APPELLATE PRACTICE PITFALLS: BEYOND THE BASICS, ANTICIPATING PROBLEMS

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General Commentary on Article 55, Prof. David D. Siegel

“Article 55 supplies the procedural instruction for the taking and perfecting of appeals, but it does so only after leading off, in CPLR 5501, with “scope of review”, a subject more substantive than procedural in its impact. “Reviewability”, as scope of review is sometimes called, is easily confused with “appealability”, which determines what dispositions may be appealed.” Judgments and orders appealable to the Court of Appeals are the subject of Article 56; those appealable to the appellate division, Article 57. Once an appeal is taken, however, on the authority of whichever of the two articles is in point, the question of what will be reviewed by the appellate court is determined by the “scope of review” instruction of CPLR 5501.”

Appealability = the right to be in the Court of Appeals, “depends on the scope of the Court’s power to review” [what dispositions may be appealed].

Reviewability = the authority of the Court of Appeals once the appeal is before the Court to consider the issues (Cohen and Karger, Op. cit., pp. 4, 447).

“Reviewability” and “Appealability” Distinguished.
Prof. David Siegel, Practice Commentaries, C5501:2

“Article 57 of the CPLR sets forth the list of judgments and orders that may be appealable to the appellate division. Article 56 does the same for the Court of Appeals. But the fact that a given case may be appealed does not automatically insure the appellant review of the point that aggrieves her. ‘Reviewability’, as we may call it, is not always coextensive with ‘appealability’. Examples of where the two diverge are likely to involve the Court of Appeals more than any other court, because of the court's narrow powers of review. An appeal may be taken to the Court of Appeals, for example, from an appellate division order finally determining an action, upon a showing that two appellate division justices dissented on a point of law. On that appeal, the Court of Appeals can review any question of law. But because the Court of Appeals lacks the general power to review findings of fact, the mere presence of the case before the Court of Appeals, brought there readily enough under the “appealability” standards of CPLR 5601, will not earn review of the fact findings because of the restrictions imposed on ‘reviewability’ by subdivision (b) of CPLR 5501.

In rare instances the question of whether a given case is ‘appealable’ to the Court of Appeals may even turn on whether or not the point it presents is ‘reviewable’. See, e.g., Patron v. Patron, 40 N.Y.2d 582, 388 N.Y.S.2d 890 (1976). Patron was decided when, under CPLR 5601(a), a showing that the appellate division had merely ‘modified’ the lower court's judgment could set the stage for an appeal to the Court of Appeals. The modification option was later removed--see Commentary C5601:3 on CPLR 5601 below--but the case remains a good instruction on the occasional interplay between ‘appealability’ and ‘reviewability’.”
REVIEWABILITY

Court of Appeals May Not Review Question of Weight of Evidence But It May Review Issue of Sufficiency of the Evidence


Defendant argues that we have no power to review the Appellate Division's decision because it resolved a question of fact, not a question of law (CPLR 5501[b] ). We disagree, and hold that the decision is reviewable.

[1] The problem arises because the Appellate Division opinion says that Supreme Court's order is “modified on the law,” but also says that “the jury's award of damages is against the weight of evidence”...A “weight of the evidence” determination is a factual one that we have no power to review (Cohen v. Hallmark Cards, 45 N.Y.2d 493, 498–500, 410 N.Y.S.2d 282 [1978] ).

The result reached shows that in reality the Appellate Division ruled on the sufficiency, not the weight, of the evidence. The Appellate Division held that the new trial it ordered “shall be on damages from September 1998 to April 2000,” thus prohibiting any award of damages for a later time...In effect, the Appellate Division directed a verdict against plaintiffs as to post-April 2000 damages—a ruling of law that this Court is empowered to review (Cohen, 45 N.Y.2d at 497–498, 500, 410 N.Y.S.2d 282; Karger, Powers of the New York Court of Appeals § 77[c], at 475–476 [3d ed] ).

Settlement of the Record
Every appellant has a clear legal right to settlement of the record.1

CPLR 5601(c), JUDGMENT ABSOLUTE

CPLR 5601. Appeals to the court of appeals as of right
(a) Dissent. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:
   1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and
   2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

(c) From order granting new trial or hearing, upon stipulation for judgment absolute. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

(d) Based upon nonfinal determination of appellate division. An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance, from a final determination of an administrative agency or from a final arbitration award, or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment, determination or award and which satisfies the requirements of subdivision (a) or of paragraph one of subdivision (b) except that of finality.

Lacking finality, an order of the Appellate Division granting a new trial typically would not be appealable to this Court, but plaintiff has stipulated that, upon affirmance, judgment absolute shall be entered against her, permitting an exceptional appeal as of right (CPLR 5601[c] ).
Absent prejudice, CPLR 3025 authorizes amendment to pleadings “at any time.” However, the procedural posture of this case prohibits our addressing plaintiff’s motion to amend. On an appeal taken pursuant to stipulation for judgment absolute, the only matter this Court may consider is whether the Appellate Division erred as a matter of law in granting the new trial (Matter of Wilcox v. Zoning Bd. of Appeals, 17 N.Y.2d 249, 254, 270 N.Y.S.2d 569; Karger, Powers of the New York Court of Appeals § 47, at 293 [3d ed.]). After the stipulation, which confines our review to the question whether the Appellate Division's reversal was proper, the time to amend had passed.

Weiman v. Weiman, 295 N.Y. 150 (1946):
A judgment entered upon a stipulation for judgment absolute is “** founded upon the agreement of the parties that a certain result should follow the decision of this court upon the questions of law presented to it by the record in court.’ Roberts v. Baumgarten, 126 N.Y. 336, 341. It is “** in effect a stipulation for judgment by consent in case of affirmance.' Christensen v. Morse Dry Dock & Repair Co., 243 N.Y. 587; Canfield v. Elmer E. Harris & Co., 252 N.Y. 502, 505. Where, as in this case, the reversal is upon the facts as well as the law, any evidence which supports the determination of the Appellate Division would require an affirmance by this court. Curcio v. City of New York, 275 N.Y. 20...

Prof. David Siegel, Practice Commentaries, C5615:1.
Disposition in Judgment Absolute Situation.
In three instances in New York appellate practice there is the procedure called the stipulation for judgment absolute. In two of them, the appellate division has made an order granting a new trial and the party whose lower court judgment is lost because of that order wants to appeal the order to the Court of Appeals. (The third instance involves a similar new trial order, but on appeal from an appellate term to the appellate division. See CPLR 5703[a].) The order violates one of the cardinal rules of Court of Appeals jurisdiction, however, in that it's nonfinal. It may nevertheless be taken up, but only if the appellant--the party who would take it to the Court of Appeals--stipulates that judgment absolute may be entered against her if the Court of Appeals determines that the appellate division was correct, or merely within its prerogatives, in ordering a new trial.

In one of these two instances the appeal may be taken to the New York Court of Appeals as of right. That's where the action originated in one of the superior trial courts or in an administrative agency. CPLR 5601(c). In the other instance, it originated in one of the lower trial courts and in that event, even with the judgment absolute stipulation, the appeal to the Court of Appeals lies only with the permission of the appellate division. CPLR 5602(b)(2)(iii). The pitfalls of the judgment absolute procedure in both instances were discussed earlier--see Commentaries C5601:5 and C5602:3--with the warning that the procedure should
be used, if at all, only when a question of law is involved, and hardly ever even in that instance.

Never should it be used if the appellate division ordering of a new trial can be justified on the basis either of fact findings or the exercise of discretion. If the Court of Appeals finds it supportable on either basis, the result that this procedure decrees and which CPLR 5615 confirms is a judgment absolute against the appellant: no restored judgment and no new trial, either.

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[S]ubdivision (c) of CPLR 5601 offers a way to appeal an appellate division order granting a new trial, or affirming an order granting a new trial...There are few if any instances in which the stipulation procedure of CPLR 5601(c) should be used. It is a perilous device whose potential is at best unpredictable. In the following example we will have the plaintiff in the role of the one who wants to go to the Court of Appeals. It can as well happen on the defendant's side.

Plaintiff P has had a verdict and a judgment for $500,000 after a jury trial. On appeal by defendant D, the appellate division has reversed and granted a new trial. P wants to appeal the appellate division order granting the new trial. P may do so if he stipulates that, on affirmance by the Court of Appeals, “judgment absolute shall be entered against him”. This means that if the Court of Appeals finds that the appellate division had ground for ordering the new trial, whatever that ground might be, there will be no new trial, just a final judgment dismissing the plaintiff's action. CPLR 5601(c) is, in practical effect, a vindictive statute that tells the appellant that he imposes on the Court of Appeals at his peril.

The appellate division's discretion in the granting of a new trial is broad. It can grant a new trial, for example, simply in the interests of justice because of some cumulative effect of otherwise minor colloquies or rulings at the trial, or because it finds the verdict contrary to the weight of the evidence, or for any number of other discretionary grounds that have little hope of being overturned in the Court of Appeals. Indeed, unless an “abuse” of discretion is found, which can qualify as a question of law, the Court of Appeals does not even have the power to review such exercises of discretion. The plaintiff who uses CPLR 5601(c) when one of these factual or discretionary grounds is the basis for the appellate division's order is therefore courting disaster. See CPLR 5615. The plaintiff will doubtless think the discretion was abused, but if the Court of Appeals disagrees, as just as likely it will, P's lawsuit is at an end. P gets no restoration of the judgment he wants to keep, nor even a second chance for a new one.

If the basis of the new trial rests on an issue of law, it is a bit closer to justifying
the use of subdivision (c). Suppose, for example, that the sole ground for the new trial is the appellate division's holding that the trial judge erroneously admitted a piece of evidence; that as matter of law it is not admissible. If the appellate division disposition makes it clear that that is the ground for the new trial, and the plaintiff is convinced the appellate division is in error, perhaps the subdivision (c) stipulation procedure can be used. Even here, however, it is perilous. If the Court of Appeals agrees with the appellate division, the plaintiff may lose everything.

Is it worthwhile? Only if P is of the view that without the now-to-be-excluded evidence he has no case. If there is still a chance of prevailing at the new trial, despite the loss of this evidence, P may forfeit that chance by appealing the order of the appellate division granting the new trial.

The consequences work the same way when D is the appellant. Suppose, for example, that the verdict and judgment go for D, dismissing P's action. On appeal the appellate division reverses and grants a new trial. If D, using subdivision (c), appeals to the Court of Appeals with the stipulation for judgment absolute, and the Court of Appeals upholds the order granting the new trial, there will be “judgment absolute” for P. In this context it means that liability is established and that the remand of the case to the trial court will be only for a trial of damages.

If the appellant has already given the stipulation but has second thoughts about it—a tardy but probably healthy development—he should seek the other side's permission to withdraw the stipulation, or move the Court of Appeals for leave to withdraw it. The motion should be made before the oral argument, although it has sometimes been entertained at or after it. See the several columns by Thomas R. Newman addressed to the stipulation procedure, N.Y. Law Journal, January 15, February 18, and March 18, 1976, and Siegel, New York Practice 2d Ed. § 527.

In one recent case, a defendant who took the risk of the stipulation for judgment absolute procedure was spared its consequences when—ironically—the Court of Appeals dismissed his appeal for a procedural defect. Lusenskas v. Axelrod, 81 N.Y.2d 300, 598 N.Y.S.2d 166, 614 N.E.2d 729 (1993). The defect was that when the appellate division, after a defendant's verdict, reversed and granted a new trial, and the defendant sought to appeal the new trial order, he stipulated to judgment absolute on the issue of liability only. That won't do, held the court. It's got to be a stipulation that disposes of everything, because the purpose of this small opening in the wall of finality is to create at least the possibility of a final determination. That possibility is lost with the kind of fractional stipulation the defendant offered here. An affirmance would not put an end to the case, because there would still have to be a trial of the damages issues. Hence the CPLR 5601(c) path was closed and the appeal was dismissed without reaching the merits.

CPLR 5615 reflects further on the Court of Appeals disposition when the case is
there under one of the judgment absolute stipulations. See the Commentary on CPLR 5615.


Forfeiture Potential of Stipulation for Judgment Absolute Procedure Is Again Shown in Court of Appeals Case

We had an example of this unpredictable device in the 2000 Commentary C5601:5, built around the Court of Appeals Morales case. Another and more recent Court of Appeals example is Heary Bros. Lightning Protection Co. v. Intertek Testing Services, N.A., 4 N.Y.3d 615, 797 N.Y.S.2d 400 (2005), built on a case whose substantive issue concerned the gauging of lost profits.

In most cases an appellant can get to the Court of Appeals only with the court's leave. Amendments in the 1980s largely reduced the appeal as of right. One of the survivors in the of-right category, however, is known as the “stipulation for judgment absolute”, provided for in CPLR 5601(c), again involving a plaintiff (P) who won at the trial, but lost the victory on appeal before the appellate division. Not in a final judgment, but in an appellate division order that merely directs a new trial, meaning that all is not yet lost.

P can accept the new trial, which offers at least some opportunity for winning again and getting at least something out of the case, or instead appeal the appellate division order to the Court of Appeals--as a matter of right under CPLR 5601(c)--and hope for a reversal, which would restore P's trial-level victory.

The difficulty is that this step requires P to stipulate that if the Court of Appeals affirms the appellate division order, there will not be a new trial at all, but a final judgment entered against P dismissing the case on the merits and foreclosing any recovery. P in this situation is placing all bets on being able to convince the Court of Appeals that the appellate division was wrong as a matter of law.
CPLR 5511, AGGRIEVED PARTY, DEFAULTS

CPLR 5511. Permissible appellant and respondent:
An aggrieved party or a person substituted for him may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party. He shall be designated as the appellant and the adverse party as the respondent.

Krause v. Krause, 282 N.Y. 355 (1940):
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.

[A]n appellate court's scope of review with respect to an appellant, once an appeal has been timely taken, is generally limited to those parts of the judgment that have been appealed and that aggrieve the appealing party (CPLR 5501, subd. [a]; 5511; Segar v. Youngs, 45 N.Y.2d 568, 410 N.Y.S.2d 801; Stark v. National City Bank, 278 N.Y. 388, 394; St. John v. Andrews Inst. for Girls, 192 N.Y. 382, 386–389).

The cross appeal must be dismissed as abandoned, as the brief filed by the defendant does not seek reversal or modification of any portion of the judgment.


² Musacchio v. Musacchio 107 A.D.3d 1326, 968 N.Y.S.2d 664 (3rd Dept.,2013) (The husband's arguments that Supreme Court erred in failing to appoint an attorney for the children, order forensic evaluations or conduct in camera interviews of the children prior to reaching its custody determination are not preserved for appellate review because, when given the opportunity, he failed to request any of the foregoing.); Dana-Sitzer v. Sitzer, 48 A.D.3d 354, 851 N.Y.S.2d 530 (1st Dept.,2008).

[1] [2] Generally, the party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal. (CPLR 5511; 10 Carmody-Wait 2d, N.Y.Prac., § 70:54; Siegel, N.Y.Prac., § 525; 7 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 5511.05.) ▶ The major exception to this general rule, however, is that the successful party may appeal or cross-appeal from a judgment or order in his favor if he is nevertheless prejudiced because it does not grant him complete relief. This exception would include those situations in which the successful party received an award less favorable than he sought (Norton & Siegel v. Nolan, 276 N.Y. 392) or a judgment which denied him some affirmative claim or substantial right (City of Rye v. Public Serv. Mut. Ins. Co., 34 N.Y.2d 470, 358 N.Y.S.2d 391). But where the successful party has obtained the full relief sought, he has no grounds for appeal or cross appeal (Matter of Bayswater Health Related Facility v. Karagheuzoff, 37 N.Y.2d 408, 413, 373 N.Y.S.2d 49). This is so even where that party disagrees with the particular findings, rationale or the opinion supporting the judgment or order below in his favor (Matter of Zaiac, 279 N.Y. 545, 554), or where he failed to prevail on all the issues that had been raised (Matter of Kaplan v. Rohan, 7 N.Y.2d 884, 197 N.Y.S.2d 187; 7 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 5511.06). FN1

FN1. Indeed, even where the order of the Appellate Division “directs a modification * * * in a substantial respect”, the successful party has no right to appeal unless it is actually “aggrieved” by that modification. (CPLR 5601, subd. [a], par. [iii]; Matter of Mize v. State Div. of Human Rights, 31 N.Y.2d 1032, 342 N.Y.S.2d 65; 7 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 5601.05.)

