New York Law Journal

Elliott Scheinberg. Courtesy photo

EXPERT OPINION

Court of Appeals Sotto Voce Reverses Groundbreaking Jurisdictional Decision

The author writes "The subject of this discussion focuses on Ruisech v Structure Tone Inc., 42 NY3d 1061 [2024], a decision by the Court of Appeals regarding CPLR 5513(a) that addresses the issue of whose service of the order or judgment with notice of entry starts the 30-day limitation period when there are multiple parties, a jurisdictional issue with potentially devastating consequences."

March 20, 2025 at 11:49 AM

8 minute read

Court Administration

By Elliott Scheinberg

The subject of this discussion focuses on *Ruisech v Structure Tone Inc.*, 42 NY3d 1061 [2024], a decision by the Court of Appeals regarding CPLR 5513(a) that addresses the issue of whose service of the order or judgment with notice of entry starts the 30-day limitation period when there are multiple parties, a jurisdictional issue with potentially devastating consequences. *Ruisech* seems to tacitly reverse the groundbreaking, well-reasoned decision from the Second Department, *W. Rogowski Farm, LLC v. County of Orange*, 171 A.D.3d 79 [2d Dept 2019].

Statutes which regulate the right to appeal are strictly construed

Statutes which regulate the right to appeal are traditionally accorded a strict construction, *Austin & Co., Inc. v H.D. Reichert Const. Corp.*, 151 AD2d 851, 852 [3d Dept 1989]; *Reynolds v. Dustman*, 1 N.Y.3d 559, 560 (2003), so as not to deprive a defeated party of his right to appeal. *In re Downey's Will*, 275 AD 1008, 1008, 91 N.Y.S.2d 918 [3d Dept 1949]; also *Livingston v New York El. R. Co.*, 15 NYS 191, 192 [NY Gen Term 1891].

The party seeking to limit the time of another to take an appeal must be held strictly to the rules of practice; failure to comply therewith may not be overlooked. *Nagin v. Long Is. Sav. Bank*, 94 A.D.2d 710 [2d Dept 1983], lv. denied 63 N.Y.2d 603 [1984].

CPLR 5513(a) pre and post 1997 amendment

On Feb. 4, 2019, this column addressed "CPLR 5513(a): Whose Service of the Order or Judgment Starts the 30-Day Limitation Period?" We, now, revisit this jurisdictional concern. A brief historic overview of the issue is very helpful (see, E. Scheinberg, The New York Civil Appellate Citator [NYSBA (2d ed 2023) and (3d ed 2025)].

From, at least, 1858 (*Dobess Realty Corp. v City of New York*, 79 AD2d 348, 352 [1st Dept 1981]) to Jan. 1, 1997, caselaw held that "CPLR 5513(a) limit[ed] the time to appeal by requiring that an appeal as of right 'be taken within thirty days *after service upon the appellant* of a copy of the judgment or order appealed from and written notice of its entry.' " *Williams v Forbes*, 157 AD2d 837, 838 [2d Dept 1990].

Although then "CPLR 5513 did not explicitly designate the person who must serve the order or judgment being appealed from for purposes of commencing the 30-day limitation period running" in cases involving multiple parties (*Williams,* at 838-39), "5513 [wa]s construed to require *each* prevailing party to separately serve an order with notice of entry to commence the running of time within which the appeal limitations period became effective for each." *Blank v Schafrann*, 206 AD2d 771, 773 [3d Dept 1994]; *Williams* [at 838-39].

Several cases illustrated then-policy. The plaintiff, in *Maddox v City of New York*, 104 AD2d 430 [2d Dept 1984], moved to dismiss the appeal by the City of New York (City) for untimeliness. While another defendant had

served the order with notice of entry upon all of the parties, including the City, plaintiffs, however, failed to serve the appellant-City.
Held: “[A] [read: the] party moving to dismiss an adversary's appeal as untimely must have served upon that appellant a copy of the order or judgment appealed from, together with notice of its entry, in order to start the 30-day limitations period running.” Also, *Farrell v Stafford Mach. Corp.*, 205 AD2d 951 [3d Dept 1994]; *O'Brien v City of New York*, 6 AD2d 63 [1st Dept 1958] (“when a defendant seeks to appeal against a codefendant, “said defendant's time to appeal does not start to run until 30 days after service upon him of notice of entry of the judgment by the *prevailing* codefendant.”).

In 1996, CPLR 5513(a) was amended, (L.1996, c. 214, §1), effective Jan. 1, 1997, to provide: "An appeal as of right must be taken within thirty days after service by *a* party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry ... "

The statute still did not identify who needs to effect service in instances involving multiple parties – must it still be the prevailing party or is service by any party sufficient as long as the respondent has been properly made aware?

