

Expert Opinion

CPLR 5511: The Varied Implications of Jurisdictional Aggrievement, Part III

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.

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Elliott Scheinberg. Courtesy photo

CPLR 5511, Default

An issue is not actually litigated if, for example, there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading or even because of stipulation. *Krause v. Krause*, 282 N.Y. 355 [1940]. A party cannot appeal from an order entered upon default, the proper procedure is to move to vacate the default and, if necessary, appeal from the denial of that motion. CPLR 5701(a)(3); *Sholes v. Meagher*, 100 N.Y.2d 333 [2003]. *Menghi v. Trotta-Menghi*, 162 AD3d 771 [2d Dept 2018].

When it is unclear whether an order was granted on default, remittal is necessary to the issuing court for clarification. *Glickman v. Sami*, 146 A.D.2d 671 [2nd Dept 1989].

Where a party contests the application for entry of a default judgment, CPLR 5511 is inapplicable and the judgment predicated upon the party's default is appealable. *Achampong v. Weigelt*, 240 A.D.2d 247 [1st Dept 1997]; *Cole-Hatchard v. Eggers*, 132 AD3d 718 [2d Dept 2015]; *Robert Marini Bldr. Inc. v Rao*, 263 AD2d 846 [3d Dept 1999]; *Spano v. Kline*, 50 AD3d 1499 [4th Dept 2008].

Default, Admissions, Burden of Proof

The granting of a default judgment does not impose a “mandatory ministerial duty” upon a court. *Gagen v. Kipany Productions Limited.*, 289 A.D.2d 844 [3rd Dept 2001]. While a default admits all factual allegations of the complaint and all reasonable inferences therefrom, it does not admit legal conclusions which are reserved for the court's determination. *Silberstein v. Presbyt. Hosp. in City of N.Y.*, 96 AD2d 1096 [2d Dept 1983]; *McGee v. Dunn*, 75 A.D.3d 624 [2nd Dept 2010].

Plaintiff must present prima proof of entitlement to the relief, *Walley v. Leatherstocking Healthcare, LLC.*, 79 A.D.3d 1236 [3rd Dept 2010]; he must meet the burden of stating a viable cause of action. *Paulus v. Christopher Vacirca, Inc.*, 128 AD3d 116 [2d Dept 2015], without which the party moving for judgment is not entitled to the relief, even on default, *Nationstar Mtge., LLC v. Hilpertshauser*, 156 AD3d 1052 [3d Dept 2017], and the court may sua sponte dismiss the complaint upon the motion for a default judgment [*Walley*].

An order entered upon an uncontested inquest after a default is not reviewable on appeal. *Pincus v. Family Dental Services*, 142 AD2d 561 [2d Dept 1988], however, an order from a contested inquest is reviewable such as in an instance of an excessive award. “An unwarranted and excessive award after inquest will not be sustained, as to do otherwise would be tantamount to granting the plaintiffs an open season at the expense of a defaulting defendant.” *Quicksilver Capital, LLC v. Dixon Fin. Services, LLC*, 242 AD3d 916, 917 [2d Dept 2025].

Default by Disruptive Behavior

Disruptive behavior in the courtroom constitutes a default. *Kondratyeva v. Yapi*, 13 A.D.3d 376 [2nd Dept 2004]. In *Seltzer v. Altman*, 2026 NY Slip Op 00929 [2d Dept 2026], the Appellate Division

upheld a finding of default based on the defendant's disruptive behavior in the courtroom and the court's inquest on the issue of equitable distribution in his absence. *McConnell v. Montagriff*, 233 A.D.2d 512, 513 (2d Dept 1996) affirmed a finding of default where "the father's conduct precipitated his removal from the courtroom."

CPLR 321, the Second Department, default by not attending the trial, walking out of the courtroom

CPLR 321 provides, in pertinent part: "A party, other than one specified in section 1201 of this chapter, may prosecute or defend a civil action in person or by attorney..."

The Second Department has affirmed findings of "willing default" where a party has walked out of the courtroom: *Bottini v. Bottini*, 164 A.D.3d 556 [2d Dept 2018] ("she attended the first day of trial and then voluntarily chose not to attend the remainder of the trial."); *Graham v. Rawley*, 140 A.D.3d 765 (2d Dept 2016) ("she voluntarily exited the courtroom during the pendency of the custody hearing and failed to return"); and *Pinzur v. Pinzur*, 59 A.D.3d 607 [2d Dept 2009] ("The judgment from which the husband appeals was entered on default, since he left the courtroom as the trial commenced.")