[3] [4] ▶ The question remaining in such cases, however, is whether the successful nonaggrieved party, thus barred from bringing an appeal or cross appeal, may nonetheless seek review of an adverse holding rendered below, on the appeal from the final judgment or order brought by the losing party. Whatever may have been the confusion existing under section 580 of the old Civil Practice Act (repealed Sept. 1, 1963), the provisions of CPLR 5501 (subd. [a], par. 1) permit a broad scope of review of any such determinations that were “adverse to the respondent”, as long as the final judgment or order has been properly appealed by the appellant. (10 Carmody-Wait 2d, N.Y.Prac., § 70:337; Siegel, N.Y.Prac., § 530, pp. 736–737; 7 Weinstein-Korn-Miller, N.Y.Civ.Prac., pars. 5501.04, 5511.06.) An appeal from a final judgment or order brings up for review any determination of the court below “which was adverse to the respondent” and which “if reversed, would entitle the respondent to prevail in whole or in part on [the] appeal”. (CPLR 5501, subd. [a], par. 1.) 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 by the judgment or order appealed from and who, therefore, has no right to bring an appeal, 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. (Town of Massena v. Niagara Mohawk Power Corp., 45 N.Y.2d 482, 488, 410 N.Y.S.2d 276; Kulaga v. State of New York, 37 A.D.2d 58, 63, 322 N.Y.S.2d 542 [concurring opn], affd. 31 N.Y.2d 756, 338 N.Y.S.2d 436; cf. Ferro v. Bersani, 78 A.D.2d 1010, 433 N.Y.S.2d 666 see, generally, Appeal—Right of Winning Party, Ann., 69 A.L.R.2d 701.) Any such error is reviewable once the final judgment or order has been properly appealed from by the losing party.

Plaintiff sustained personal injuries when he was struck by ice and snow that fell from a roof of one of Cornell's dormitory buildings. Plaintiff commenced this personal injury action against the architect, defendant The Hillier Group, Inc., and the general contractor, defendant Welliver McGuire, Inc...Welliver McGuire commenced a third-party action seeking indemnification from Charles F. Evans Company, Inc., the subcontractor that performed the roof work on the building.

[W]elliver McGuire moved for summary judgment dismissing the complaint against it on the basis that it owed no duty to plaintiff, a third party to its contract with Cornell to construct the building. [W]hile that motion was pending, Hillier's counsel moved to withdraw as counsel of record...Evans cross-moved for summary judgment dismissing the third-party complaint. While both motions for summary judgment were pending, Supreme Court... permitted [Hillier's] counsel to withdraw but without a stay of the proceedings. Thereafter, Supreme Court granted both motions for summary judgment dismissing all claims against Welliver McGuire and Evans. Hillier now appeals from the order.

The appeal must be dismissed. Hillier did not assert any cross claims against Welliver McGuire or Evans. Hence, Hillier is not aggrieved and may not appeal the grant of summary judgment to those parties ( [cites omitted] ). Likewise, Hillier's challenge to Supreme Court's order granting counsel's motion to withdraw without staying the proceedings is not properly before this Court as Hillier did not appeal from that order (cites omitted).
Saleh v. Saleh  40 A.D.3d 617, 617 (2nd Dept.,2007):³
The appeal from so much of the judgment as dissolved the parties' marriage must be dismissed because that portion of the judgment was, in effect, entered upon the defendant's consent, and thus, the defendant is not aggrieved thereby.

Vernon v. Vernon, 10 A.D.3d 722, 723 (2nd Dept. 2004):
The defendant contends that the Supreme Court erred in failing to provide him with an opportunity to proceed at the trial on his counterclaims for divorce. However, the defendant's challenge to that portion of the judgment awarding the plaintiff a divorce must be dismissed since the defendant, through an April 5, 2001, preliminary conference order, in effect, withdrew his counterclaims for divorce and consented to the entry of judgment in favor of the plaintiff.

The defendant contends that the Supreme Court erred in failing to allow him to contest the grounds for divorce at trial. However, the defendant's appeal from that portion of the judgment awarding the plaintiff a divorce must be dismissed since the defendant, through a February 5, 2003, preliminary conference order, in effect, agreed to waive any challenge to the grounds for the divorce.

**Defaulting Party Must First Move to Vacate Default**

If a party has defaulted, he is not deemed to be aggrieved until he has moved to vacate the default and the motion has been denied. It is thus not the default which is appealable but the motion to vacate the default.

Quigley v. Coco's Water Cafe, Inc.  43 A.D.3d 1132, 842 N.Y.S.2d 545 (2nd Dept.,2007):
The order did not decide the branch of the motion which was to vacate the judgment entered against [defendant] upon his default in answering. Accordingly, no appeal lies as of right from that portion of the order (CPLR 5701[a][2][v]; Acunto v. Stewart Ave. Gardens, LLC, 26 A.D.3d 305, 808 N.Y.S.2d 782; Rosen v. Swarzman, 296 A.D.2d 392, 745 N.Y.S.2d 465; Avis Rent–A–Car Sys. v. Edmin Realty Corp., 209 A.D.2d 656, 619 N.Y.S.2d 334; Matter of Fritsch v. Westchester County Dept. of Transp., 170 A.D.2d 602, 566 N.Y.S.2d 377).

³ Dudla v. Dudla, 50 A.D.3d 1255, 1257 (3rd Dept.,2008); Ralph M. v. Nancy M.  280 A.D.2d 995, 996 (4th Dept.,2001) (Plaintiff sought a divorce on that ground in his complaint and stipulated to a divorce on that ground at trial, and thus he is not an aggrieved party within the purview of CPLR 5511.)
Palmiotti v. Piscitelli, 100 A.D.3d 637, 953 N.Y.S.2d 255 (2nd Dept., 2012): Family Court did not err by dismissing the petition for a writ of habeas corpus as deficient. A writ of habeas corpus is not the proper procedure for seeking review of the Family Court's order of custody and visitation entered upon the mother's default...The proper procedure is to move to vacate the order of custody and visitation, and, if the motion is denied, to appeal from the order denying the motion.

Where a Party Contests the Application for Entry of a Default Judgment
the Judgment Predicated on the Default Is Appealable

Plaintiff moved for a default judgment based upon defendant's failure to answer or appear in a timely manner. “[W]here [] a party appears and contests an application for entry of a default judgment, CPLR 5511, prohibiting an appeal from an order or judgment entered upon default, is inapplicable, and the judgment predicated upon the party's default is therefore appealable” (Spatz v. Bajramoski, 214 A.D.2d 436, 624 N.Y.S.2d 606, citing Marrocco v. Marrocco, 90 A.D.2d 989, 456 N.Y.S.2d 906).

When a Party Has Not Appeared but Counsel Appeared the Party Is Not in Default

Although respondent did not appear before the Support Magistrate on the scheduled date for the hearing, his attorney had previously made a written request for an adjournment and appeared in court on the date of the hearing to reiterate that request. “A party who is represented at a scheduled court appearance by an attorney has not failed to appear”

Although the father did not appear at the hearing, the order appealed from was not rendered upon default, as his counsel appeared and participated at the hearing (see Matter of Elijah P. [ C.I.P.], 76 AD3d 631; Matter of Newman v. Newman, 72 AD3d 973). Accordingly, the father may appeal from the order of fact-finding and disposition (see Matter of Amber Megan D., 54 AD3d 338; Matter of Vanessa M., 263 A.D.2d 542; Matter of Geraldine Rose W., 196 A.D.2d 313).

Although the mother failed to appear in person at the hearing, her counsel appeared on her behalf and participated in the hearing. Accordingly, the order was
not entered on the mother's default, and this appeal is properly before us.


**No Appeal from a Consent Order, Except where It Differs from the Consent**

No appeal lies from an order entered upon consent of the appealing party, since a party who consents to an order is not aggrieved thereby.

No appeal lies from a judgment entered on consent, except to the extent that it differs from or exceeds the consent (Norton & Siegel, Inc. v. Nolan, 276 N.Y. 392).

Defendant appeals from that part of the judgment of divorce providing that all future "issues relative to income tax deductions and exemptions [concerning] the children" shall be referred to Family Court. Although the judgment was entered upon consent, the provision at issue was added by Supreme Court sua sponte, and defendant's attorney objected to that provision. Thus, defendant's contention is properly before us (Hatsis v. Hatsis, 122 A.D.2d 111, 111, 504 N.Y.S.2d 508).

We reject plaintiff’s contention that certain issues raised by defendant with respect to the modification of the access schedule are not appealable because they were the subject of a consent order. Although the [consent]-order states at the end that it is a “[s]tipulation,” it states at the beginning that it is an order entered after the court heard “testimony and ... consider[ed] ... evidence in this matter, in the best interests of the children.” Additionally, the November 2011 order states that the amended access provisions were the result of the modification proposed by the Attorney for the Children. Notably, “no agreement or stipulation was placed upon the record during the ... [action]” and “the court issued a written decision, a fact that supports the notion that the determination was made on the merits” (Matter

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of Schunk, 136 A.D.2d 904, 905, 524 N.Y.S.2d 925; see generally CPLR 2104). Thus, the record before us “does not clearly indicate that the [relevant] order was made by consent” (Schunk, 136 A.D.2d at 905, 524 N.Y.S.2d 925).

**Issues Not Discussed in Notice of Appeal Are Deemed Abandoned**

**Lurie v Lurie, 94 A.D.3d 1376 (3rd Dept., 2012):**
FN2. Inasmuch as plaintiff's appellate brief does not address any of the issues raised in his notice of cross appeal, plaintiff has abandoned his appeal of those issues (see Suriel v. Dominican Republic Educ. & Mentoring Project, Inc., 85 A.D.3d 1464, 1465 n., 926 N.Y.S.2d 198 [2011]).

**“A Litigation Strategy Cannot Be a Reasonable Excuse for a Default”**

We reject plaintiff's argument that the trial court's assertedly erroneous oral in-limine ruling limiting plaintiff's proof of damages gave it a reasonable excuse for refusing to proceed to trial (48 A.D.3d 249 [2008]). A litigation strategy cannot be a reasonable excuse for a default (cf. Manhattan Vermeer Co. v. Guterman, 179 A.D.2d 561, 579 N.Y.S.2d 874 [1992]). Plaintiff's remedy was not to defy the court's order to proceed, but to make an offer of proof, concede that it has no case, and then appeal the in limine ruling as part of an appeal from the final judgment. Absent a reasonable excuse we need not consider the merits of the action.

**Manhattan Vermeer Co. v. Guterman, 179 A.D.2d 561, 579 N.Y.S.2d 874 (1st Dept. 1992):**
The appealing-defendants did not show a reasonable excuse for their default, and indeed that the default was deliberate. Accordingly, the motion to vacate the default was properly denied.

**No Relief to a Non-Appealing Party**

**Citnalta Const. Corp. v. Caristo Associates Elec. Contractors, Inc., 244**
Neither CPLR 5522 nor any other statutory or constitutional authority permits an appellate court to exercise any general discretionary power to grant relief to a nonappealing party.

**-- Exception to Rule of No Relief to Non-Appealing Party**

**Hecht v. City of New York, 60 N.Y.2d 57, 467 N.Y.S.2d 187 (1983):**
This appeal presents a question respecting the limits of an appellate court's scope of review of a judgment rendered against multiple parties but appealed by only one. Generally, an appellate court cannot grant affirmative relief to a nonappealing party unless it is necessary to do so in order to accord full relief to a party who has appealed. [I]t was error [ ] for the Appellate Division...to dismiss the action against a joint tort-feasor found liable at trial, but who took no appeal from the judgment.

And an appellate court's scope of review with respect to an appellant, once an appeal has been timely taken, is generally limited to those parts of the judgment that have been appealed and that aggrieve the appealing party...The corollary to this rule is that an appellate court's reversal or modification of a judgment as to an appealing party will not inure to the benefit of a nonappealing coparty...unless the judgment was rendered against parties having a united and inseverable interest in the judgment's subject matter, which itself permits no inconsistent application among the parties...

It is [ ] axiomatic that, once an appeal is properly before it, a court may fashion complete relief to the appealing party. On rare occasions, the grant of full relief to the appealing party may necessarily entail granting relief to a nonappealing party (cf. United States Print. & Lithograph Co. v. Powers, 233 N.Y. 143 ). At this time, there is no need to detail or enumerate the specific circumstances when such a judgment or order might be appropriate.

These issues are beyond this Court's review because plaintiffs failed to cross-move for leave to appeal. We will generally deny affirmative relief to a nonmoving party (Hecht v. City of New York, 60 N.Y.2d 57, 467 N.Y.S.2d 187 [1983] ), even where the Appellate Division broadly certifies the propriety of its order for review by this Court (Graubard Mollen Dannett & Horowitz v. Moskovitz, 86 N.Y.2d 112, 118 and n. 2, 629 N.Y.S.2d 1009 [1995] ). ➤An exception exists only for cases where granting relief to a nonappealing party is necessary to give meaningful relief to the appealing party (Cover v. Cohen, 61
DEFAULTS AND SUBJECT OF CONTEST

Delijani v. Delijani, 100 A.D.3d 951, 954 N.Y.S.2d 479 (2nd Dept., 2012):

Defendant contends that the Supreme Court improvidently exercised its discretion in denying his attorney’s request for an adjournment in which to appear to oppose the plaintiff’s motion...for an award of interim counsel fees... and in granting that branch of the plaintiff's unopposed motion. While CPLR 5511 prohibits an appeal from an order or judgment entered upon the default of the appealing party, the appeal from the order and money judgment...brings up for review those matters which were the subject of contest before the Supreme Court...Since the adjournment requested by defendant's attorney was the subject of dispute...the denial of that request may be reviewed on appeal.


A hearing was scheduled [ ] in the Family Court. The mother appeared that morning, pro se, but allegedly became ill before the case was called. The mother submitted an adjournment request, indicating that she was ill, and then left the courthouse, allegedly to go see a doctor. When the case was called at approximately 3:00 P.M., the Support Magistrate acknowledged receiving the adjournment request, but proceeded with the hearing in the mother's absence, in effect, denying the mother's request for an adjournment. Thus, when the Support Magistrate granted the father's petition, it did so on the mother's default. The mother filed objections to the Support Magistrate's orders, including an objection to the denial of her request for adjournment. Family Court denied the objections.

[1] [2] “[N]otwithstanding the prohibition set forth in CPLR 5511 against an appeal from an order or judgment entered upon the default of the appealing party, the appeal from the order brings up for review those ‘matters which were the subject of contest’ before the [Family] Court” (Tun v. Aw, 10 A.D.3d 651, 782 N.Y.S.2d 96, quoting James v. Powell, 19 N.Y.2d 249, n. 3, 279 N.Y.S.2d 10; Matter of Brittany C. [Linda C.], 67 A.D.3d 788; Matter of Mary C. v. Anthony C., 61 A.D.3d 682). The only matter which was the subject of contest before the Support Magistrate and, hence, the Family Court, was the denial of the mother's request for an adjournment. Accordingly, review is limited at this juncture to the denial of the mother's objection to the denial of her request for an adjournment.

Romero v. Ramirez, 100 A.D.3d 909, 955 N.Y.S.2d 353 (2nd Dept., 2012):

The mother appeals from an order of the Family Court...which, upon her default in answering or appearing, and, in effect, upon the denial of her motion to dismiss the petition for lack of personal jurisdiction, granted the father's petition for custody of the [ ] child.

“[N]otwithstanding the prohibition set forth in CPLR 5511 against an appeal from an order or judgment entered upon the default of the appealing party, the appeal
from the order brings up for review those ‘matters which were the subject of contest’ before the [Family] Court” (Tun v. Aw, 10 AD3d 651, 652, quoting James v. Powell, 19 N.Y.2d 249, 256 n. 3; Matter of Branch v. Cole–Lacy, 96 AD3d 741, 742). Since the issue of whether the Family Court had personal jurisdiction over the mother was the subject of contest, it is brought up for review on this appeal (James v. Powell, 19 N.Y.2d at 256 n. 3).

