

Expert Opinion

## CPLR 5511: The Varied Implications of Jurisdictional Aggrievement, Part II

Part II examines: (i) assignment of judgment or rights; (ii) individual and corporate aggrievement; (iii) standing; (iv) third-party standing, organizational standing; (v) non aggrieved party, CPLR 5501(a), alternative grounds for affirmance; (vi) leave to replead, refile;(vii)“There is nothing particularly novel about repleading a dismissed complaint in Supreme Court to cure a defect discovered on appeal” where the Appellate Division dismissed without prejudice; and (viii) denial of a motion to renew without prejudice is appealable.

April 19, 2026 at 01:56 PM By **Elliott Scheinberg**



Elliott Scheinberg. Courtesy photo

### Assignment of Judgment or Rights

An assignment, without reservation, is generally a transfer of one's whole interest. The assignee takes all the right, title and interest possessed by the assignor. *Trans-Resources, Inc. v. Nausch Hogan and Murray*, 298 AD2d 27 [1st Dept 2002]. An appellant who had no interest in the judgment at the time of the order or during the statutory period for filing a notice of appeal is not aggrieved. That the judgment was again assigned to the appellant during the pendency of the appeal does not confer jurisdiction nunc pro tunc on the Appellate Division.

*Jacob and Valeria Langeloth Foundation v. Dickerson Pond Associates*, 149 A.D.2d 408 [2<sup>nd</sup> Dept 1989]; *Advanced Distribution Systems, Inc. v. Frontier Warehousing, Inc.*, 27 A.D.3d 1151 [4<sup>th</sup> Dept 2006]. Note the distinction between this situation and the intervenor who becomes involved during the litigation who thus becomes a party to the underlying proceeding for all purposes, including aggrievement. *Dolomite Products Co., Inc. v. Town of Ballston*, 151 AD3d 1328 [3d Dept 2017].

### **Individual and Corporate Aggrievement**

Individual and corporate rights of aggrievement are distinct. In *Carollo v. N. Westchester Hosp. Ctr.*, 5 AD3d 715 [2d Dept 2004], an action for medical malpractice and wrongful death, the plaintiffs were granted leave to add David T. Ennis, M.D., P.C., the professional corporation under which the defendant Dr. David Ennis conducted his medical practice, as a defendant. Dr. Ennis appealed. The order affected only the rights of the corporation, and not Dr. Ennis' individual rights. He was thus not aggrieved and could not appeal. (Also, *LaRose v. Cricchio*, 20 NYS3d 169 [2d Dept 2015]).

### **Standing**

Standing is "a party's right to make a legal claim or seek judicial enforcement of a duty or right." Black's Law Dictionary [10th ed. 2014]. One held to lack standing is aggrieved and has standing to appeal that finding. *Levitt & Kaizer v. Charles*, 150 AD3d 478 [1st Dept 2017].

As noted in Part I, 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]; *Auerbach v. Bennett*, 64 A.D.2d 98, 104 [2d Dept 1978], *affd in relevant part, mod on other grounds* 47 N.Y.2d 619 [1979].

In *Three Amigos SJL Rest., Inc. v. 250 W. 43 Owner LLC*, 144 AD3d 490 [1st Dept 2016], the commercial tenants were granted a Yellowstone injunction. The current landlord-defendants were neither parties to the action when the injunction was issued nor when the former landlord filed the

notice of appeal. Nevertheless, the Appellate Division, sua sponte, deemed the notice of appeal to be a notice of appeal by the current landlords because they were aggrieved.

A candidate of one political party has no standing to challenge the internal affairs and operating functions of another political party in its designation of candidates. *Lavell v. Baker*, 153 AD3d 1135 [4th Dept 2017]; *Hardwick v. Ward*, 109 AD3d 1223 [4th Dept 2013].

*In re Gena S.*, 101 AD3d 1593 [4th Dept 2012], the mother's parental rights had been terminated and, therefore, lacked standing to participate in the permanency hearing and to appeal any of the orders.