The First, Third and Fourth Departments have ruled differently.

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.

Yakov T. v. Tracy S., 227 AD3d 633, 633 [1st Dept 2024]: Although a party's failure to appear at the hearing may not automatically result in a default, particularly where the absent party had an attorney who appeared, explained the client's absence, and stated that he or she was authorized to proceed in the party's absence, this is not the case here (Matter of Aaron C. [Grace C.], 105 A.D.3d 548, 549, 963 N.Y.S.2d 208 [1st Dept. 2013]). The record shows that, although the mother's attorney was present on June 7, she informed the court that she had not been in contact with the mother, save for a single call the prior day at which time the mother told her that she would not be appearing in court the next day, and requested to be relieved.

"To be sure, 'a party's failure to appear does not automatically result in a default'... particularly where counsel appears upon the absent party's behalf and offers an explanation for his or her failure to attend." *Matter of Derek P. v. Doris Q.*, 92 AD3d 1103, 1105 [3d Dept 2012].

Freedman v. Horike, 107 A.D.3d 1332 [3d Dept 2013]: "The father's counsel stated that, while the father had elected not to appear, counsel had not informed him that his appearance was necessary. Family Court did not challenge the accuracy of that representation and, moreover,

made no effort to reach the father telephonically or by other means. Under these circumstances, Family Court erred in holding that the father's nonappearance constituted a default."

Matter of Linger v. Linger, 150 A.D.3d 1444 [3d Dept 2017]: "[T]he mother's counsel appeared and advised Family Court that he had communicated with the mother several times by phone and email, that she was then at a considerable distance in either Florida or South Carolina, and that she had a limited income. The mother's counsel further advised the court relative to the mother's position in the matter and participated in the proceedings by consenting to the requested relief, that is, to permit the child to remain temporarily with the father. Counsel also unsuccessfully requested a continuance, and ultimately advised that he did not have authority to consent to a final order of permanent physical placement to the father. In light of these circumstances, we find that the mother was not in default and that the order is appealable."

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.

Reardon v. Krause, 219 A.D.3d 1710, 196 N.Y.S.3d 829 [4th Dept 2023]: "Subject to limited exceptions not applicable here, a party 'may prosecute or defend a civil action in person or by attorney,' including such an action in Family Court (CPLR 321(a) (internal emphasis); Family Ct Act §165(a)117; *Matter of Kwasi S.*, 221 A.D.2d 1029, 1030, 634 N.Y.S.2d 579 [4th Dept 1995]; Merrill Sobie, Prac. Commentaries, McKinney's Cons Laws of NY, Family Ct Act §165). Thus, a party's 'failure to appear [in person] at the hearing on [a] petition does not automatically constitute a default' (...generally CPLR 3215 (a))... Nonetheless, a party's failure to appear may, under certain circumstances, constitute a default, particularly where the party's attorney, although present, declines to participate in the hearing in the party's absence and instead elects to stand mute."

The mother, in *Reardon*, was told by the court that she needed to appear in court because "[the court] needed to see her in order to adequately assess her credibility." The court denied her request for an adjournment and proceeded to inquest: "Inasmuch as the mother's attorney, although present, thereafter declined to participate in the inquest in the mother's absence and instead elected to stand mute, we conclude that the court properly determined that the mother's failure to appear in the manner required constituted a default."

Matter of Jayden M., 237 A.D.3d 1560, 231 NYS3d 305 [4th Dept 2025]: "As we previously suggested... the other Appellate Division departments have applied the same rule." [Editor's note: this statement is inconsistent with the cases from the other Departments].

The father's attorney, having explained that he was not authorized to proceed in the father's absence, declined to participate in the fact-finding hearing and instead elected to stand mute... Under these circumstances, as the court indicated in the order and contrary to the father's

contention, we conclude that the order was entered upon the father's default... We also note that the record supports the additional conclusion that the father willfully failed to appear at the fact-finding hearing.

22 NYCRR 202.27

Dismissal of an action for failure to prosecute is proper where, on the scheduled date of trial, a party either fails to appear and proceed or is not ready to proceed, such as refusing to select a jury, 22 NYCRR 202.27[b]. This constitutes a default. *Community Network Serv., Inc. v. Verizon New York, Inc.*, 48 AD3d 249 [1st Dept 2008]. Absence of an order of dismissal under 22 NYCRR 202.27(b) does not mean that there is no default. *Saunders v. Riverbay Corp.*, 17 AD3d 137 [1st Dept 2005].