[F]ollowing a hearing, the referee issued his report, with recommendations. [P]laintiff moved to confirm the referee's report. The defendant did not move to reject the referee's report (CPLR 4403), nor did he oppose the plaintiff's motion to confirm the report...the Supreme Court confirmed the report. Upon the order... the Supreme Court entered a judgment...awarding the plaintiff a divorce on the ground of cruel and inhuman treatment.

Although defendant failed to oppose plaintiff's motion to confirm the referee's report, or cross-move to reject it, his appeal from portions of the judgment is properly before us since the underlying issues he addresses, including whether there was a proper ground for divorce and whether plaintiff was properly awarded certain ancillary relief, were the “subject of contest” at the hearing (James v. Powell, 19 N.Y.2d 249, 256 n. 3, 279 N.Y.S.2d 10). On appeal, however, the defendant raises these issues in the context of numerous objections to the referee's report. By failing to challenge the alleged errors in the referee's report before Supreme Court, defendant waived his right to raise those objections on appeal.

Notwithstanding the prohibition [] in CPLR 5511 against an appeal taken from a judgment entered upon the default of the appealing party, the appeal from the judgment [] brings up for review those “matters which were the subject of contest.” The issues pertaining to whether the Supreme Court properly refused to vacate the husband's default in opposing his wife's application for attorney's fees are reviewable since they were contested in the motion papers.

[T]he [] order...entered after the plaintiff defaulted in appearing at the hearing, is appealable, although review is limited to the matters which were the subject of contest before the Supreme Court. [P]laintiff moved for expanded visitation rights with the children. The defendant cross-moved for an award of maintenance. In July 1989 a hearing was commenced...The hearing continued on September 25, 1989, at which point the parties entered into a stipulation on the record with respect to the plaintiff's request for expanded visitation. The plaintiff thereafter failed to appear at the hearing, and the court held an inquest on the other issues raised in the parties' motions. Following the inquest, the court denied the plaintiff's motion for expanded visitation, despite the stipulation, and granted the
defendant open-ended maintenance of $125 per week. The two issues raised by the appellant are whether he is entitled to expanded visitation, and whether the wife is entitled to any maintenance, were contested in Supreme Court, and may be reviewed on appeal.

Although the judgment appealed from was entered upon the appellant's default in answering the complaint, it is now well settled that "an appeal would lie from such a final judgment but review would be limited to matters which were the subject of contest below. The appellant moved to dismiss the complaint "in its entirety" based "upon the grounds that the alleged causes of action are barred by the statute of limitations". This motion was opposed by the plaintiff, and by order entered November 16, 1988, the Supreme Court denied the motion.

By refusing to participate in the hearing, the petitioner failed to contest the findings of the hearing officer. Since our review is limited to matters which were the subject of contest at the hearing, we may not consider the merits of the respondent's determination.

In James v. Powell, 19 N.Y.2d 249, 279 N.Y.S.2d 10, the Court of Appeals noted that where a defendant's answer has been stricken, a judgment entered thereafter in favor of the plaintiff is, in effect, based in part upon a default by the defendant. The court held that despite the provisions of CPLR 5511 (which prohibit appeals from judgments or orders entered upon the default of an aggrieved party) an appeal would lie from such a final judgment but review would be limited to matters which were the subject of contest below.

Addressing first the order in appeal No. 2 the court erred in determining that the prior nonfinal orders and related motion papers submitted by plaintiff should not be included in the record in appeal No. 1. The complete record on appeal must include "all necessary and relevant motion papers" as well as "any other reviewable order" when the appeal is from a final order or judgment (22 NYCRR 1000.4[a][2]; see generally Matter of Lavar C., 185 A.D.2d 36, 39, 592 N.Y.S.2d 535). Plaintiff is permitted to appeal from the final order entered on her default for the sole purpose of securing review, pursuant to CPLR 5501(a)(1), of any prior contested nonfinal order that necessarily affected the final order (James v. Powell, 19 N.Y.2d 249, 256 n. 3, 279 N.Y.S.2d 10, rearg. denied 19 N.Y.2d 862).
APPEALS AS OF RIGHT

CPLR 5701. Appeals to appellate division from supreme and county courts:
(a) Appeals as of right. An appeal may be taken to the appellate division as of right in an action, originating in the supreme court or a county court:

1. from any final or interlocutory judgment except one entered subsequent to an order of the appellate division which disposes of all the issues in the action; or

2. from an order not specified in subdivision (b), where the motion it decided was made upon notice and it:

(i) grants, refuses, continues or modifies a provisional remedy; or

(ii) settles, grants or refuses an application to resettle a transcript or statement on appeal; or

(iii) grants or refuses a new trial; except where specific questions of fact arising upon the issues in an action triable by the court have been tried by a jury, pursuant to an order for that purpose, and the order grants or refuses a new trial upon the merits; or

(iv) involves some part of the merits; or

(v) affects a substantial right; or

(vi) in effect determines the action and prevents a judgment from which an appeal might be taken; or

(vii) determines a statutory provision of the state to be unconstitutional, and the determination appears from the reasons given for the decision or is necessarily implied in the decision; or

(viii) grants a motion for leave to reargue made pursuant to subdivision (d) of rule 2221 or determines a motion for leave to renew made pursuant to subdivision (e) of rule 2221; or
3. from an order, where the motion it decided was made upon notice, refusing to vacate or modify a prior order, if the prior order would have been appealable as of right under paragraph two had it decided a motion made upon notice.

(b) Orders not appealable as of right. An order is not appealable to the appellate division as of right where it:

1. is made in a proceeding against a body or officer pursuant to article 78; or

2. requires or refuses to require a more definite statement in a pleading; or

3. orders or refuses to order that scandalous or prejudicial matter be stricken from a pleading.

(c) Appeals by permission. An appeal may be taken to the appellate division from any order which is not appealable as of right in an action originating in the supreme court or a county court by permission of a judge who made the order granted before application to a justice of the appellate division; or by permission of a justice of the appellate division in the department to which the appeal could be taken, upon refusal by the judge who made the order or upon direct application.

Family Court Act § 1112: An appeal may be taken as of right from any order of disposition.


...[P]laintiff made an untimely cross motion to restrain defendant from removing the child from Suffolk County until final disposition of the action. [S]upreme Court...sua sponte, restrained [defendant] from removing the child from Suffolk County until final disposition of the action.

While no appeal lies as of right from an order that does not determine a motion made on notice (CPLR 5701[a][2]), this Court granted defendant leave to appeal from that portion of the order [] (CPLR 5701[c]). When plaintiff cross-moving to restrain defendant from removing the child from Suffolk County until final disposition of the action, defendant objected to the cross motion as untimely, and did not submit any substantive opposition thereto...Under these circumstances, Supreme Court's order prejudiced defendant, who had no fair notice of plaintiff's cross motion and was deprived of a sufficient opportunity to address the issues raised. Accordingly, we modify the order [] by deleting the provision thereof restraining defendant from removing the child from Suffolk County until final
disposition of the action. Our determination is without prejudice to plaintiff making a motion for the same relief, on proper notice to defendant.

► Yuen Lin Lee v. Kwok Wai Lee, 68 A.D.3d 421, 889 N.Y.S.2d 577 (1st Dept., 2009): Defendant’s contention that the stipulation vacating the judgment of divorce was inaccurate and defective and should not have been sua sponte so-ordered by the motion court was not properly before the Appellate Division, since neither party moved on notice to have the stipulation so-ordered and defendant never moved to vacate the stipulation once it was so-ordered. Defendant did not file papers in opposition to plaintiff's motion to vacate the judgment of divorce, the record does not contain a transcript of any oral argument that may have been heard on the return date of that motion, and the record is otherwise insufficient to permit review of the motion court's implicit finding that the stipulation was valid and enforceable.

Prof. David Siegel, Practice Commentaries, 2003, C5701:5.
Ex Parte Orders, Court's Sua Sponte Order Is Treated as Ex Parte Order, and Is Hence Unappealable; What Remedy for Appellant?
[A]n order not appealable of right under subdivision (a) of CPLR 5701 may be appealed by permission under subdivision (c). The aggrieved lawyer in this case did not seek such permission, apparently relying all the way on the assumption that the order was appealable of right. In the course of reviewing a record on an appeal improperly taken of right, the appellate division will sometimes grant permission to appeal sua sponte and just keep the appeal where it is. The court did that in Ploski v. Riverwood Owners Corp., 255 A.D.2d 24, 688 N.Y.S.2d 627 (2d Dep't 1999), for example, where it said that “in view of the important issue involved we treat the notice of appeal ... as an application to appeal and grant leave”.

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APPEALS FROM ORDERS OF REFERENCE DIRECTING A HEARING

– Split Authority:
  – First Department: appealable
  – Second and Fourth Departments: non-appealable.
  – Third Department: no appealable, except for one case holding otherwise

First Department: Orders of Reference Are Appealable

Plaintiff urges that the appeal from the reference to hear and report on the jurisdiction issue should be dismissed as nonappealable. This Court has consistently held that an order of reference is appealable (Grand Cent. Art Galleries v. Milstein, 89 A.D.2d 178, 454 N.Y.S.2d 839; Drew Natl. Corp. v. Goldstein, 74 A.D.2d 771, 425 N.Y.S.2d 598; Candid Prods. v. SFM Media Serv. Corp., 51 A.D.2d 943, 381 N.Y.S.2d 280). H & Y Realty Company v. Baron, 160 A.D.2d 412, 413, 554 N.Y.S.2d 111 (1st Dept.1990), since it affects a substantial right, see, CPLR 5701[a], [2], [v]), in that it would force one party or the other to submit to a lengthy expensive hearing. Grande Central Art Galleries v. Milstein, 89 A.D.2d 178, 181, 454 N.Y.S.2d 839 (1st Dept.1982).

[T]his Court will not ordinarily interfere with the discretion of the trial court in referring a matter to a Special Referee to hear and report (Miller v. Albertina Realty Co., 198 App.Div. 340, 342, 190 N.Y.S. 407) and, in this case, we perceive no abuse of discretion as the court had before it five accounts and, at a minimum, eighteen potential claimants. There is even the view that no appeal lies from an order directing a reference for a referee to hear and report because it does not affect a substantial right (Warner v. Warner, 88 A.D.2d 639, 450 N.Y.S.2d 225 [2d Dept.1982] ), although that is not the view in this Department (General Elec. Co. v. Rabin, 177 A.D.2d 354, 576 N.Y.S.2d 116 [1st Dept.1991]; Grand Central Art Galleries, Inc. v. Milstein, 89 A.D.2d 178, 454 N.Y.S.2d 839 [1st Dept.1982] ) because “it would force one party or the other to submit to a lengthy expensive hearing”...In this case, however, no such right is affected as the hearings have been very brief.

-- Second Department: Not Appealable as of Right

No appeal lies as of right from an order directing a hearing to aid in the determination of a motion.

An order directing a hearing to aid in the determination of a motion does not dispose of the motion and does not affect a substantial right, and therefore is not appealable as of right (CPLR 5701[a][2][v]; Berliner v. Berliner, 294 AD2d 524, 742 N.Y.S.2d 864; Davidson-Sakuma v. Sakuma, 280 A.D.2d 577, 720 N.Y.S.2d 798; Palma v. Palma, 101 A.D.2d 812). Since leave to appeal has not been granted, we dismiss the appeals from the orders directing such hearings.

An order directing a hearing to aid in the determination of a motion does not dispose of the motion and does not affect a substantial right, and therefore is not appealable as of right (CPLR 5701[a][2][v]...). Since leave to appeal from that branch of the order has not been granted, the appeal from so much of the order as directed a conference and thereafter, if necessary, a hearing on that branch of the cross motion which was for an award of an attorney's fee, is dismissed.


--- Third Department: Not Appealable

Civil Service Employees Association, Inc. Local 1000, AFSCME, AFL-CIO v.

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Evans, 92 A.D.2d 669, 460 N.Y.S.2d 149 (3rd Dept.,1983):\(^7\)
Since an order directing a judicial hearing to aid in the disposition of a motion does not affect a substantial right (Bagdy v. Progresso Foods Corp., 86 A.D.2d 589, 446 N.Y.S.2d 137; Alfred D. Geronimo, Inc. v. Board of Educ. of City of N.Y., 69 A.D.2d 805, 415 N.Y.S.2d 64), the orders sought to be reviewed on this appeal are not appealable as of right (CPLR 5701 [a][2][v]).

An appeal may be taken to the Appellate Division as of right if the order of Supreme Court was made upon notice and affects a substantial right (CPLR 5701, subd. [a], par. 2, subpar. [v]). An order directing a hearing which will prolong resolution of the issues raised on the motion affects a substantial right (Grand Cent. Art Galleries v. Milstein, 89 A.D.2d 178, 454 N.Y.S.2d 839). Accordingly, the matter is properly before this court.

An Order Appointing a JHO
An order appointing a JHO to hear and report is not appealable as of right (CPLR 5701[a][2][v]; Tornheim v. Tornheim, 28 A.D.3d 534, 816 N.Y.S.2d 87 [2006]; 1074372 Ontario, Inc. v. 200 Corbin Owners Corp., 13 A.D.3d 502, 786 N.Y.S.2d 319 [2004] ), and we decline to grant leave in this regard.

--- Fourth Department: Not Appealable as of Right ---


Barone v. City of Buffalo, 134 AD2d 948, 521 NYS2d 1018 (4th Dept. 1987): 9
[T]he order directing an evidentiary hearing must be dismissed since there is no appeal as of right from such an order.

An order directing a hearing to aid in the disposition of a motion “does not decide the motion and does not affect a substantial right (CPLR 5701[a][2] [v]), and is, therefore, not appealable as of right.

-- Order Referring Motion to Trial Court Does Not Affect Substantial Right

The defendant may not appeal, as of right, from the portion of the order which referred his motion to the trial court for determination, since it merely deferred resolution of his motion until trial, where the parties' financial circumstances may be fully explored without the additional delay of an interim hearing. Under these circumstances, the challenged ruling does not affect a substantial right (see, CPLR 5701[a]; see also, Marine Midland Bank v. Rashid, 259 A.D.2d 739, 687 N.Y.S.2d 416; Walis v. Walis, 192 A.D.2d 598, 600, 596 N.Y.S.2d 167). Accordingly, the defendant's appeal from that portion of the order is dismissed.

the appeal should be dismissed since Supreme Court's order constituted an exercise of discretion affecting no substantial right (CPLR 5701[a][2][v]).

No decision was made by the court as to the appropriate valuation dates of the marital assets. Had the court selected dates for valuation, that order would have been appealable by the party disagreeing with the dates selected (Scheinkman, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 14, Domestic Relations Law C236B:26, at 288). Instead, [] the court essentially defer[red] the


10 Samaroo v. Bogopa Service Corp., 964 N.Y.S.2d 255, 106 A.D.3d 713 (2nd Dept. 2013); Anesthesia Associates of Mount Kisco, LLP v. Northern Westchester Hosp. Center, 44 A.D.3d 975, 844 N.Y.S.2d 446 (2nd Dept. 2007); Beharry v. Guzman, 33 A.D.3d 741, 822 N.Y.S.2d 612 (2nd Dept. 2006); Weissman v. Weissman 8 A.D.3d 264, 777 N.Y.S.2d 679 (2nd Dept. 2004) (A party may not appeal, as of right, from so much of an order as merely defers disposition of a motion until trial. Accordingly, the appeal from that portion of the order which deferred until trial the resolution of that branch of the plaintiff's motion which was for reimbursement...is dismissed as leave to appeal has not been granted.)
fixing of valuation dates of the marital assets until a later point in the action. In that sense, insofar as the order basically reserved for future determination the relief sought (Sobel v. Bess, 45 A.D.2d 1049...; 7 Weinstein–Korn–Miller, NY Civ Prac ¶ 5701.16), it “may be regarded as only preliminary to a disposition of the motion on the merits” (7 Weinstein–Korn–Miller, NY Civ Prac ¶ 5701.16) and therefore is not appealable as of right.

