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EXPERT OPINION

Appeal Heard from Defective Dispute as between Jurisdictional Nonparty Attorneys

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Class Actions

By Elliott Scheinberg

To quote Lewis Carroll, *Santiago v Gen. Motors LLC*, 232 AD3d 1173 [3d Dept 2024], serves up a series of procedural events that are “curiouser and curiouser,” and curiousest. Although an appellate court is, with the rarest exception, jurisdictionally constrained from hearing an appeal from nonparties, *Santiago,* anomalously entertained appeals from a dispute over a contractual fee sharing agreement between two nonparty attorneys in a personal injury action under the caption of the case rather than in a separate plenary action.

The nonparty-attorneys were a New York law firm (the law firm), and co-counsel from Texas, who was admitted pro hac vice on application of the New York law firm. Critically, the plaintiff had received her full share of the proceeds and was not involved in any dispute with either attorney; the litigation was strictly inter se. *Santiago* has many moving parts.

There were two orders on appeal from the Supreme Court: one which denied a motion by the law firm “to extinguish any lien upon counsel fees asserted by Stephen E. Van Gaasbeck,” and the appeal from an order, which denied Van Gaasbeck's motion to renew and reargue.

The Appellate Division denied Van Gaasbeck’s motion to reargue because no appeal lies from the denial of a motion to reargue and also denied his motion to renew because, having ruled that he was “not an aggrieved *party*” because he had not sought affirmative relief, “there [wa]s no basis for a motion to renew a prior motion ruled upon in the party's favor.”

An analysis of the issues establishes that neither the Supreme Court nor the Appellate Division had the power to do more than to dismiss the appeals on jurisdictional grounds. Texas' counsel's brief offers insight and is referenced accordingly.

The Three Jurisdictional Predicates to an Appeal

An appellant must satisfy three jurisdictional predicates before an appellate court may reach the merits: Aggrievement [CPLR 5511]; Appealable Paper [CPLR 5512] and Timeliness [CPLR 5513]. The plain language in CPLR 5511 and 5513 restricts appeals to parties. "[I]f a party is not aggrieved, then this Court does not have jurisdiction to entertain the appeal." *Matter of Dolomite Products Co. v Town of Ballston*, 151 AD3d 1328, 1330 [3d Dept 2017]. Aggrievement may be raised sua sponte. *Leeds v. Leeds*, 60 N.Y.2d 641 [1983].

Aggrievement, Two-Tier Test

Aggrievement occurs when a party requested relief that is denied in whole or in part or when a party demands relief against another party, who opposed the application, and the relief is granted in whole or in part. *Mixon v. TBV, Inc.*, 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].

A Court's Reasoning, Adverse Language

Aggrievement does not hinge upon a court's reasons underpinning why relief was granted or denied. *Dolomite Products Co., Inc. 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 writing 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 Med. Ctr. Corp.*, 126 AD3d 1322 [4th Dept 2015].

The foregoing notwithstanding, “While a party who has been successful may not appeal a judgment in his favor, this rule is not inflexible and an appeal may be taken when the judgment does not grant complete relief to the successful party, when, for example, a specific finding at trial might prejudice a party in a future proceeding by way of collateral estoppel.” *Lincoln v. Austic*, 60 A.D.2d 487, 401 N.Y.S.2d 1020 [3d Dept 1978]; *Feldman v. Planning Bd. of Town of Rochester*, 99 A.D.3d 1161 [3rd Dept 2012].

Standing, A Technical Nonparty

Standing is “a *party's* right to make a legal claim or seek judicial enforcement of a duty or right.” Black's Law Dictionary [12th ed. 2024]. One held to lack standing is aggrieved and has standing to appeal that finding. *Levitt & Kaizer v Charles*, 150 AD3d 478 [1st Dept 2017].

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. *Stewart v Stewart*, 118 AD2d 455 [1st Dept 1986]; *Buller v Giorno*, 40 AD3d 316 [1st Dept 2007]; *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].

The United States Supreme Court recommended a better practice for nonparties, where applicable: “We think the better practice is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course, appealable.” *Marino v. Ortiz*, 484 U.S. 301, 304 [1988].

An in-depth review of aggrievement is examined in Scheinberg, CPLR 5511, The Pitfalls of Aggrievement, Beyond the Basics, Parts I and II, Aug. 30, 2018 and Aug. 31, 2018.