While many post-amendment cases track the language in CPLR 5513(a) that a “notice of appeal must be filed and served within 30 days after service *by a party* of the order and written notice of entry”, diligent research revealed no direct post-amendment case law on this point.

The Memorandum of the Bill Sponsor (A10407), and the Bill Jacket indicated that the amendment was “introduced at the request of the Chief Administrative Judge upon the recommendation of his Advisory Committee on Civil Practice” to resolve no more than the ambiguity as to whether the time to file a notice of appeal also begins to run when a court serves the judgment with notice of entry.

The 1977 amendment eliminated this concern by confirming that the clock begins to run only when service of the order or judgment with notice of entry is effected “by a party.”

In *W. Rogowski Farm, LLC v. County of Orange* the Second Department held that the 1997 Amendment means service by “any party to an action”

In *W. Rogowski Farm, LLC v. County of Orange*, 171 A.D.3d 79, 81 [2d Dept 2019], Justice Mark C. Dillon, writing for the Second Department, in his customary scholarly, didactic style, “clarified the meaning” of the 1997 amendment to mean “that service of the order or judgment with written notice of entry by *any* party upon the other parties to the action operates to commence the 30–day time to appeal with respect to not only the serving party, but all the parties in the action”:

“The amendment to CPLR 5513(a) expressly provides for the commencement of the time to appeal as running from service of the order or with written notice of entry by ‘a’ party. In interpreting statutes,

courts look first to the statutory text as the clearest indicator of legislative intent . . . (*Matter of Anonymous v Molik*, 32 NY3d 30; *Matter of New York County Lawyers' Association. v Bloomberg*, 19 NY3d 712, 721 . . . Where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning (*State of New York v Patricia II*, 6 NY3d 160, 162 . . .).
With that all in mind, the language of CPLR 5513(a) as to who serves notice of entry is not limited to the 'prevailing party,' or to 'the appealing party,' or to 'the party seeking to limit an adversary's appellate time.' Rather, 'a' party, which is unrestricted, necessarily refers to 'any' party to an action.

As a result, the service of an order or judgment with written notice of entry commences the 30-day time to appeal as to not only the party performing the service, but as to all other parties as well."

Ruisech v Structure Tone Inc., has *Rogowski* effectively been reversed

Ruisech v Structure Tone Inc., 42 NY3d 1061 [2024] involved a personal injury at a construction site following which the plaintiff commenced an action pursuant to Labor Law §§200, 241(6) against multiple defendants. The Court of Appeals, without mentioning *Rogowski,* applied pre-*Rogowski* case law, seemingly reversing *Rogowski* sub silencio:

"Plaintiffs moved for leave to appeal before this court 31 days after defendant Structure Tone Inc. (Structure Tone) served plaintiffs by filing on the trial court's NYSCEF docket.

Plaintiffs' motion to this court was therefore untimely as to structure tone and, consequently, the portion of the motion to dismiss the appeal as against Structure Tone should be granted (42 N.Y.3d 1030 ... [2024] [decided today]). *However, as to defendants 200 Park, LP (200 Park), Tishman Speyer Properties, L.P. (Tishman), and CBRE, Inc. (CBRE), the motion was timely.*"

This conclusion stresses logic because service was on NYSCEF, which was upon everyone at the same time.

Furthermore, there is no question that the Court of Appeals was aware of *Rogowski* as it was twice raised in the appellate briefs to the court regarding this point of law. It is first raised in the "Brief for Defendant/Third-Party Defendant-Respondent CBRE, Inc.," p. 18, quoting the above language.

It is next cited in the "Brief for Defendant/Second Third-Party Plaintiff-Respondent Structure Tone Inc.," p. 23. FN6: "It is immaterial that Defendants 200 Park and Tishman Speyer subsequently served Notice of Entry on Nov. 23, 2022, or that Defendant CBRE did not serve notice of entry. (Pl. App. Brf. 16-17). Structure Tone's service was sufficient to trigger the 30-day deadline on behalf of all parties. See generally *W. Rogowski Farm, LLC v. County of Orange*, 171 A.D.3d 79, 87-88 [2d Dept. 2019]."

Rogowski is also cited in two other briefs albeit for the rule that CPLR 5513 is jurisdictional, which every judge and court attorney knows and would likely not have triggered any further reading by the court. Plainly, at the very least, the court was alerted to *Rogowski*. It remains a mystery why the court did not address the sound rule of law in *Rogowski* while plainly tackling the issue and reversing *Rogowski.*

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