In matrimonial actions, the party seeking to establish a valuation date different from the customary principles must object at the time of trial and introduce evidence that supports the position or lose the right to appeal on the issue.11

ORDERS DIRECTING IN-CAMERA INSPECTIONS OF DOCUMENTS ARE NOT APPEALABLE AS OF RIGHT

-- All Four Departments Are Unanimous:

Patterson v. Turner Const. Co., 88 A.D.3d 617, 931 N.Y.S.2d 311 (1st Dept., 2011):12 Appeal from order which deferred determination on defendants' motion to compel to the extent of directing plaintiff to produce his Facebook records for an in camera review, unanimously dismissed, without costs, as taken from a nonappealable paper.


12 Albino v. New York City Housing Authority, 52 A.D.3d 321, 860 N.Y.S.2d 57 (1st Dept. 2008) (No appeal lies as of right from an order deferring determination of a motion to compel discovery until after in camera review, because such an order does not affect a substantial right within the meaning of CPLR 5701 (a)(2)(v).); Damour v. Montefiore Medical Center, 32 A.D.3d 772, 820 N.Y.S.2d 884 (1st Dept. 2006).
substantial right of plaintiff, no appeal as of right lies therefrom (see CPLR 5701[a][2][v]...)

**In re Will of Nugent, 26 A.D.3d 892, 808 N.Y.S.2d 876 (4th Dept., 2006):**
The court abused its discretion in directing an in camera review of certain medical records of proponent, and we therefore modify the order accordingly. We note that no appeal lies as of right from an order directing an in camera review of such records because such an order “does not affect a substantial right within the meaning of CPLR 5701(a)(2)(v)”

**No Appeal Lies if an Application for the Specific Relief Was Not Made**

**Dinoto v. Dinoto, 97 A.D.3d 529, 947 N.Y.S.2d 605 (2nd Dept., 2012):**
Plaintiff's claim [for] attorney's fee is without merit, “since she never made a formal application for such an award, and submitted no supporting documentation regarding the legal services rendered” [cites omitted].

**Appealability from a Demand for Relief Set Forth in Opposing Papers but Not Designated in a Formal “Cross Motion”**

**Fried v. Jacob Holding, Inc., 970 N.Y.S.2d 260 (2nd Dept. 2013):**
[The principal issue is whether it was proper for the court to consider defendant's application when defendant had not made its request for relief in a formal notice of cross motion (CPLR 2215). Our precedent...has been inconsistent, leaving the law unsettled.]

Plaintiffs moved pursuant to CPLR 3215 for leave to enter a default judgment on the issue of liability. Defendant timely filed opposing papers, but did not merely oppose plaintiffs' motion; it also asked the court [in an attorney’s affirmation], in effect, for leave to serve a late answer, and to compel plaintiffs to accept its untimely answer. Defendant's application for affirmative relief was not, however, set forth in a notice of cross motion duly served pursuant to CPLR 2215...

* * *

Courts retain discretion to entertain requests for affirmative relief that do not meet the requirements of CPLR 2215. Litigants, however, must be cognizant of an
important distinction between the two situations: a party in compliance with CPLR 2215 is entitled to have its cross motion considered; a party not in compliance with the statute must hope that the court opts, in the exercise of its discretion, to entertain the request. Thus, we are in agreement with our colleagues in the Appellate Division, Third Department, who, in Fox Wander W. Neighborhood Assn. v. Luther Forest Community Assn., 178 A.D.2d at 872, held that, even in the absence of an explicit notice of cross motion, the Supreme Court is not “prohibited” from entertaining the nonmoving party's request for relief.

* * *

A request for relief made in the absence of a notice of cross motion is not a “motion made upon notice” (CPLR 5701[a][2] ), so an order granting or denying the request is not appealable as of right, and permission to appeal is necessary (CPLR 5701[c]; Blam v. Netcher, 17 A.D.3d 495, 496, 793 N.Y.S.2d 464). By contrast, generally, a party may appeal as of right to challenge the disposition of a motion or cross motion made on notice ( see CPLR 5701[a] ).

Also see:
Myung Chun v. North American Mort., 285 A.D.2d 42 716 (1st Dept. 2001);


No Appeal as of Right from Qualified Domestic Relations Order (QDRO)

In this postjudgment matrimonial proceeding, defendant appeals from a qualified domestic relations order (QDRO) that directed the...retirement system to pay his ex-wife her marital share of defendant's pension pursuant to the Majauskas formula (Majauskas v. Majauskas, 61 N.Y.2d 481, 489–491). Although no appeal lies as of right from a QDRO...we nevertheless treat the notice of appeal as an application for leave to appeal and grant the application.13

13 Piskorz v. Piskorz, 81 A.D.3d 1354, 916 N.Y.S.2d 572 (4th Dept.,2011); Cuda v. Cuda, 19 A.D.3d 1114, 796 N.Y.S.2d 821 (4th Dept.,2005), appeal and rearg. denied, 21 A.D.3d 1442, 801 N.Y.S.2d 555 (4th Dept.,2005); Weissman v. Weissman 300 A.D.2d 261, 262, 751 N.Y.S.2d 366, 367 (1st Dept.,2002) (The appeal from the QDRO must be dismissed since a QDRO is not appealable as of right, and we decline to grant leave to appeal where plaintiff signed a stipulation withdrawing his opposition to the QDRO's entry without indicating that he would be seeking such leave.); Bernstein v. Bernstein 18 A.D.3d 683, 795 N.Y.S.2d 733 (2nd Dept.,2005) (No
Although no appeal lies as of right from a QDRO, plaintiff raised timely objections prior to the entry of the QDRO and thereby preserved a record for our review. We therefore treat the notice of appeal as an application for leave to appeal, grant the application and consider the merits of plaintiff's contentions.

The Appellate Division May Not Sua Sponte Dismiss an Appeal

In its October 2010 order the Appellate Division sua sponte dismissed plaintiff's appeals without articulating the basis for its order. The dismissal was an abuse of discretion. No grounds for dismissing the appeals appear tenable from the record. Plaintiff timely perfected his appeals under the First Department's rules, and the court did not give plaintiff adequate notice if it shortened the time period for him to perfect the appeals. On this record, the appeals could not have been properly dismissed for failure to comply with the court's orders. Accordingly, plaintiff's appeals should be reinstated and the case remitted to the Appellate Division to consider the merits of those appeals.

appeal lies as of right from a Qualified Domestic Relations Order that merely implements those portions of the judgment of divorce awarding one spouse an interest in the marital portion of the other spouse's retirement pension (Gormley v. Gormley, 238 A.D.2d 545, 657 N.Y.S.2d 85); Wojtaszek v. Wojtaszek, 64 A.D.3d 1035, 881 N.Y.S.2d 916 (3rd Dept., 2009); Gartley v. Gartley, 15 A.D.3d 995, 789 N.Y.S.2d 559 (4th Dept., 2005) (The stipulation, which was incorporated but not merged in the judgment of divorce, provided for the distribution of the retirement benefits pursuant to the formula set forth in Majauskas v. Majauskas (61 NY2d 481 [1984]) and further provided that defendant receive preretirement death benefits utilizing that formula. The stipulation also provided that plaintiff could designate a beneficiary for his share of the death benefit. Because the administrator of plaintiff's retirement plan will not accommodate the provision of the stipulation, however, the amended QDRO in appeal No. 2 was issued to comply with the requirements of the plan. The terms of the judgment of divorce differ from the amended QDRO only in that respect and thus, under the circumstances of this case, we decline to treat the notices of appeal in appeal Nos. 2 and 3 as applications for leave to appeal.)
INTERLOCUTORY ORDERS –
NO APPEALS BY RIGHT OR BY PERMISSION FROM EVIDENTIARY RULINGS

Cotgreave v. Public Adm' r of Imperial County, 91 A.D.2d 600, 456 N.Y.S.2d 432 (2nd Dept., 1982):
It is axiomatic that an evidentiary ruling made during the course of trial is not separately appealable.

An evidentiary ruling made before trial is generally reviewable only in connection with an appeal from the judgment rendered after trial.

Boeke v. Our Lady of Pompei School, 73 A.D.3d 825, 901 N.Y.S.2d 336 (2nd Dept., 2010):
The appeal from so much of the order as denied those branches of the motion...to strike the plaintiff's expert witness disclosures and to preclude reference to any claim for complex regional pain syndrome must be dismissed because it concerns an evidentiary ruling which, even when “made in advance of trial on motion papers ... is neither appealable as of right nor by permission.”

Prof. David Siegel, Practice Commentaries, C5701:4,
The Paragraph 2 List of Appealable Orders.
While Not Ordinarily Appealable, Order on Motion In Limine That Has Summary Judgment Effect Is Appealable
A ruling “in limine” is generally understood to be a ruling on the admissibility of a given piece of evidence. The ruling may be made at the trial or even earlier, as at a pretrial conference. Even if reduced to an order, for appeal purposes it is still deemed a mere “ruling”, and hence not independently appealable. It must await appellate review, as all trial rulings must, as part of an appeal from the final judgment that later eventuates.

*   *   *   *

Another case on the point is City of New York v. Mobil Oil Corp., 12 A.D.3d 77, 783 N.Y.S.2d 75 (2d Dep't, 2004), a condemnation proceeding in which value was the only issue. Because the “in limine” ruling excluded evidence that went to value, the court found this to be the equivalent of a partial summary judgment that strikes disputed damages demands. For that reason, the court held the order appealable, like any order on a summary judgment motion would be.
AN ORDER FROM A MOTION IN LIMINE WHICH LIMITS THE SCOPE OF ISSUES TO BE TRIED, THE MERITS, OR THE CLAIMS SUCH AS, SUMMARY JUDGMENT, IS APPEALABLE


Judgment...after a jury trial...bringing up for review an order...to the extent it dismissed plaintiff's claim for lost rent, unanimously affirmed.

Contrary to Negev's position, the subject ruling is appealable, as the in limine order dismissing plaintiff's claim for lost rental income did not "merely determine[] the admissibility of evidence," it "limit[ed] the scope of issues to be tried" (Parker v Mobil Oil Corp., 16 AD3d 648, 650 [2d Dept 2005], affd on other grounds 7 NY3d 434 [2006]). In the absence of a proffer as to how plaintiff intended to establish lost rental income and to show that the loss was proximately caused by defendants' conduct, the trial court properly precluded plaintiff from offering evidence on this claim (see e.g. Lee Kin Chiu v City of New York, 174 Misc2d 422, 426 [App Term, 2d Dept 1997]).


Plaintiff appeals from an order that, inter alia, granted defendants' motion in limine to preclude him from presenting further evidence on the issues whether he was a part-time employee and whether he was entitled to formal charges and a hearing prior to termination. [A]lthough the parties do not address the issue of the appealability of an order determining a motion in limine, the order in this case is appealable...“Generally, an order ruling [on a motion in limine], even when made in advance of trial on motion papers constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission”... Here, however, the order precluded the introduction of evidence on the issue whether defendants were liable for punitive damages. “[B]ecause the court's order ‘has a concretely restrictive effect on the efforts of plaintiff to ... recover [punitive] damages, ... defendant[s'] motion ... [was] the functional equivalent of a motion for partial summary judgment dismissing the complaint insofar as it sought [such] damages' ”... “[A]n order that ... ‘limits the legal theories of liability to be tried’ or the scope of the issues at trial ... is appealable” (cites omitted).

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“[A]n order which merely limits the admissibility of evidence, even when made in advance of trial on motion papers, constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission” (Strait v. Arnot Ogden Med. Ctr., 246 A.D.2d 12, 675 N.Y.S.2d 457 [1998]; Ferrara v. Kearney, 285 A.D.2d 890, 727 N.Y.S.2d 358 [2001]; Brennan v. Mabey's Moving & Stor., 226 A.D.2d 938, 640 N.Y.S.2d 686 [1996] ). However, an order that limits the scope of issues to be tried, affecting the merits of the controversy or the substantial rights of a party, is appealable (Brown v. State of New York, 250 A.D.2d 314, 681 N.Y.S.2d 170 [1998]; see also Scalp & Blade v. Advest, 309 A.D.2d 219, 765 N.Y.S.2d 92 [2003]; Rondout Elec. v. Dover Union Free School Dist., 304 A.D.2d 808, 758 N.Y.S.2d 394 [2003] ). Here, Supreme Court cast a broad blanket precluding the hospital from offering its own discharge instructions as well as any evidence about whether those instructions were followed. This significantly undercuts the primary theory of the hospital, i.e., that discharging the child with specific instructions to the parent fell within the acceptable standard of care. Such a ruling has a clear potential of impacting the merits and it affects a substantial right of the hospital. Indeed, in light of the opinions of plaintiff's experts, such a ruling was essentially tantamount to summary judgment for plaintiff on the issue of liability. Accordingly, we conclude that the appeals are properly before us.


While “[i]t is correct to say that an order, made in advance of trial, which merely determines the admissibility of evidence is an unappealable advisory ruling” (Rondout Elec. v. Dover Union Free School Dist., 304 A.D.2d 808, 758 N.Y.S.2d 394; see Vesperman v. Wormser, 283 A.D.2d 637, 725 N.Y.S.2d 361), in fact, Mobil's motion to preclude sought far more than a mere evidentiary ruling. By precluding the evidence regarding diminution in value, Mobil sought to affect the amount of compensation for which the City would be liable in the condemnation proceeding. Since compensation is the only issue involved in a condemnation valuation proceeding, Mobil's “in limine” motion was the functional equivalent of a motion for summary judgment. As this court has recently stated, “[a]n order deciding such a motion clearly involves the merits of the controversy (see CPLR 5701[a][2][iv]) and affects a substantial right (CPLR 5701[a][2][v]) and thus is appealable” (Rondout Elec. v. Dover Union Free School Dist.; Marshall v. 130 N. Bedford Rd. Mount Kisco Corp., supra);


Franklin Corp. v. Prahler 91 A.D.3d 49, 932 N.Y.S.2d 610 (4th Dept., 2011): Generally, an order [on a motion in limine], even when made in advance of trial on motion papers[,] constitutes, at best, an advisory opinion [that] is neither appealable as of right nor by permission” (Scalp & Blade v. Advest, Inc., 309 A.D.2d 219, 765 N.Y.S.2d 92). “[A]n order that ‘limits ...’ the scope of the issues at trial,” however, is appealable (Scalp & Blade...). Thus, because the court's order “has a concretely restrictive effect on the efforts of plaintiff[ ] to ... recover certain damages from [him] ..., defendant[s] motion ... [is] ‘the functional equivalent of a motion for partial summary judgment dismissing the complaint insofar as it sought damages ... in excess of the damages' that defendant[ ] believe[s] are appropriate.’”


Plaintiffs commenced this action to recover damages for [] conversion of corporate assets of ITEC. Plaintiffs appeal from an order that [] granted what was in effect a motion in limine of defendants...seeking [] to preclude plaintiffs from offering evidence that ITEC owned the assets in question. [W]e dismiss the appeal from the order insofar as it concerned plaintiffs' cross motion in limine seeking to preclude defendants from offering evidence that ITEC's owner and principal has a criminal conviction and that part of the motion in limine of the [] defendants requesting that judicial notice be taken of that conviction. Generally, an order “ruling [on a motion in limine], even when made ‘in advance of trial on motion papers constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission’ ” (Winograd v. Price, 21 A.D.3d 956, 800 N.Y.S.2d 649; Citlak v. Nassau County Med. Ctr., 37 A.D.3d 640, 828 N.Y.S.2d 912). “Inasmuch as [those parts of] the order herein ‘merely adjudicate[d] the admissibility of evidence and do[ ] not affect a substantial right, no appeal lies as of right from [those parts of] the order’ ” (Shahram v. St. Elizabeth School, 21 A.D.3d 1377, 1378, 801 N.Y.S.2d 643).

[2] [3] That part of the order granting the [] defendants' motion in limine to the extent that it sought to preclude plaintiffs from submitting evidence that ITEC owned the assets in question [] is appealable [] because “an order which limits the scope of issues to be tried is appealable” (Parker v. Mobil Oil Corp., 16 A.D.3d 648, 793 N.Y.S.2d 434, affd. 7 N.Y.3d 434, rearg. denied 8 N.Y.3d 828; see Scalp & Blade v. Advest, Inc., 309 A.D.2d 219, 765 N.Y.S.2d 92; Rondout Elec. v. Dover Union Free School Dist., 304 A.D.2d 808, 758 N.Y.S.2d 394).
This appeal must be dismissed since “an order which merely determines the admissibility of evidence, ‘even when made in advance of trial on motion papers, constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission’...While an order that limits the scope of the issues to be tried may be appealable (Vaughan v. Saint Francis Hosp...), the controversy here solely addresses the admissibility of evidence in advance of trial. Accordingly, a review of this ruling must await the conclusion of a trial so that “the relevance of the proffered evidence, and the effect of Supreme Court's ruling with respect thereto, can be assessed in the context of the record as a whole” (Brennan v. Mabey's Moving & Stor., 226 A.D.2d 938, 938, 640 N.Y.S.2d 686 [1996] ).