Actions and Order to Show Cause Distinguished

The nonparty attorneys were litigating against each other by way of motions under the caption of the personal injury case, not under their own plenary action. “A motion [i]s an application for an Order. It is neither an action nor a special proceeding but a procedural step connected with and dependent upon the remedy invoked in the particular controversy.” *Lyons Falls Farmers' Co-op. Ass'n v Moore*, 158 NYS2d 1013, 1015 [Sup Ct 1956]; *In re Argus Co.*, 138 NY 557, 566 [1893].

The Facts in *Santiago*

Ms. Santiago commenced an action to recover monetary damages for injuries sustained following a car accident. New York counsel (the law firm) recruited Stephen E. Van Gaasbeck, an attorney from Texas, whose experience included lead-trial attorney on liability issues and causation in more than 70 cases (Record on Appeal (“Record”) 203).

The record (439-441) adds voice to the decision’s silence regarding the law firm’s successful motion (as the plaintiff’s agent, as a matter of law, *Kugel v Reynolds*, 228 AD3d 743, 750 [2d Dept 2024]) to admit Van Gaasbeck pro hac vice as co-counsel (Record 445). Parenthetically, in an affidavit in the subsequent plenary action the plaintiff chided Van Gaasbeck’s fee claim and denied having retained him (Record 158-159).

The law firm and Van Gaasbeck discussed their respective duties and two alternate fee-sharing formulae proposed by Van Gaasbeck (Record 448-450):

Proposal 1: would be that I sign on for a 25% share of the 33% fee, paying my own travel costs.

Proposal 2: would be that I sign on for 50% share of the 33% fee, and share costs accruing after I sign on for a 50% - 50% basis.

The law firm accepted the second proposal: “OK, let’s get you in on this one too; consider the Santiago case a go at 50/50 …” (Record 450), hence, a meeting of the minds.

Upon plaintiff's settlement with General Motors, the law firm paid Van Gaasbeck in excess of $280,000. Upon settlement with the two remaining defendants, the law firm and Van Gaasbeck turned adversarial. The law firm moved to extinguish any prospective lien upon the counsel fees that Van Gaasbeck might assert---unmentioned in the decision is that the law firm also proposed alternative relief for a quantum meruit hearing (Record 139).

Although Van Gaasbeck opposed the motion, asserting that he engaged in extensive research on this portion of the case and that he had a significant role in the settlement with the remaining defendants, he had not, however, asserted any affirmative relief relative to the motion, i.e. a charging lien.

Supreme Court denied the law firm’s motion ruling that the proper procedural mechanism by which to obtain a declaration extinguishing any interest Van Gaasbeck may have in the disputed settlement proceeds is a plenary action, “particularly considering that Van Gaasbeck had not moved to enforce a lien”; the Appellate Division noted that a plenary action was eventually commenced.

The appeal, Judiciary Law §475 applies only to attorneys and clients

Van Gaasbeck moved to renew and reargue, requesting that the Supreme Court “correct certain erroneous material factual findings set forth in [the June 2023 order],” specifically, that the court erred in finding that Van Gaasbeck was not an attorney of record and that no fee agreement existed.

The Appellate Division affirmed that branch of the order which denied Van Gaasbeck's motion to renew and reargue: (1) "no appeal lies from the denial of a motion to reargue; and (2) as to renewal, the Appellate Division used the word "party" even though both attorneys were nonpartys: "[W]hen a movant is not an aggrieved *party* seeking to change the legal effect of a trial court's order, there is no basis for a motion to renew a prior motion ruled upon in the party's favor."

It further noted the rule: "Aggrievement is a central and necessary component to invoke this court's jurisdiction, and *only an aggrieved party* may take an appeal to this court...see CPLR 5511) [at 1174]"---but, absent intervenors, if someone is not a party ab initio that someone cannot morph into party status. Nevertheless, the Appellate Division treated both attorneys as parties.

As noted, the record (450) evidences a clear meeting of the minds, there was an agreement, which is, nevertheless, entirely irrelevant because, as shown, below, under governing law, neither the Supreme Court nor the Appellate Division ever properly acquired jurisdiction over either attorney and concomitantly over their dispute.