### **Third-Party Standing, Organizational Standing**

Generally, a party has no standing to raise the legal rights of another, *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761 [1991]. The concept of third-party standing allows a third party who has suffered an "injury in fact" to assert the constitutional rights of others. *New York County Lawyers' Ass'n [NYCLA] v. State*, 294 AD2d 69 [1st Dept 2002], citing *Powers v. Ohio*, 499 U.S. 400 [1991]:

Three factors... are relevant in determining whether the principle of third-party standing applies in a particular case... (1) some substantial relationship between the party asserting the claim and the right holder, (2) the impossibility of the right holder asserting his own rights, and (3) the need to avoid a dilution of the parties' constitutional rights... *NYCLA* was also held to have organizational standing, citing *Grant v. Cuomo*, 130 A.D.2d 154 [1987], *affd.* 73 N.Y.2d 820 [1988]; *Urban Justice Ctr. v. Silver*, 66 AD3d 567 [1st Dept 2009].

### **Nonaggrieved Party, CPLR 5501(a), Alternative Grounds for Affirmance**

CPLR 5501(a)(1) provides that "an appeal from a final judgment brings up for review any non-final judgment or order which necessarily affects the final judgment, including any which was adverse to the respondent on appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal..."

In *Parochial Bus Sys., Inc. v. Bd. of Educ. of City of New York*, 60 NY2d 539, 546 [1983], the Court of Appeals emphasized: "5501(a)(1) permit[s] a broad scope of review of any determinations that were 'adverse to the respondent... This rule permits a respondent to obtain review of a determination incorrectly rendered below where, otherwise, he might suffer a reversal of the final judgment or order upon some other ground. Hence, the successful party, who is not aggrieved... is entitled to raise an error made below, for review by the appellate court, as long as that error has been properly preserved and would, if corrected, support a judgment in his favor."

Although a respondent's cross-appeal was dismissed because it was not aggrieved, the Appellate Division, nevertheless, considered the contentions therein as alternative grounds for affirmance of the order. *In re Tehan*, 144 AD3d 1530 [4th Dept 2016]. (Also *Nieves v. Martinez*, 285 AD2d 410 [1st Dept 2001]).

### **Leave to Replead, Refile**

A party is not aggrieved from an order which dismisses a cause of action or a motion with leave to replead or refile. *Meachum v. Outdoor World Corp.*, 273 A.D.2d 208 [2nd Dept 2000]; *Rubiano v. Kelly*, 136 AD3d 780 [2d Dept 2016]. A grant of leave to replead is not final as the party retains the opportunity to cure the defects in the pleading. *Meachum v. Outdoor World Corp.*, 273 A.D.2d 208[2d Dept 2000]; *Sabeno v. Mitsubishi Motors Credit of Am., Inc.*, 20 A.D.3d 466, 468[2d Dept 2005].)

A party who accepts the benefit of leave to replead by actually filing an amended complaint has abandoned/waived any right to appeal the dismissal order. *Hawthorne v. O'Keefe*, 53 AD2d 534, 535 [1st Dept 1976] ("Though plaintiff filed notice of appeal, he elected thereafter to re-plead, thus automatically electing to abandon that appeal by acceptance of the terms of the order.").

In *Beary v. Schwimmer*, 44 AD2d 833, 833 [2d Dept 1974], the Supreme Court granted that branch of a motion by the defendant which was to dismiss the first cause of action in the complaint on the ground it did not state a cause of action (CPLR 3211(a)(7)). The order, however, granted appellant leave to replead. After filing his notice of appeal the appellant took advantage of the leave to replead, which precluded him from seeking review of the order.

The motion court, in *Wilde v. Caron Corp.*, 20 AD2d 931, 931 [2d Dept 1964], gave the appellant the alternative to appeal the order or to replead: "Since plaintiff did not appeal directly from that order within the time prescribed, and since she availed herself of the leave to replead, that order is not reviewable on this appeal from the final judgment."

"There is nothing particularly novel about repleading a dismissed complaint in Supreme Court to cure a defect discovered on appeal" where the Appellate Division dismissed without prejudice *Favourite Ltd. v. Cico*, 42 NY3d 250, 253 [2024] "concerned the proper scope of the trial court's discretion to grant leave to amend a complaint under CPLR 3025 (b)."