An attorney's nonappearance at a preliminary conference does not remove the order out of the realm of a default and a motion to vacate is required. *Kelly v. Long Is. Coll. Hosp.*, 199 AD2d 244 [2d Dept 1993].

Conditional Orders, CPLR §§3126, 5015(a)(1)

A default order entered pursuant to CPLR 3126 is directly appealable because it was made on notice enabling the defaulter to contest the motion. An appeal is the sole remedy; the defaulter may not proceed by way of CPLR 5015. "A 5015(a)(1) motion would effectively grant that party an extension of time in which to appeal, a result anathema to the legislative intent of CPLR 5513." *Pinapati v. Pagadala*, 244 AD2d 676 [3d Dept 1997]; *Clarke v. United Parcel Serv., Inc.*, 300 AD2d 614 [2d Dept 2002]. Were a 5015(a)(1) motion permissible, the recalcitrant party would be allowed to relitigate the very issue previously contested and decided, to wit, whether there was an excusable failure to comply with the disclosure orders. *Pergamon Press, Inc. v. Tietze*, 81 AD2d 831 [2d Dept 1981].

Where a pleading is stricken based on a self-executing conditional order, a motion to vacate the conditional order pursuant to CPLR 5015(a)(1) is required, not an appeal from the conditional order. But where a noncompliant party has defaulted on a motion seeking a conditional order to strike its pleading or had consented to the conditional order before failing to comply with it, that party has had no opportunity to offer a reasonable excuse for the default or a meritorious claim or defense, the additional prerequisite to relief under CPLR 5015(a)(1). Accordingly, an appeal is not only expressly precluded by CPLR 5511, it also would be an empty exercise, given the lack of any record on those issues. *Lauer v. City Of Buffalo*, 53 AD3d 213 [4th Dept 2008]. Lauer further underscored:

“[E]ven where a motion for a conditional order to strike a pleading has been opposed, if the motion is granted and the conditional order by its terms is self-executing upon the failure to comply with its conditions, there likewise has been no opportunity to present an excuse for that default or a meritorious claim or defense, and thus there likewise is no record on those issues.”

Subject of Contest

A default by the appealing party notwithstanding, an appeal from a judgment brings up for review those “matters which were the subject of contest” below. *Bank of New York Mellon Tr. Co., N.A. v Sukhu*, 163 AD3d 748 [2d Dept 2018], citing *James v. Powell*, 19 N.Y.2d 249, 256 n. 3 [1967].

In *Feldman v. Teitelbaum*, 160 A.D.2d 832 [2nd Dept 1990], the appellant defaulted in answering the complaint but, during the litigation, moved to dismiss the complaint, that motion was the subject of contest and hence appealable. In *Tun v. Aw*, 10 A.D.3d 651 [2nd Dept 2004], counsel appeared at a hearing without the client but refused to participate. Counsel’s request for an adjournment was denied. The client defaulted but the application for an adjournment was held to be the subject of contest. [It is noteworthy that the motion for the adjournment was not made on notice, which is not appealable as of right under CPLR 5701(a)(2).]

In *O’Donnell v. O’Donnell*, 80 A.D.3d 586 [2nd Dept 2011], plaintiff moved to confirm the referee's report. Defendant neither moved to reject the report (CPLR 4403) nor did he oppose plaintiff's motion to confirm the report. The Supreme Court confirmed the report. Defendant could appeal from portions of the judgment since the underlying issues were the “subject of contest” at the hearing.

On appeal, defendant could not, however, raise the same issues in the context of objections to the referee's report. By failing to challenge the referee’s errors in the report before Supreme Court, he waived his right to raise those objections on appeal.

Subject of contest includes anything that had been contested below: (1) denial of a motion to appear by either mail or telephone, *In re Sacks v. Abraham*, 114 AD3d 799 [2d Dept 2014]; *Rossi v. Spano*, 26 AD3d 388 [2d Dept 2006]; (2) whether Family Court had personal jurisdiction over the personal representatives of the decedent's estate, *Constance P. v. Avraam G.*, 27 AD3d 754 [2d Dept 2006]; (3) failure to state a cause of action, *Smith v. Howard*, 113 AD3d 781 [2d Dept 2014]; (4) motion to withdraw as counsel, *Sarlo-Pinzur v. Pinzur*, 59 AD3d 607 [2d Dept 2009]; (6) waiver of the right to counsel, *Graham v. Rawley*, 140 AD3d 765 [2d Dept 2016]; etc.

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