Next, the Appellate Division noted that Van Gaasbeck did not assert a charging lien: "Van Gaasbeck did not seek any affirmative relief. Rather, he simply opposed the law firm's motion, which was denied by the court. Therefore, he is not aggrieved." Critically, as a matter of law, Van Gaasbeck could never have been aggrieved ab initio because, as a nonparty with no statutory failsafe to rescue him, a charging lien would have been an exercise in absolute futility leaving the Appellate Division with no jurisdiction over either nonparty's appeal.

Appellate authority to review fee disputes between counsel and client has its jurisdictional genesis in Judiciary Law §475: "From the commencement of an action, special or other proceeding in any court ... *the attorney who appears for a party has a lien* upon his or her client's

cause of action ... The court upon the petition of the client or attorney may determine and enforce the lien."
This statute allows attorney-client fee disputes to be resolved in the same action, under the same caption and index number. *Rodriguez v. City of New York*, 66 N.Y.2d 825 (1985). The statute, however, pertains exclusively to disputes between counsel and client, and between none other:

- "The summary proceeding authorized by §475 of the Judiciary Law is applicable only to disputes between attorney and client." *Maier v Maze Realty Co.*, 189 AD 339, 339 [1st Dept 1919]; *Marshall v Katsaros*, 152 AD2d 542, 543 [2d Dept 1989] ("In a proceeding pursuant to Judiciary Law §475, one who is not a client is not a proper party.")

- "An attorney's lien, of whatever nature, is valid only so long as there exists an unpaid balance owing to the attorney from the client." *Cooper v Cranin*, 104 AD2d 550, 550 [2d Dept 1984].

Ms. Santiago had already been fully paid so that there was no attorney-client dispute.

Disputes between attorneys and third parties may only be resolved by way of a plenary action

The warring attorneys not only stood as third parties in relationship to each other under §475 but they were also improperly engaging in motion practice, hence no jurisdiction:

- "Although an attorney may summarily enforce a charging lien against his or her client Shaw v. Shaw, 66 N.Y.S.2d 437), an attorney must commence a separate action to enforce the lien

against third parties who are not his or her clients." *Rebmann v Wicks,* 259 AD2d 972, 973 [4th Dept 1999].

- "[T]he proper practice is that an attorney's lien as against a defendant not his client must be enforced by action and not by motion."); Rebmann v. Wicks, 259 A.D.2d 972, 973 (4th Dep't App. Div. 1999) ("[A]n attorney must commence a separate action to enforce the lien against third parties who are not his or her clients." *Ie v Ageha Japanese Fusion, Inc.*, 15-CV-63 (JGK)(SN), 2018 WL 4935785, at *3 [SDNY Oct. 11, 2018].

Judiciary Law §475 only applies to the attorney of record

Although §475 neither specifically nor impliedly imposes any limitations on whether all attorneys in a case involving multiple counsel or whether only one attorney may seek relief against a client under §475, decisional authority has carved out the requirement that only the attorney of record may seek the aid of this statute:

- "The emphasized language [*the attorney who appears* for a party has a lien upon his client's cause of action has consistently been held to grant a lien to the attorney of record" (cites omitted). *Rodriguez v. City of New York*, 66 N.Y.2d 825 (1985); *Cataldo v Budget Rent A Car Corp.*, 226 AD2d 574, 574 [2d Dept 1996];

- *Itar-Tass Russian News Agency v Russian Kurier, Inc.*, 140 F3d 442, 450 [2d Cir 1998] ("The restriction provided by Rodriguez on who may be an 'attorney of record' for the purposes of Section 475 has been implemented on several occasions by the New York courts.");

- *Klien v. Eubank*, 87 N.Y.2d 459 (1996) (“under both the statute and our precedents, an attorney's participation in the proceeding *at one point* as counsel of record is a sufficient predicate for invoking the statute's protection”) citing Rodriguez v. City of New York, 66 N.Y.2d 825.”

22 NYCRR §520.11(c)

Further encumbering matters for Van Gaasbeck was 22 NYCRR §520.11(c), not mentioned in *Santiago* but rather in his brief:

“Association of New York counsel. No attorney may be admitted pro hac vice pursuant to paragraph (a)(1) of this section to participate in pre-trial or trial proceedings unless he or she is associated with an attorney who is a member in good standing of the New York bar, who shall be the attorney of record in the matter.”

Accordingly, both §475 and 22 NYCRR §520.11(c) ganged up to deny Van Gaasbeck any summary assistance.