The appeal from [] the order as denied those branches of the motion...to preclude the testimony of a court-appointed forensic evaluator at a hearing to be held on the issue of custody and to preclude the use of that evaluator's report at the hearing must be dismissed because it concerns an evidentiary ruling, which, even when made in advance of a hearing or trial on motion papers, is not appealable as of right or by permission...Although we must dismiss this portion of the appeal, this should not be construed as an indication that there is no merit to the contentions which cannot be reviewed at this point in the proceedings.

The motion court's appealable pre-trial dispositions, granting or denying preclusion of evidence on the basis of clear discovery malfeasance by the plaintiff's counsel or other grounds, constituted proper exercises of the court's discretion.

No Appeals From Oral Rulings– Transcripts Must Be So-Ordered

Plaintiff's [] appeals from various oral rulings...must be dismissed. No appeal lies from the court's rulings in open court, as the transcripts were not “so-ordered” by the court (Sanchez de Hernandez v. Bank of Nova Scotia, 76 A.D.3d 929 [2010], lv. denied 16 N.Y.3d 705 [2011] ), and a number of findings on the record were superseded by a written order from which plaintiff did not appeal.

No Appeal Lies From A Decision Directing “Settle Order”

Smith v. United Church of Christ, 95 A.D.3d 581, 943 N.Y.S.2d 530 (1st Dept., 2012):\(^\text{16}\)
“No appeal lies from a decision directing ‘settle order’ ” (Hutchinson v. City of New York, 18 A.D.3d 370, 795 N.Y.S.2d 554 [2005]).

GENERALLY, NO APPEAL LIES AS OF RIGHT FROM THE DENIAL OF A MOTION TO REARGUE 17

TWO EXCEPTIONS TO THE RULE

1. Where Partial Relief Is Granted:
   Although the Supreme Court stated that the defendant's motion for leave to reargue was denied, the court, in fact, for the first time, partially granted that branch of the defendant's motion which was for the distribution from escrow of certain sale proceeds, thereby, in effect, granting reargument. Thus, the order is appealable.

2. ALTHOUGH AN ORDER STATES THAT IT DENIED REARGUMENT, IF IT REVIEWED THE MERITS AND ADHERED TO ITS DETERMINATION THE DENIAL OF REARGUMENT IS APPEALABLE

   Ordinarily no appeal lies from an order denying reargument. However, where [] the court denies the motion to reargue but addresses the merits of the motion, and then adheres to its original determination, the order is appealable.

   While the denial of a reargument motion is not appealable as of right (Town of Poestenkill v. New York State Dept. of Envtl. Conservation, 229 A.D.2d 650, 644 N.Y.S.2d 602 [1996] ), we are of the view that Supreme Court's decision and order, which addressed the merits of defendants' motion, granted reargument and adhered to its original order, is appealable as of right to this Court (CPLR 5701 [a] [2] [viii]; also Corey v. Gorick Constr. Co., 271 A.D.2d 911 [2000]).


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Although defendants’ notice of appeal refers only to Supreme Court's order purporting to deny reargument and, of course, an order denying reargument is not appealable (Fitzgerald v. Adirondack Tr. Lines, 23 A.D.3d 907, 909 n. 1 [2005]), we view the decision and order as having granted the motion for leave to reargue. Despite the court's statement that it denied reargument, it nevertheless acknowledged its error... reconsidered defendants' motion for summary judgment, and then adhered to its prior decision (CPLR 2221[f]).
CPLR 5501

APPEAL FROM INTERLOCUTORY ORDER FOLLOWING A FINAL JUDGMENT MUST “NECESSARILY AFFECT THE FINAL JUDGMENT”

5501. Scope of review.
(a) Generally, from final judgment. An appeal from a final judgment brings up for review:

1. 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, provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken;

2. any order denying a new trial or hearing which has not previously been reviewed by the court to which the appeal is taken;

3. any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant, and any charge to the jury, or failure or refusal to charge as requested by the appellant, to which he objected;

4. any remark made by the judge to which the appellant objected; and

5. a verdict after a trial by jury as of right, when the final judgment was entered in a different amount pursuant to the respondent's stipulation on a motion to set aside the verdict as excessive or inadequate; the appellate court may increase such judgment to a sum not exceeding the verdict or reduce it to a sum not less than the verdict.

(b) Court of appeals. The court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered. On an appeal pursuant to subdivision (d) of section fifty-six hundred one, or subparagraph (ii) of paragraph one of subdivision (a) of section fifty-six hundred two, or subparagraph (ii) of paragraph two of subdivision (b) of section fifty-six hundred two, only the non-final determination of the appellate division shall be reviewed.
(c) Appellate division. The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal. The notice of appeal from an order directing summary judgment, or directing judgment on a motion addressed to the pleadings, shall be deemed to specify a judgment upon said order entered after service of the notice of appeal and before entry of the order of the appellate court upon such appeal, without however affecting the taxation of costs upon the appeal. In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.

(d) Appellate term. The appellate term shall review questions of law and questions of fact.

CPLR 5701 permits an immediate appeal from a nonfinal (interlocutory) order that "involves some part of the merits" or "affects a substantial right." Appellate review of certain nonfinal orders, however, may be deferred until the entry of a final judgment provided such nonfinal order "necessarily affects the final judgment." Specifically, CPLR 5501(a)(1) provides that an appeal from a final judgment brings up for review "any nonfinal judgment or order which necessarily affects the final judgment."19

Appeals of interlocutory orders to the Appellate Division are liberally permitted under CPLR 5701(a), a real benefit when an important matter needs review prior to final judgment. But it often is unnecessary to take such an appeal, because CPLR 5501 provides a broad scope of review on an appeal from a final judgment. Such an appeal will bring up for review all the prior, non-final orders in the case, so long as they "necessarily affect the final judgment," and have not been previously reviewed on appeal.20


Finality

The concept of finality is a complex one that cannot be exhaustively defined in a single phrase, sentence or writing (see generally, Cohen and Karger, Powers of the New York Court of Appeals § 9, at 39; Scheinkman, The Civil Jurisdiction of the New York Court of Appeals: The Rule and Role of Finality, 54 St. John's L.Rev. 443). Nonetheless, a fair working definition of the concept can be stated as follows: a “final” order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters (see generally, Cohen and Karger, op. cit., §§ 10, 11). FN1 Under this definition, an order or judgment that disposes of some but not all of the substantive and monetary disputes between the same parties is, in most cases, nonfinal. Thus, a nonfinal order or judgment results when a court decides one or more but not all causes of action in the complaint against a particular defendant or where the court disposes of a counterclaim or affirmative defense but leaves other causes of action between the same parties for resolution in further judicial proceedings (see, e.g., Marna Constr. Corp. v. Town of Huntington, 31 N.Y.2d 854, 340 N.Y.S.2d 167).

FN1. Of course, this definition has no bearing on the entirely separate question of when a postjudgment order may be deemed final (see e.g., Cohen and Karger, op. cit., §§ 29, 36, 43, 44).

[When an appeal from an intermediate order is perfected together with an appeal from a final judgment, the appeal from the intermediate order must be dismissed and any error alleged, to the extent that it affects the final judgment, may be reviewed upon the appeal from the final judgment” (Chase Manhattan Bank, N.A. v. Roberts & Roberts, 63 A.D.2d 566, 567, 404 N.Y.S.2d 608 [1978]). [Editor’s Note: see Matter of Aho, 39 N.Y.2d 241, 383 N.Y.S.2d 285 (1976)].

To the extent that plaintiff contends that defendant cannot now raise the statute of limitations because that issue was decided in the prior order from which defendant did not appeal, an appeal from the final judgment brings up for appellate review “any non-final judgment or order which necessarily affects the final judgment” (CPLR 5501[a][1]; see Madden v. Dake, 30 A.D.3d 932, 935 n. 2 [2006]).
CPLR 5501(a)(1): Nonfinal Orders, “Necessarily Affect the Final Judgment”


See annexed:


   Also see:

2. Dangerous Interactions: Interlocutory Appeals and Judgments”, Thomas F. Gleason, Esq. NYLJ, 11/19/12;

3. The 'Necessarily Affects' Requirement of CPLR 5501, Thomas R. Newman and Steven J. Ahmuty Jr., NYLJ, 11/08/12; and


Kaleida argues that its motion to amend its answer to assert a defense of release, made between the first and second trials, should have been granted. The other defendants join the argument, because a release of Kaleida would reduce their exposure to damages under General Obligations Law § 15–108. Before considering the argument, however, we must decide whether we have the power to do so. The question arises because, as we mentioned above, under CPLR 5501(a)(1) an appeal from a final judgment brings up for review a nonfinal judgment or order only when the nonfinal decision “necessarily affects the final judgment.” The reviewability of the order denying Kaleida's motion to amend depends on whether it meets that description.

»Our opinions have rarely discussed the meaning of the expression “necessarily affects” in CPLR 5501(a)(1). ( Matter of Aho, 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285, 347 N.E.2d 647 [1976] and Siegmund Strauss, Inc. v. East 149th Realty Corp., 20 N.Y.3d 37, 956 N.Y.S.2d 435, 980 N.E.2d 483 [2012] are exceptions.) We have never attempted, and we do not now attempt, a generally applicable definition. Various tests have been proposed, but how to apply them to particular cases is not self-evident, and our decisions in this area may not all be consistent (see generally Karger, Powers of the New York Court of Appeals § 9:5 at 304–314 [3d ed. rev. 2005]).

»The application of the “necessarily affects” rule to orders granting or denying motions to amend pleadings has been particularly vexing. We have at times reviewed such orders, thus implicitly assuming that they necessarily affected the final judgment (see Whalen v. Kawasaki Motors Corp., U.S.A., 92 N.Y.2d 288,

We now conclude that we cannot adhere to the rule that the grant or denial of a motion to amend is always unreviewable on appeal from a final judgment. There will be times, of which this is one, when such a ruling “necessarily affects” the final judgment under any common sense understanding of those words. Here, Kaleida's motion to amend, if granted, would have added a new defense to the case—one that defendants argue, with at least colorable justification, would have significantly changed the case's result. We hold that in such cases—when an order granting or denying a motion to amend relates to a proposed new pleading that contains a new cause of action or defense—the order necessarily affects the final judgment. Best and Arnav, to the extent they hold otherwise, are overruled.

**Prof. David Siegel offers additional thoughts on Siegmund:**

[Appeals] ... from just about all interlocutory dispositions...at least helps avoid the prospect of an expensive trial going completely to waste because an incidental point, maybe involving only a procedural matter, involves a key one and generates a reversal of everything. An example would be an interlocutory order denying disclosure of an item later found fundamental to the loser’s case.

* * *

In *Siegmund*, [The Appellate Division’s] test [wa]s rejected as too narrow. Generally speaking, that’s a welcome development for lawyers on the losing side of the disposition. Lawyers bent on getting it overturned but not sure whether the “necessarily affects” rule would support its review on an appeal from a later final judgment, must take the immediate appeal; they can’t safely rely on any kind of serene assumption that if they lose on final judgment and appeal it, review of the interlocutory disposition can be included.

**Davis v. State, New York State Office of Mental Health, 106 A.D.3d 1488, 966**

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N.Y.S.2d 300 (4th Dept.,2013):
Petitioner's appeal from the final order brings up for review the nonfinal order denying the motion for a change of venue because it “necessarily affects” the final order (CPLR 5501[a][1]).

Addressing first the order in appeal No. 2, we conclude that the court erred in determining that the prior nonfinal orders and related motion papers submitted by plaintiff should not be included in the record in appeal No. 1. The complete record on appeal must include “all necessary and relevant motion papers” as well as “any other reviewable order” when the appeal is from a final order or judgment (22 NYCRR 1000.4[a][2]; see generally Matter of Lavar C., 185 A.D.2d 36, 39, 592 N.Y.S.2d 535). Plaintiff is permitted to appeal from the final order entered on her default for the sole purpose of securing review, pursuant to CPLR 5501(a)(1), of any prior contested nonfinal order that necessarily affected the final order (see James v. Powell, 19 N.Y.2d 249, 256 n. 3, 279 N.Y.S.2d 10, 225 N.E.2d 741, rearg. denied 19 N.Y.2d 862, 280 N.Y.S.2d 1025, 227 N.E.2d 408). When plaintiff moved to settle the record on appeal, she sought to include the court's prior orders and related documents in the record, contending that those orders necessarily affected the final order entered on her default. Without examining the prior orders and related papers, we cannot review the propriety of the court's determination that the order entered on default was not necessarily affected by those documents. Thus, although “the notice of appeal from the [final order] does not have to recite that the appeal is also taken from the nonfinal order[s], to obtain review of the nonfinal order[s] the record submitted must contain the papers on which the order[s] were based, and the briefs may argue the validity of the order[s]” (Austrian Lance & Stewart v. Jackson, 50 A.D.2d 735, 736, 375 N.Y.S.2d 868). Consequently, we reverse the order in appeal No. 2 and grant plaintiff's motion, thereby directing that the record in appeal No. 1 be expanded to include the materials that were submitted to the court in appeal No. 2.

[3] [4] [5] With respect to appeal No. 1, having reviewed the court's prior nonfinal order relieving plaintiff's counsel, we agree with the court that the order did not necessarily affect the finding of default (CPLR 5501). Thus, that nonfinal order is not reviewable (see Siegmund Strauss, Inc. v. E. 149th Realty Corp., 81 A.D.3d 260, 265, 919 N.Y.S.2d 1, quoting Siegel, N.Y. Prac. § 530, at 910 [4th ed.], mod. on other grounds 20 N.Y.3d 37, — N.Y.S.2d —, — N.E.2d —). We further conclude, however, that the court's other prior nonfinal order dismissing plaintiff's claim for lost wages necessarily affects the final order and thus is reviewable (see Karlin v. IVF Am., 93 N.Y.2d 282, 290, 690 N.Y.S.2d 495, 712 N.E.2d 662), because dismissal of that claim “necessarily removed that legal issue from the case (i.e., there was no further opportunity during the litigation to raise the question decided by the prior [nonfinal] order)” (Siegmund Strauss, Inc., 20 N.Y.3d at —, — N.Y.S.2d —, — N.E.2d —). Nevertheless, we conclude that plaintiff's contentions concerning that order are without merit. The
record reflects that plaintiff refused to comply with discovery demands as late as five days before trial, and thus the court did not abuse its discretion in dismissing the claim for lost wages.

We conclude that the order granting defendants' respective motion and cross motion for summary judgment dismissing the claims regarding the trees is reviewable on appeal as a nonfinal order from the subsequent judgment on the counterclaims (see CPLR 5501[a][1]; RPAPL 1521[1]). Because the order dismissing the claims regarding the trees “expressly contemplated**856 further nonministerial proceedings to determine civil penalties,” i.e., damages for trespass regarding the stones, the order was, by its terms, nonfinal (Lake George Park Commn. v. Salvador, 72 A.D.3d 1245, 1247, 899 N.Y.S.2d 382, lv. denied 15 N.Y.3d 712, 2010 WL 4182377; see Burke v. Crosson, 85 N.Y.2d 10, 17, 623 N.Y.S.2d 524, 647 N.E.2d 736; see generally Kimmel v. State of New York, 49 A.D.3d 1210, 1210, 853 N.Y.S.2d 779, lv. dismissed 11 N.Y.3d 729, 864 N.Y.S.2d 381, 894 N.E.2d 644). Furthermore, inasmuch as the claims contained in both the complaint and the counterclaims are derived from the same source, i.e., the will, the claims contained in the complaint “arise out of ... the same legal relationship as the unresolved [claims contained in the counterclaims]” (Burke, 85 N.Y.2d at 16, 623 N.Y.S.2d 524, 647 N.E.2d 736). Thus, we further conclude that the court erred in determining that the doctrine of implied severance, which is a “very limited exception to the general rule of nonfinality,” applies here (id.).
Provisional Remedies to Preserve Status Quo, Injunctions

“Provisional remedies, such as, preliminary injunctions designed to retain the status quo during the pendency of the action, do not ‘necessarily affect’ the final judgment.” Such orders are “incidental order[s] which do[] ‘not have any impact on the final judgment’ [and are] not subject to review.”

