealed from the judgment entered upon the jury verdict:

> [P]laintiff's contention concerning the court's letter order is not properly before us. The only notice of appeal in the record is from the judgment, and the order does not 'necessarily affect[ ] the final judgment' entered against defendant-physicians (CPLR 5501[a][1]…).

Parenthetically, otherwise nonappealable papers draw greater scrutiny when they necessarily affect the final order or judgment, as reflected in recent case law which held ex parte and sua sponte orders directly appealable from the final order or judgement even though they were otherwise not directly appealable during the pendency of the action: (a) E. Scheinberg, *Braun v. Cesareo*, When "CPLR 5701(a)(2) Intersects CPLR 5501(a)(1)", New York Law Journal, Sept. 16, 2019; and (b) *Ahmed v. Ahmed*, 175 A.D.3d 1363 [2d Dept 2019], citing *Shah v. Oral Cancer Prevention International*, 138 AD3d 722 [2d Dept 2016], E. Scheinberg, "Appellate Updates, Part I, New York Law Journal", Oct. 17, 2019.

Letter Application Appealable Where Both Parties Were Heard and Created a Suitable Record

Naramore v. Mount Sinai Health System, 2024 NY Slip Op 02757 [1st Dept 2024] upheld an order which denied the defendants' letter application to reconsider a prior discovery order adverse to the defendants, on the grounds that: "… the process 'afforded [the parties] the opportunity to be heard' and created 'a suitable record' for appellate review."

Notably this is not the first time that appellate courts have discretionarily held otherwise nonappealable papers appealable when both sides had argued them.

In *Mashreqbank PSC v. Ahmed Hamad A1 Gosaibi & Brothers*, 23 N.Y.3d 129 [2014], the Court of Appeals held: "We see no reason to read CPLR 327(a) as prohibiting a forum non conveniens dismissal where only the formality of a document labeled 'notice of motion' was lacking, and where AHAB, the only party opposed to dismissal, neither objected to nor was prejudiced by the omission of that formality." Also, *Fried v. Jacob Holding,* 110 A.D.3d 56 [2d Dept 2013]. *See*, E. Scheinberg, "'Mashreqbank' Adds a Layer of Confusion to 'Notice of Motion,'" New York Law Journal, April 11, 2014.

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