Conclusion

The sum total of the foregoing rules of law required an in brevis jurisdictional dismissal with no more.

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Elliott Scheinberg *is a member of NYSBA Committee on Courts of Appellate Jurisdiction. He is the author of The New York Civil Appellate Citator (NYSBA, 3 vols., 2025) and Contract Doctrine and Marital Agreements in New York, (NYSBA, 2 vols., 5th ed., 2023). He is a Fellow of the American Academy of Matrimonial Lawyers.*

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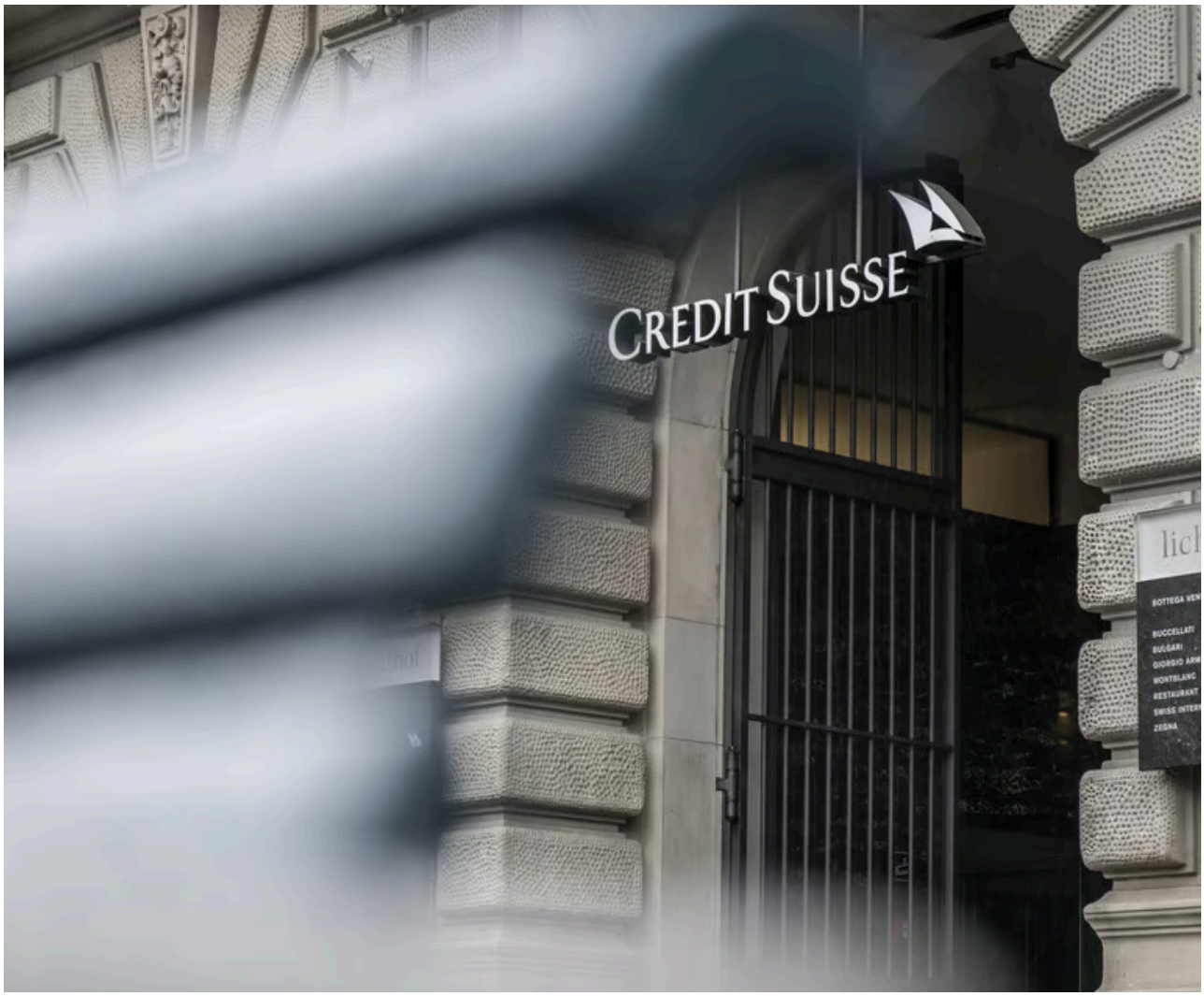

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