Appeals from Pendente Lite Orders in Matrimonial Cases: Appeal Immediately and Hope

"After final judgment, an intermediate order is merged therein and does not survive, unless it comes up for review allowed pursuant to CPLR s 5501(a)(1). Further, an order granting temporary alimony does not affect the final judgment and cannot be reviewed on an appeal from the final judgment. Caplin v. Caplin, 33 A.D.2d 908, 307 N.Y.S.2d 486 (2nd Dept., 1970); Koziar v. Koziar, 281 App.Div. 771, 118 N.Y.S.2d 417 (2nd Dept., 1953); see generally: 7 Weinstein-Korn-Miller s 5501.05."

The appeal from the intermediate order dated January 31, 1984, has been dismissed, since the right to separately appeal therefrom was extinguished upon the entry of the judgment, dated November 21, 1984 (Matter of Aho, 39 N.Y.2d 241, 248). This order is also not reviewable pursuant to CPLR 5501 since, if it were reversed or modified, it would not affect the foundation of the judgment of divorce, or render the judgment and the trial of the action invalid and without support.

“In Schapiro v. Schapiro, 27 A.D.2d 667, 276 N.Y.S.2d 678, this court held that a temporary order in a matrimonial action is superseded by the final judgment (see also, Mittman v. Mittman, 263 App.Div. 384, 33 N.Y.S.2d 211; Kellogg v. Stoddard, 89 App.Div. 137, 84 N.Y.S. 1015). This is a rule well grounded in logic. An order awarding pendente lite relief is only designed to provide temporary relief pending disposition of the matter in a final judgment. Once a

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final judgment has been entered, it stands to reason that the order granting pendente lite relief is no longer effective, and thus no longer appealable."

Defendant contends that Supreme Court erred in issuing a pendente lite order requiring him to pay temporary child support and maintenance on the grounds that plaintiff did not seek that relief and the order was the result of a hearing that was held before defendant's time to appear in the divorce action had expired. “The propriety of [the pendente lite order] is not reviewable on this appeal”... [E]ven if we assume, arguendo, that the court erred...defendant is [nevertheless] not entitled to any relief as a result thereof. The judgment provided for maintenance and child support in an amount greater than that provided for in the pendente lite order, and the amount awarded in the judgment was retroactive to a date before the effective date of the pendente lite order. Thus, the pendente lite order was rendered moot by the judgment.

“Defendant appeals, contending that Supreme Court made various errors in granting plaintiff's motion for pendente lite support, including imputing his prior annual salary of $55,000 when establishing the temporary support obligation. However, “[a]n order awarding pendente lite relief only is designed to provide temporary relief pending disposition of the matter in a final judgment” (Flynn v. Flynn, 128 A.D.2d 583, 584, 512 N.Y.S.2d 847). Thus, when Supreme Court issued the judgment of divorce incorporating the parties' opting-out agreement and settling all issues raised in their respective actions for divorce, the prior temporary order was extinguished...Accordingly, because the rights of the parties cannot be affected by the determination defendant seeks, the issue is moot and beyond this Court's review (Matter of Hearst Corp. v. Clyne, 50 N.Y.2d 707, 713, 431 N.Y.S.2d 400; cf., Goulet v. Goulet, 97 A.D.2d 940, 468 N.Y.S.2d 736).”
CPLR 5512. APPEALABLE PAPER

Orders and Judgments Only – No Decisions, Verdicts, Reports, or Rulings

CPLR 5512. Appealable paper; entry of order made out of court:
(a) Appealable paper. An initial appeal shall be taken from the judgment or order of the court of original instance and an appeal seeking review of an appellate determination shall be taken from the order entered in the office of the clerk of the court whose order is sought to be reviewed. If a timely appeal is taken from a judgment or order other than that specified in the last sentence and no prejudice results therefrom and the proper paper is furnished to the court to which the appeal is taken, the appeal shall be deemed taken from the proper judgment or order.

(b) Entry of order made out of court. Entry of an order made out of court and filing of the papers on which the order was granted may be compelled by order of the court from or to which an appeal from the order might be taken.

Prof. David Siegel, Practice Commentaries, C5512:1. Appealable Paper:
No appeal lies from a decision, verdict, report, or ruling, but as long as the judgment or order embodying the matter that is the subject of the aggrievement has been duly and timely appealed, additional “appeal” from one of the listed items will be harmless. If the disposition is not embodied in a judgment or order, however, the appeal will be dismissed. Perhaps, if a judgment or order has been duly entered, and the problem is only in the notice of appeal's reference to a “decision” or “verdict” instead of to the overlaying order or judgment, it could be excused under CPLR 5520(c). It is a careless procedure at best.

CPLR 5512(a): when appealing from an appellate determination, you do not need to reduce it to a judgment.

Defendant initially contends that this appeal should be dismissed because plaintiff appealed from an unappealable decision rather than from a judgment or order (CPLR 5512[a]...). Regardless of the label employed by Supreme Court...we deem the paper a mixed decision and order. This order “affect[ed] a substantial right” of the parties, making it appealable (CPLR 5701[a][2][v]...). Thus, we will not dismiss the appeal, and will instead address its merits.

Appeal From Order Rather Than Judgment.
Treated As Appeal From Judgment

Although the parties appealed from Supreme Court's decision and order and not
the final judgment of divorce, we find that due to the lack of a showing of
prejudice and the fact that the order does not differ materially from the judgment,
we will exercise our discretion and, in the interest of justice, consider the appeal
to have been taken from the final judgment (Matter of Troy Sand & Gravel Co. v.
New York State Dept. of Transp., 277 A.D.2d 782, 783, 716 N.Y.S.2d 772, lv.
denied 96 N.Y.2d 708, 725 N.Y.S.2d 638; Curtis v. Curtis, 132 A.D.2d 850, 852,

COURT MAY NOT DEPRIVE A PARTY OF THE RIGHT TO
EITHER MOVE OR MAKE A RECORD

“A party cannot be deprived of his right to be heard on a substantive matter not
involving a trial ruling by the simple expedient of denying him the right to make a written
motion or a record, thereby foreclosing the opportunity for appellate review.”

[T]he defendants served a request for a premotion conference, seeking permission
to move to strike the note of issue and statement of readiness on the ground that
the action was not ready for trial, alleging as the basis their entitlement to another
physical examination and deposition of the plaintiff with respect to his newly
asserted claim and to receipt of duly executed authorizations for the release of his
employment and tax records. In response, the court scheduled a conference for
July 14, 1986, at which it issued a preliminary conference order directing that the
plaintiff provide the defendants with the requested authorizations. The application
for a further deposition and physical examination was, however, denied.
Notwithstanding the defendants' request, the justice presiding refused to enter a
written order denying the application for a further deposition and physical
examination. The court also refused the defendants' request that a court reporter
record its determination. Efforts to have the Administrative Judge prevail upon
the court to issue a written order or to permit a transcription of its denial of the
defendants' application proved fruitless.

Since they wish to appeal from the denial of their application for a physical
examination and further deposition, and no appeal lies from a ruling, as distinct
from an order (CPLR 5512[a]; Lee v. Chemway Corp., 20 A.D.2d 266), which
must be in writing (CPLR 2219; LeGlaire v. New York Life Ins. Co., 5 A.D.2d
171), the defendants, petitioners herein, thereupon commenced this proceeding
seeking a judgment in the nature of a writ of mandamus directing the court to issue a written order reflecting its denial of their application.

[5] [6] [F]undamental rights to which a litigant is entitled, including the opportunity for appellate review of certain orders, cannot be ignored, no matter how pressing the need for the expedition of cases. [T]he right to take an appeal from an intermediate order is statutory (see, generally, CPLR 5701[a][2]), as is the right to “full disclosure” of all “material and necessary” evidence (CPLR 3101 et seq.). A party cannot be deprived of his right to be heard on a substantive matter not involving a trial ruling by the simple expedient of denying him the right to make a written motion or a record, thereby foreclosing the opportunity for appellate review. At the very least, in instances where the court, in its discretion, refuses to entertain a written motion, the denial of which would be otherwise appealable had the motion been made in writing, the putative moving party should be afforded the opportunity to make a record reflecting the respective positions of the parties on the particular issue and the court's reasoning and decision, as well as a recitation of the facts and documentation that were considered in the court's determination. We note that the Uniform Civil Rules for the Supreme Court and the County Court make provision for the transcription of the court's directions at a preliminary conference and expressly state that the transcript “shall have the force and effect of an order of the court” (22 NYCRR 202.12(e)). So that there will be no question as to the appealability of such disposition, however, we would also require that where a party presents a written order embodying the court's determination spread on the transcript that such order be signed.

We are aware that on another occasion... we held that a precalendar conference order not made on notice of motion and without supporting papers was non-appealable. We then suggested that in such cases appellate review could be had, if otherwise available, if the party adversely affected by the order formally moved to vacate or modify it. The determination of that motion would then be appealable. Such a procedure... would be wasteful in an individual assignment system, the hallmarks of which are judicial flexibility and continuity of supervision.

Signed Transcript of Court Order Is Appealable


[Although we have in the past been inclined to read CPLR 5512 strictly and so have required as appealable paper a duly entered order or judgment, we have since our recent decision in Grisi taken a less restrictive approach (Grisi, supra 119 A.D.2d 418, 422, 507 N.Y.S.2d at 158–59). As a transcript of the court's
directions at a preliminary conference is deemed to “have the force and effect of an order of the court” (22 NYCRR 202.12[e] ) it may be considered an appealable paper pursuant to CPLR 5512, provided it is signed (119 A.D.2d 418, 422).

**No Appeals From Oral Rulings— Transcripts Must Be So-Ordered**

*Smith v. United Church of Christ, 95 A.D.3d 581, 943 N.Y.S.2d 530 (1st Dept., 2012):* Plaintiff's [ ] appeals from various oral rulings...must be dismissed. No appeal lies from the court's rulings in open court, as the transcripts were not “so-ordered” by the court (Sanchez de Hernandez v. Bank of Nova Scotia, 76 A.D.3d 929 [2010], lv. denied 16 N.Y.3d 705 [2011] ), and a number of findings on the record were superseded by a written order from which plaintiff did not appeal.
CPLR 5513. Time to take appeal, cross-appeal or move for permission to appeal:
(a) Time to take appeal as of right. 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, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

(b) Time to move for permission to appeal. The time within which a motion for permission to appeal must be made shall be computed from the date of service by a party upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry, or, where permission has already been denied by order of the court whose determination is sought to be reviewed, of a copy of such order and written notice of its entry, except that when such party seeking permission to appeal has served a copy of such judgment or order and written notice of its entry, the time shall be computed from the date of such service. A motion for permission to appeal must be made within thirty days.

(c) Additional time where adverse party takes appeal or moves for permission to appeal. A party upon whom the adverse party has served a notice of appeal or motion papers on a motion for permission to appeal may take an appeal or make a motion for permission to appeal within ten days after such service or within the time limited by subdivision (a) or (b) of this section, whichever is longer, if such appeal or motion is otherwise available to such party.

(d) Additional time where service of judgment or order and notice of entry is served by mail or overnight delivery service. Where service of the judgment or order to be appealed from and written notice of its entry is made by mail pursuant to paragraph two of subdivision (b) of rule twenty-one hundred three or by overnight delivery service pursuant to paragraph six of subdivision (b) of rule twenty-one hundred three of this chapter, the additional days provided by such paragraphs shall apply to this action, regardless of which party serves the judgment or order with notice of entry.

CPLR 5513 Is Jurisdictional, Appellant Is Held to Strict Compliance

Kelly v. Sheehan 76 N.Y. 325 (1879):
There being no power in the court to relieve a party who fails to take an appeal in due time, however meritorious his excuse, the party undertaking to limit the time is held to strict practice.

Motion for extension of time to file and serve notice of appeal and for other relief denied. Memorandum: The time in which to take an appeal is jurisdictional and cannot be extended unless authorized by statute (A & B Serv. Sta. v. State of New York, 50 A.D.2d 973, 974, 376 N.Y.S.2d 656, lv. denied 39 N.Y.2d 709, 386 N.Y.S.2d 1027, 352 N.E.2d 597; see also, CPLR 5513, 5514, 5520).

The notice of appeal from the order, not having been filed within 30 days of service of the order with notice of its entry, was untimely and the appeal must therefore be dismissed (CPLR 5513; Hecht v. City of New York, 60 N.Y.2d 57, 61, 467 N.Y.S.2d 187; see CPLR 5514).

IMMATERIAL INACCURACIES IN THE NOTICE OF APPEAL

[A] party seeking to limit the time of another to take an appeal is strictly held to
the rules of practice, and the failure to comply therewith will not be overlooked
(Good v. Daland, 119 N.Y. 153; Nagin v. Long Is. Sav. Bank, 94 A.D.2d 710, 462
N.Y.S.2d 69). However, “a mere inaccuracy in the notice which violates no rule
of practice and is in itself immaterial, will not be sufficient to avoid” the time to
Although plaintiff failed to include the index number of the case (CPLR 2101[c]
), Eastern waived its objection to any defect in the form of the notice of entry by
failing to return it within two days after receiving it (CPLR 2101[f]).

-- CPLR 5513(a): Time Does NOT Begin to Run If Order and Notice of Entry
Are Not Served

Mideal Homes Corp. v. L & C Concrete Work, Inc., 90 A.D.2d 789, 455
N.Y.S.2d 394 (2nd Dept., 1982):
Since a copy of the order and written notice of its entry was never served upon the
appellant, the 30-day period to take an appeal as of right never began to run
(CPLR 5513, subd. [a]; see Malvin v. Schwartz, 65 A.D.2d 769, 409 N.Y.S.2d
787 affd. 48 N.Y.2d 693, 422 N.Y.S.2d 58, 397 N.E.2d 748).

-- LETTER: “HERE’S THE DECISION!” ...

It is well settled that the requirements of CPLR 5513(a) must be strictly followed
(Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B,
CPLR C5513:1, at 169; CPLR C5513:2, at 171). Compliance with CPLR 5513(a)
requires a notice of entry that refers to the appealable paper, and the date and
place of its entry.

Although the Supreme Court paper respondents served identifies itself as both a
decision and order, it can be treated as a judgment determining the proceeding, an
appealable paper (CPLR 411; 5512[a]). Nevertheless, respondents’ cover letter
describing the enclosure as a “decision filed” was not notice of entry of a
judgment or order. Consequently, the cover letter is insufficient for the notice of
entry required by CPLR 5513(a). In addition, because their cover letter did not
alert petitioner to the enclosure of an appealable paper, respondents cannot rely
on notations on the enclosed paper itself as providing essential elements of a
notice of entry. Moreover, the paper respondents enclosed was neither stamped

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with the date and place of entry nor signed by the clerk, and therefore did not provide the essential elements of a notice of entry (CPLR 5016 [a]). Thus, petitioner's time to appeal never commenced running and his appeal was timely taken.

Motion for leave to appeal dismissed as untimely. While the cover letter here stated only that the Appellate Division order was attached and did not specify that it was entered, the attached Appellate Division order was stamped entered with the date of entry and the name of the clerk of the court where the order was entered. Service of this cover letter together with the Appellate Division order constitutes service of the order with notice of entry so as to commence the running of appellant's time to move for leave to appeal. Thus, the motion for leave to appeal, made more than 35 days after service of the cover letter and the Appellate Division order, was untimely (CPLR 5513[b]; 2103[b][2]).