The Appellate Division dismissed the plaintiffs' second amended complaint in its entirety for lack of standing, leaving only the defendants' counterclaims pending in Supreme Court. "The Supreme Court granted the plaintiffs leave to file a third amended complaint... The Appellate Division sided with the defendants, holding that Supreme Court had no discretion to grant leave to amend a complaint that the Appellate Division had dismissed." The Court of Appeals reversed:

“When an appellate court remits a case to the trial court, further proceedings in the trial court must be consistent with the appellate court remittitur (*Sayre v. People*, 128 N.Y. 622, 622-623, 27 N.E. 1079 [1891]; *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255, 16S.Ct. 291, 40L.Ed. 414 [1895]; see also *Litchfield Const. Co. v. City of New York*, 219 App. Div. 369, 370, 220 N.Y.S. 6 [1st Dept. 1927] [“upon remittitur..., judgment must be entered in strict accordance therewith”]). In some cases, the only action consistent with the appellate court mandate is for the trial court to terminate the action. For example, if a complaint were dismissed with prejudice by the appellate court, it would be inconsistent with that order for the trial court to entertain a CPLR 3025 (b) motion.

“Here, however, the Appellate Division dismissal of the second amended complaint due to lack of standing or capacity was without prejudice (*Landau v. LaRossa, Mitchell & Ross*, 11 N.Y.3d 8, 12-14, 862 N.Y.S.2d 316, 892 N.E.2d 380 [2008]).”

“The mere fact that a complaint is dismissed by an appellate court does not generally imply that the trial court lacks such power. Indeed, we have regularly contemplated the possibility that plaintiffs might replead claims at the trial court after they are dismissed by our court (e.g. *A.J. Temple Marble & Tile, Inc. v. Union Carbide Marble Care, Inc.*, 87 N.Y.2d 574, 585, 640 N.Y.S.2d 849, 663 N.E.2d 890 [1996]; *Abrams v. Donati*, 66 N.Y.2d 951, 953, 498 N.Y.S.2d 782, 489 N.E.2d 751 [1985]; *Sanders v. Schiffer*, 39 N.Y.2d 727, 384 N.Y.S.2d 769, 349 N.E.2d 869 [1976]). There is nothing particularly novel about repleading a dismissed complaint in Supreme Court to cure a defect discovered on appeal.”

### **Denial of a Motion to Renew Without Prejudice is Appealable**

“The inclusion of “without prejudice” does not render an order non-appealable.” *B and H Florida Notes LLC v. Ashkenazi*, 172 AD3d 433, 434, 100 N.Y.S.3d 220 [1st Dept 2019], *affd*, 182 AD3d 525 [1st Dept 2020]. *Nationstar Mtge., LLC v. Rao*, 202 AD3d 980 [2d Dept 2022] (“an order that denies a motion without prejudice to renew is appealable.”); *Morri N.Y. Foods Corp. v. DeFilippo*, 34 AD3d 223, 224 [1st Dept 2006]. (In *Okin v. White Plains Hosp.*, 97 AD2d 399, 467 N.Y.S.2d 225 [2d Dept 1983] the Second Department reversed precedent cases now holding that an order denying a motion without prejudice to renew is appealable).

Part III reviews: (i) CPLR 5511, default; (ii) default, admissions, burden of proof; (iii) Default by disruptive behavior; (iv) CPLR 321, the Second Department, default by not attending the trial, walking out of the courtroom; (v) The First and Third Departments hold that a party’s failure to appear “may not “automatically” or “not necessarily” “result in a default,” where the absence was explained and counsel was authorized to proceed; (vi) The Fourth Department generously holds that there is no default where a party does not appear but counsel appeared and participated in

the proceedings, including actions in the Family Court; (vii)22 NYCRR 202.27; (viii) conditional orders, CPLR §§3126, 5015(a)(1); and (ix) subject of contest.

**Elliott Scheinberg** *is the author of The New York Civil Appellate Citator, [NYSBA 4<sup>th</sup> ed., 3 vols, TBA2026] and of Contract Doctrine and Marital Agreements in New York, [NYSBA, 5th ed., 2 vols, 2023]. He is a Fellow of the American Academy of Appellate Lawyers and the American Academy of Matrimonial Lawyers. He is a member of the Committee on Courts of Appellate Jurisdiction (NYSBA) and of NYSBA's Family Law Executive Committee.*

**Page printed from:** <https://www.law.com/newyorklawjournal/2026/04/19/cplr-5511-the-varied-implications-of-jurisdictional-aggrievement-part-ii/print/>

---

**NOT FOR REPRINT**

© 2026 ALM Global, LLC, All Rights Reserved. Request academic re-use from [www.copyright.com](http://www.copyright.com). All other uses, submit a request to [asset-and-logo-licensing@alm.com](mailto:asset-and-logo-licensing@alm.com). For more information visit [Asset & Logo Licensing](#).