**Lum v. YWCA, 136 A.D.2d 972, 525 N.Y.S.2d 82 (4th Dept.,1988):**
The motion to dismiss the appeal for failure to serve and file the notice of appeal timely is denied. The notice of entry, dated and mailed on July 22, reciting that the order being appealed from was entered on July 23 is obviously defective. Hence, appellant's time to appeal was not limited (CPLR 5513[a]). The party seeking to limit another party's time to appeal must adhere strictly to the provisions of the statute (Kelly v. Sheehan, 76 N.Y. 325; Nagin v. Long Is. Sav. Bank, 99 A.D.2d 827, lv. denied 63 N.Y.2d 603).
There are only four grounds for an extension of the 30-day time to appeal:

CPLR 5514. Extension of time to take appeal or to move for permission to appeal:27
(a) Alternate method of appeal. If an appeal is taken or a motion for permission to
appeal is made and such appeal is dismissed or motion is denied and, except for
time limitations in section 5513, some other method of taking an appeal or of
seeking permission to appeal is available, the time limited for such other method
shall be computed from the dismissal or denial unless the court to which the
appeal is sought to be taken orders otherwise.

(1) 5514(a): using the wrong method to appeal (see CPLR 5520(a),
“Omissions; appeal by improper method”)

“The extension of time pursuant to CPLR 5514(a) will not apply where the
dismissal is for untimeliness.”

Timely filing of a notice of appeal is nonwaivable and jurisdictional.28

Andress v. Andress, 97 A.D.3d 1151, 947 N.Y.S.2d 748 (4th Dept., 2012): The
Appellate Division may treat the notice of appeal as an application for leave to
appeal.

Park East Corp. v. Whalen, 38 N.Y.2d 559, 381 N.Y.S.2d 819 (1976):
CPLR 5514(a): “unnecessary procedural traps for the unwary”
In Park East, the Court of Appeals delivered unwary counsel from this trap by equalizing
the time frames between these statutes: the Court interpreted 5514(a) to require service of the
denial or dismissal of the procedurally incorrect method as the predicate for the fresh 30-day
limitation period:
Literally and out of context, CPLR 5514 (subd. (a)) seems to require computation

27 Prof. David D. Siegel, Practice Commentaries C5520:1. Defects and Omissions:
“The most serious and often fatal omissions in appellate practice concern the time
to appeal. CPLR 5514(c) recognizes only a few bases for excusing time defects.
Among the few that are recognized are those set forth in CPLR 5520.”

28 Wei v. New York State Dept. of Motor Vehicles 56 A.D.3d 484, 865 N.Y.S.2d 920 (2nd Dept.
2008); Retta v. 160 Water Street Associates, L.P. 94 A.D.3d 623, 942 N.Y.S.2d 525 (1st
of the time to take an alternative method of appeal to begin on the date of the denial or dismissal of the first attempted appeal. However, we interpret CPLR 5514 (subd. (a)) similarly to the provision for all other appeal time limitations, so as to require computation of the time allowed to begin upon service of a copy of the order terminating the first attempted appeal with written notice of its entry. Such interpretation evidently conforms to the intention of the Legislature and harmonizes this statute's requirements with those of CPLR 5513 where service of a copy of the order with written notice of entry was deliberately adopted upon the recommendation of the Judicial Conference CPLR Advisory Committee (see McKinney's Cons.Laws of N.Y., Book 7B, CPLR 5513, Supplementary Practice Commentary for 1970 by Donald Zimmerman, Pocket Part (1975--1976), at pp. 248--249). Moreover, this achieves a uniform rule governing commencement of time requirements affecting appeals and it eliminates unnecessary procedural traps for the unwary while simultaneously insuring notification of termination of the first appeal attempt (contra, Dayon v. Downe Communications, 42 A.D.2d 889, 347 N.Y.S.2d 460).29

“Thus, the time for taking the right step is to be measured from the service of the order (with notice of entry) disposing of the wrong step.”30


Motion to dismiss appeal granted...upon the ground that no appeal as of right lies, noting that petitioners-appellants have thirty days, pursuant to CPLR 5514(a), to make a motion for leave to appeal.

**Inconsistent Applications of Park East**

*Park East’s* unequivocal holding to the contrary notwithstanding, appellate courts have not applied the decision evenly or consistently within the same departments.

**The First Department**


CPLR 5513(b) provides that a motion for leave to appeal must be made within thirty days of service of a copy of the order with notice of entry, but CPLR 5514 provides that if an appeal is taken and dismissed, the thirty days shall be

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29 See Lazarcheck v. Christian 58 N.Y.2d 1033, 448 N.E.2d 1354, 1354, 462 N.Y.S.2d 443 (N.Y. 1983), which has not been cited anywhere held: "Motion to dismiss appeal granted and appeal dismissed...upon the ground that no appeal as of right lies, noting that petitioners-appellants have thirty days, pursuant to CPLR 5514(a), to make a motion for leave to appeal." it must be assumed that this holding is consistent with Park East.

30 Prof. David D. Siegel, Practice Commentaries to CPLR 5514, “C5514:1, Mistaking Method.”
computed from the dismissal. This has been interpreted to mean that computation of the time allowed begins upon service of a copy of the order terminating the first attempted appeal with written notice of its entry.

Nevertheless, in 2012, without explanation, the First Department, in Retamozzo v. Quinones, 95 A.D.3d 652, 945 N.Y.S.2d 22 (1st Dept., 2012), dismissed an appeal based on a literal reading of 5514(a) rather than as interpreted in Park East:

Because the order appealed from is appealable as of right (CPLR 5701[a][2]), plaintiff should have served and filed a notice of appeal instead of moving for leave to appeal. When the motion for leave to appeal was denied, in order to take advantage of the tolling provision provided in CPLR 5514(a), plaintiff should have served and filed a notice of appeal within the time set forth in CPLR 5513(a), computed from the date the motion for leave to appeal was denied. He did not and thus the appeal is untimely.

The Fourth Department

While in Sawma v. Bane, 197 A.D.2d 938, 604 N.Y.S.2d 844 (4th Dept. 1993), the Fourth Department, citing Park East and CPLR 5514(a), correctly held “Petitioner has 30 days from the service of our order with notice of entry to file and serve a notice of appeal”, in no less than five other decisions, the Fourth Department has applied section 5514(a) literally rather than as interpreted by the Court of Appeals.31 In each of these decisions the Fourth Department held: “Pursuant to CPLR 5514(a), petitioner will have 30 days from the date of our order denying this motion to file and serve a notice of appeal as of right.”

There appear to be no rulings from the Second or Third Departments on this question.

References:

CPLR 5514(a): The Uncertain Limitations Period Following Appeals By Improper Method, E. Scheinberg, NYLJ, 8/15/12.

CPLR 5514(a): When an incorrect method is used, Court can fix time or deny:
(a)... the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders

otherwise.

Motion to dismiss the appeal herein granted...Pursuant to CPLR 5514(a), any motion by appellants for permission to appeal shall be made within ten days of the date hereof.

**Fau T. Leung v. Department of Motor Vehicles, 65 A.D.2d 736, 410 N.Y.S.2d 616 (1st Dept. 1978):**
The remand directed by the order will require further fact finding and adjudication as to which respondent is unfettered by any directive of Special Term. In that sense, the remand is not merely ministerial...Consequently, the order is a non-final one in an Article 78 proceeding from which an appeal does not lie as of right [CPLR s 5701(b)(1)]. Permission to appeal was required from the Special Term Justice or from a Justice of this Court [CPLR s 5701(c)]. No such permission was obtained. Accordingly, the appeal must be dismissed. Cirasole v. Simins, 48 A.D.2d 795, 369 N.Y.S.2d 423...Finally, we accompany our dismissal with a directive that no further time be afforded respondent within which to move for permission to appeal. CPLR s 5514(a).

(2) **CPLR 5514(b): disability of attorney**
(b) Disability of attorney. If the attorney for an aggrieved party dies, is removed or suspended, or becomes physically or mentally incapacitated or otherwise disabled before the expiration of the time limited for taking an appeal or moving for permission to appeal without having done so, such appeal may be taken or such motion for permission to appeal may be served within sixty days from the date of death, removal or suspension, or commencement of such incapacity or disability.

– death, disbarment, suspension

– physically, mentally, or otherwise disabled (also, CPLR 321(c));

– the appeal may be taken or the motion for permission to appeal may be served within 60 days from the disability

  – doesn’t apply to voluntary discharge.

– **Siegel v. Obes, 112 A.D.2d 930, 492 N.Y.S.2d 447 (2nd Dept.,1985):** [CPLR 5514(b)] doesn’t apply to general instances of substitution of counsel...[or]...to the voluntary discharge of an attorney by his client (cites omitted).
(3) & (4): CPLR 1022 (substitution of parties):

CPLR 5514(c): Other extensions of time; substitutions or omissions.
No extension of time shall be granted for taking an appeal or for moving for permission to appeal except as provided in this section, § 1022, or § 5520.

CPLR 1022: Unless the court orders otherwise, if the time for taking an appeal has not expired... before the occurrence of an event permitting substitution of a party, the period is extended as to all parties until 15 days after substitution is made or, in case of dismissal of the action under CPLR 1021, is extended as to all parties until 15 days after the dismissal.

(4) Timely Service, Party Forgot to File a Notice of Appeal Within 30 Days

-- CPLR 5520: “Omissions; appeal by improper method”

Motion for leave to appeal dismissed upon the ground that the prior motion for leave to appeal, made to the Appellate Division, was untimely (CPLR 5513(c); cf. CPLR 5514(a); Cohen & Karger, Powers of the New York Court of Appeals, s 101, p. 429; see, e. g., Schwartz v. National Computer Corp., 38 N.Y.2d 800, 381 N.Y.S.2d 872). 57 A.D.2d 868, 393 N.Y.S.2d 1020.

The core question before us is a practice issue that has recurred in varying forms: what is the consequence of abandoning an appeal and then, later in the litigation, filing a second appeal presenting the same issue? Consistent with our precedents, we conclude that the Appellate Division, in the circumstances presented, correctly dismissed the second appeal.

Plaintiff filed a notice of appeal and simultaneously sought reargument in Supreme Court...

Plaintiff, however, failed to perfect his first appeal within six months, as required by the Appellate Division, Second Department (see, 22 NYCRR 670.8 [e]). Consequently, pursuant to 22 NYCRR 670.8(h), the Appellate Division included the appeal in a published list of cases that would be dismissed as abandoned unless a motion to extend the time to perfect were made within 10 days. Plaintiff did not seek an enlargement of time, and on February 18, 1998, the Appellate Division dismissed the appeal for failure to prosecute.

On February 27, 1998, plaintiff perfected his second appeal, but the Appellate Division dismissed it as well, citing Bray v. Cox, 38 N.Y.2d 350, 379 N.Y.S.2d 803, 342 N.E.2d 575. The court held that “plaintiff is barred from raising the issue of the timeliness of the insurance carrier's disclaimer of coverage on this appeal. The issue could have been raised in the prior appeal from the order dated May 15, 1997, which was dismissed as abandoned.” (255 A.D.2d 306, 678 N.Y.S.2d 790.) We affirm.

In Bray v. Cox, 38 N.Y.2d 350, 379 N.Y.S.2d 803, this Court held that, if an appeal has been dismissed for failure to prosecute, any subsequent appeal raising an issue presented by the earlier appeal is subject to dismissal. There, the trial court dismissed plaintiff's personal injury claim, arising out of a car accident, on the ground that the Ontario guest statute applied. The Appellate Division reversed, and this Court granted defendant leave to appeal. Defendant, however, failed to perfect his appeal, and we later dismissed it for want of prosecution. After a jury verdict for plaintiff, defendant appealed directly to this Court pursuant to CPLR 5601(d), arguing again that the Ontario guest statute applied.

This Court dismissed defendant's second appeal on the ground that “a prior dismissal for want of prosecution acts as a bar to a subsequent appeal as to all questions that were presented on the earlier appeal” (Bray v. Cox, supra, 38 N.Y.2d, at 353, 379 N.Y.S.2d 803). As we noted, if no penalty were imposed for failing to prosecute an earlier appeal, litigants could use the appellate process as a
means of “delaying enforcement of judgments and the inevitable payment of just
debts and obligations” (id., at 353, 379 N.Y.S.2d 803). Further, we concluded
that, as a prudential matter, an appellant should not “have two opportunities to
appeal to this [C]ourt on identical issues” (id., at 353, 379 N.Y.S.2d 803; see
also, Siegel, N.Y. Prac. § 542, at 898 [3d ed.]).

People v. Corley, 67 N.Y.2d 105, 500 N.Y.S.2d 633, 491 N.E.2d 1090, applied
those same principles in a criminal case. Citing Bray, we reasoned that after an
appeal has been dismissed for failure to prosecute, permitting a subsequent appeal
on the same issue would “encourage laxity” as well as “foster disrespect and
indifference toward our rules and orders” (id., at 109, 500 N.Y.S.2d 633).

We were unwilling to abide those consequences in Corley, and we remain
unwilling to do so here. Plaintiff raised the same issue on his appeal from the
original May 15, 1997 order that he raised on appeal from the subsequent August
22, 1997 order. However, he chose to ignore the first appeal, requiring the
Appellate Division to take steps to dismiss the matter. As we stated in Corley, that
sort of laxity and disrespect toward court procedures should not be condoned.

Plaintiff tries to distance himself from Bray and Corley by arguing that his first
appeal, according to CPLR 5517(a)(1), remained viable even after Supreme Court
granted reargument, and thus he had the right to file both appeals. The issue
before us, however, is not whether plaintiff had the right to file both appeals—no
one disputes that he did (Siegel, Practice Commentaries, McKinney's Cons. Laws
of N.Y., Book 7B, CPLR C5517:1, at 209; Siegel, N.Y. Prac, op. cit., § 532, at
879; see also, CPLR 5701[a][2] [viii] [eff. July 20, 1999] [explicitly authorizing
appeal from an order granting leave to reargue]). In Bray as well, appellant
unquestionably had the right to file his second appeal pursuant to CPLR 5601 (d)
(Bray v. Cox, supra, 38 N.Y.2d, at 353, 379 N.Y.S.2d 803). Rather, the issue here,
as in Bray, is whether, having decided to file both appeals, plaintiff had the right
to pursue the second appeal after allowing the first to die on the vine. Clearly, he
did not.

[2] CPLR 5517 does not mandate a contrary result. That section, derived from
Civil Practice Act § 562-a, was enacted in order to ensure that an appeal remains
viable where the trial court grants reargument of the order appealed from, and
then on reargument adheres to its original decision. The statute was designed to
reverse a string of court cases holding to the contrary (17th Ann. Report of N.Y.
Jud. Council, at 207-211 [1951]; see also, 12 Weinstein-Korn-Miller, N.Y. Civ.
Prac. ¶ 5517.01). CPLR 5517 was not intended, however, to permit litigants to
engage in the dilatory practice of allowing an appeal to be dismissed for want of
prosecution and then later pursuing a second appeal on the same issue.

Notably, plaintiff could have avoided his present predicament in several ways. He
could have timely perfected his original appeal. He could have moved the Appellate
Division for an extension of time to perfect that appeal (22 NYCRR 670.8[d]-[h]). If plaintiff knew that he could not perfect the first appeal in a timely manner, he could have withdrawn it, sparing the Appellate Division the burden of carrying, monitoring and ultimately dismissing it. After withdrawing the first appeal, plaintiff could have continued to pursue the second appeal, if he so desired (see, e.g., People v. Green, 56 N.Y.2d 427, 452 N.Y.S.2d 389, where defendant withdrew his interlocutory appeal [53 N.Y.2d 704] and court later addressed the merits). Plaintiff, however, simply chose to abandon his first appeal, showing complete indifference toward the court system. We cannot say that, in these circumstances, dismissal of plaintiff's second appeal was erroneous as a matter of law.

Nor does the result we reach conflict with Aridas v. Caserta, 41 N.Y.2d 1059, 396 N.Y.S.2d 170, as plaintiff contends. In Aridas, the Appellate Division dismissed defendants' first appeal for failure to prosecute, and then decided defendants' second appeal—though based on the same issue—on the merits. Recognizing that the Appellate Division retained “continuing jurisdiction” to reconsider its prior determination, we concluded that the Appellate Division's discretionary decision to hear the second appeal was not error as a matter of law (id., at 1061, 396 N.Y.S.2d 170; see also, Faricelli v. TSS Seedman's, 94 N.Y.2d 772, 698 N.Y.S.2d 588, 1999 WL 818714 [decided today]). Aridas recognizes the Appellate Division's discretion to entertain an appeal after dismissal of a prior appeal for failure to prosecute, but it does not require the Appellate Division to do so. Moreover, we have no doubt that the Appellate Division was well aware that it had the discretion to entertain plaintiff's appeal if it wished (see, e.g., Brosnan v. Behette, 243 A.D.2d 524, 664 N.Y.S.2d 560, another Second Department case). Thus, there is no need to remit this case to the Appellate Division for an exercise of discretion.

Finally, plaintiff argues that in other cases where appeals have been filed from the original order as well as from the order on reargument adhering to the original decision, the Appellate Division has dismissed the appeal from the original order as academic or superseded, and then considered the second appeal on the merits. However, even if the Appellate Division has, on occasion, exercised its discretion to hear a subsequent appeal, it certainly was not required to do so in the case at hand. Moreover, there is no indication in the cases cited by plaintiff that the first appeal was not timely perfected (see, e.g., Bents v. City of New York, 257 A.D.2d 372, 683 N.Y.S.2d 48 [1st Dept.]; Andrews v. LaRuffa, 257 A.D.2d 553, 682 N.Y.S.2d 891 [2nd Dept.]; Ryan v. McLean, 209 A.D.2d 913, 619 N.Y.S.2d 196 [3d Dept.]; Public Serv. Truck Renting v. Ambassador Ins. Co., 136 A.D.2d 911, 525 N.Y.S.2d 85 [4th Dept.]). Where, as here, the first appeal has been dismissed for failure to perfect in a timely fashion, the Appellate Division has held that dismissal of the second appeal is appropriate (see, Tepper v. Furino,
Plaintiff points to Dennis v. Stout, 24 A.D.2d 461, 260 N.Y.S.2d 325, where the Appellate Division held that the appellant “properly abandoned” his appeal from the original order after the trial court issued an order, on reargument, adhering to its original decision, from which a new notice of appeal was filed (id., at 461-462, 260 N.Y.S.2d 325). Dennis, however, was decided in 1965-11 years before our holding in Bray that the abandonment of a prior appeal justifies dismissal of a second appeal.

In short, the message is clear and consistent: the filing of an appeal is not inconsequential. An appeal left untended may be dismissed as abandoned, and appellant may be precluded from later appealing the same issue.

On June 17, 1964 while returning from a trip to Buffalo, New York, plaintiff was injured and defendant's decedent was killed when the automobile the latter was operating collided with a utility pole. Both plaintiff and the deceased were citizens and residents of the Province of Ontario, Canada, and the vehicle in which they were traveling was registered and insured there.

In 1967, plaintiff commenced this action in the Supreme Court, Erie County, to recover for his personal injuries. Defendant pleaded the Ontario guest statute and Supreme Court, Erie County, holding that the law of Ontario was applicable, dismissed the complaint upon stipulated facts. The Appellate Division taking a contrary view of the choice-of-laws issue, reversed and reinstated the complaint. Thereafter, defendant moved for leave to appeal on a certified question and, on September 14, 1972, the Appellate Division granted the motion.

More than one year later, and some time after plaintiff had served defendant with a demand that he file and serve his papers on appeal (see 22 NYCRR 500.6(b)), the appeal was dismissed for failure to comply with the Rules of Practice of the Court of Appeals which provide that ‘(a)n appeal must be argued or submitted within nine months after the appeal is taken. If it not so argued or submitted a summary order of dismissal shall be entered’ (22 NYCRR 500.6(a)). A subsequent motion to vacate the dismissal and reinstate the appeal was denied (33 N.Y.2d 789, 350 N.Y.S.2d 653).

A trial of the action followed, the jury rendering a verdict in favor of plaintiff and judgment being entered thereon. Defendant now appeals directly to this court pursuant to CPLR 5601 (subd. (d)) and, for a second time, seeks review of the same order of the Appellate Division and, of course, on concededly identical issues.
The appeal should be dismissed. We conclude that the rule to be followed is that a prior dismissal for want of prosecution acts as a bar to a subsequent appeal as to all questions that were presented on the earlier appeal. There is sound logic and reason for such a holding. Certain it is that a party should have his day in court, and that day should conclude the matter. Were the rule otherwise, the party who obtained judgment below could be deprived of the benefit of that judgment until a later time by the act of the losing party in appealing and disregarding the appeal (see, e.g., Anderson v. Richards, 173 Ohio St. 50, 179 N.E.2d 918); and conversely, the securing of leave to appeal might become a strategem for appellants, to be utilized for the purpose of delaying enforcement of judgments and the inevitable payment of just debts and obligations. Furthermore, since the dismissal of an appeal from a final judgment under 22 NYCRR 500.6(a) is with prejudice such as occurred in Crane v. State of New York, 35 N.Y.2d 945, 365 N.Y.S.2d 169, it would be anomalous to vary the result simply because the order appealed from is nonfinal, particularly where the issues presented on both appeals were exactly the same. When leave to appeal was granted by the Appellate Division, appellant was then in the same stance as an appellant here as a matter of right, and he ought not in these circumstances have two opportunities to appeal to this court on identical issues.

The conclusion finds strong support in cases from other jurisdictions which posited their determinations, as we do here, on common-law principles and precedent. In Carlberg v. Fields, 33 S.D. 410, 413, 146 N.W. 560, 561 the court said that it was settled ‘that a second appeal will not be allowed from an order or judgment where the first appeal has been dismissed for want of prosecution’. It was likewise held in Schmeer v. Schmeer, 16 Or. 243, 17 P. 864 that ‘(w)hen a party perfects an appeal, and then abandons it, is right of appeal is exhausted’, and so it should be. Brill v. Meeks, 20 Mo. 358, 359 reaches the same result and states that ‘(w)hen appeal has once been granted, the power over the subject is Functus officio and cannot be exercised a second time’. Similarly, after carefully and exhaustively analyzing the treatment of writs of error in the common-law courts of England, the New Jersey Supreme Court held in Welsh v. Brown, 42 N.J.L. 323 that where a writ of error directed to a lower court was dismissed for want of prosecution, the plaintiff in error could not sue out such a writ. Anderson v. Richards, 173 Ohio St. 50, 179 N.E.2d 918, Supra, reaches precisely the same conclusion, also on the basis of common-law precepts (cf. United States v. Fremont, 18 How. (59 U.S.) 30, 15 L.Ed. 241). In fact, the courts of at least two other States have apparently thought the conclusion we reach to be so clear and sound as to enact court-made rules of practice to govern such cases (Chamberlain v. Reid, 16 Cal. 208; Karth v. Light, 15 Cal. 324; Merrill v. Hunt, 52 Miss. 774.)

FN* Interestingly, none of these cases were decided on the basis of statutory authority enacted by the legislative branch of government.
FN* (Contra Sanders v. Moore, 52 Ark. 376, 12 S.W. 783; Harris v. Ferris, 18 Fla. 81; Reed v. Kimsey, 98 Ill.App. 364; Helm v. Boone, 29 Ky. 351; Marshall v. Milwaukee & St. Paul R.R. Co., 20 Wis. 644.)

... We hold only that a dismissal for want of prosecution bars litigation of the issues which could have been raised on the prior appeal. Indeed, the appellant in the case before us was not required to appeal the judgment after trial directly to this court, but, rather, could have obtained full review of that judgment in the Appellate Division and then in this court, save, of course, the issues which could have been presented on the prior dismissed appeal.

This court must have the wherewithal to control its calendar. The rules of this court have been widely publicized and reported, and the Bar has been adequately advised and forewarned that these rules will be enforced. Appeals are not hastily dismissed. Indeed, appellant has no cause to complain of the dismissal, for timely demand was made to have him serve and file his papers, which proved fruitless. In fact, had the rules not been enforced, the original appeal might still be on our docket. (See Crane v. State of New York, 35 N.Y.2d 945, 365 N.Y.S.2d 169, supra, where an appeal was permitted to lie fallow for over six years before it was dismissed under the new practice.)

That CPLR 5601(d) permits an appeal as a matter of right is of no moment in the posture in which this appeal reaches this court for the issues now raised have been foreclosed by the dismissal of the prior appeal and are not reviewable.

Thus, we hold the dismissal of an appeal for want of prosecution to be on the merits of all claims which could have been litigated had the appeal been timely argued or submitted.

Bray and Rubeo Notwithstanding,
Courts May Grant Relief To Hear The Appeal

The mother correctly asserts that a previous appeal by the father from the underlying order was dismissed by this Court for lack of prosecution. Ordinarily, the dismissal of that appeal would be ground for the dismissal of the instant appeal from the money judgment entered upon that order, since the dismissal constituted an adjudication of the merits of any issue which properly could have been raised on that prior appeal (Rubeo v. National Grange Mut. Ins. Co., 93 N.Y.2d 750, 697 N.Y.S.2d 866; Bray v. Cox, 38 N.Y.2d 350, 379 N.Y.S.2d 803; Cardo v. Board of Mgrs., 67 A.D.3d 945, 891 N.Y.S.2d 97; Graziano v. Graziano, 66 A.D.3d 835, 886 N.Y.S.2d 616; Catalano v. City of New York, 63 A.D.3d 979,
880 N.Y.S.2d 549). [W]e exercise our discretion to review the issue raised by the father on this appeal.

**Neuburger v. Sidoruk, 60 A.D.3d 650, 875 N.Y.S.2d 144 (2d Dept., 2009):**
As a general rule, we do not consider any issue raised on a subsequent appeal that was raised, or could have been raised, in an earlier appeal that was dismissed for lack of prosecution, although we have the inherent jurisdiction to do so (Rubeo v. National Grange Mut. Ins. Co...; Bray v. Cox...). Meanwhile, the earlier appeal was dismissed by decision and order on motion of this Court...for failure to perfect in accordance with the rules of this Court (22 NYCRR 670.8[h] ). While the better practice would have been for the plaintiffs to withdraw the prior appeal, rather than abandon it, nonetheless, we exercise our discretion to review the issues raised on the appeal from so much of the order dated September 26, 2007, as was made upon reargument.

**Catalanotto v. Abraham, 94 A.D.3d 937, 942 N.Y.S.2d 600 (2nd Dept., 2012):**
Generally, we do not consider an issue on a subsequent appeal which was raised or could have been raised in an earlier appeal which was dismissed for lack of prosecution, although we have inherent jurisdiction to do so (Rubeo v. National Grange Mut. Ins. Co...; Bray v. Cox...; Madison v. Tahir, 45 A.D.3d 744, 744–745, 846 N.Y.S.2d 313). Here, Kirschenbaum has not demonstrated any basis for the exercise of such discretion.

While there are ample instances of such kindness by the court, counsel should neither expect nor rely upon it. When asking for relief from a Bray-Rubeo consequence, counsel should be extremely humble.

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**Perfected Appeal from Order where Judgment Is Not Appealed**

**Molinaro v. Bedke, 281 A.D.2d 242, 721 N.Y.S.2d 534 (1st Dept. 2001):**
The appeal should be considered on the merits even though plaintiffs have not appealed the judgment that ministerially implemented the order they did appeal (CPLR 5501[c]; see, Morris & Partners v. Alfin, Inc., 234 A.D.2d 56, 650 N.Y.S.2d 201, Neuman v. Otto, 114 A.D.2d 791, 495 N.Y.S.2d 43).

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CPLR 5515(1) IS JURISDICTIONAL

An Appeal from Only a Part of a Judgment/Order
Is a Waiver of the Right to Appeal from the Remainder Thereof.
It Is Deemed Abandoned

“CPLR 5515(1) requires that a notice of appeal designate the judgment or order, or specific part of the judgment or order, from which the appeal is taken. This requirement is jurisdictional. By taking an appeal from only a part of a judgment or order, a party waives its right to appeal from the remainder thereof.” The defendant's amended notice of cross appeal specifically limits her cross appeal to the portions of the judgment “which directed the plaintiff to pay the defendant $7,500 per month in maintenance and denied the defendant's request for an award of counsel fees.” As the scope of the defendant's amended notice of cross appeal is limited, her contentions that the award of $15,000 per month of maintenance for 10 years after the marital home is sold is inadequate both in amount and duration, and that the Supreme Court should have granted her request for expert's fees, are not properly before this Court.

Failure to File a Preargument Statement Is Not Jurisdictional

Appellant timely served a notice of appeal, but its attempt at filing the notice of appeal was rejected by the County Clerk on the ground that no preargument statement was included with the notice of appeal. The County Clerk erred in rejecting the notice of appeal inasmuch as the filing of a preargument statement is not a jurisdictional prerequisite to taking an appeal (CPLR 5513, 5514[c]), and the penalty for failure to file a preargument statement is left to the discretion of this Court (22 NYCRR 1000.12[h]). Thus, appellant's failure to file timely is excusable and the motion to extend the time to take the appeal [] is granted.

Notice of Appeal May Not Be Amended

Owl Homes of Fredonia, Inc. v. Murphy, 199 A.D.2d 1077, 608 N.Y.S.2d 896 (4th Dept. 1993):
Because a notice of appeal constitutes a jurisdictional prerequisite for an appeal, the notice cannot be amended to add parties after the time to serve and file the notice has elapsed (cites omitted; see CPLR 5514[c]).
CPLR 5517, SUBSEQUENT ORDERS
(a) Appeal not affected by certain subsequent orders. An appeal shall not be affected by:

1. the granting of a motion for reargument or the granting of an order upon reargument making the same or substantially the same determination as is made in the order appealed from; or

2. the granting of a motion for resettlement of the order appealed from; or

3. the denial of a motion, based on new or additional facts, for the same or substantially the same relief applied for in the motion on which the order appealed from was made.

(b) Review of subsequent orders. A court reviewing an order may also review any subsequent order made upon a motion specified in subdivision (a), if the subsequent order is appealable as of right.

[T]he appeal from the judgment is dismissed, as that judgment was superseded by the resettled judgment.

The appeal from the first order must be dismissed because the right of direct appeal therefrom terminated with the entry of the resettled judgment (Matter of Aho, 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285). The issues raised on the appeal from the first order are brought up for review and have been considered on the appeal from the resettled judgment ( CPLR 5501[c] ).

AN AMENDED ORDER OR JUDGMENT THAT ONLY CLARIFIES THE DECISION,

NEW NOTICE OF APPEAL NOT NEEDED


Although respondent appealed only from the original judgment, we may nevertheless review the resettled judgment in the absence of a new notice of appeal inasmuch as the resettled judgment “simply clarifies” the original ... judgment for the purpose of correctly expressing the decision of the court.

NO APPEAL LIES FROM A JUDGMENT THAT HAS BEEN AMENDED, THE FIRST JUDGMENT IS SUPERSEDED BY THE AMENDED JUDGMENT


Plaintiff's motion to dismiss the appeal because the order and judgment appealed from were superseded by an amended order and judgment which were not appealed is denied. The amended order and judgment simply clarifies the original order and judgment for the purpose of correctly expressing the decision of Special Term. This act of resettlement does not affect the appeal taken from the original order and judgment and we may review the amended order and judgment without a new notice of appeal having been filed (CPLR 5517, subd. [b]; 7 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 5701.25).


[Defendant appeals from (1) a judgment dated September 4, 1992, which, upon a jury verdict, is in favor of the plaintiff and against him awarding damages, and (2) an amended judgment of the same court, dated January 13, 1993, which, inter alia, is in favor of the plaintiff and against him awarding damages.

The judgment dated September 4, 1992, was superseded by the amended judgment dated January 13, 1993. No appeal lies from a judgment that has been superseded by an amended judgment, and accordingly, the defendant's appeal from the judgment dated September 4, 1992, is dismissed (Van Scooter v. 450 Trabold Road, 206 A.D.2d 867, 616 N.Y.S.2d 281).

In re Estate of Collins 36 A.D.3d 1191, 828 N.Y.S.2d 689 (3rd Dept., 2007):

When respondent supplied a revised accounting, petitioner objected to that as well. Surrogate's Court directed respondent to reply to only one of petitioner's allegations. After that reply was received, the court issued a January 13, 2006 order finding that respondent's calculation of commissions was reasonable, but

34 In re Ashlie B. 37 A.D.3d 997, 830 N.Y.S.2d 809 (3rd Dept., 2007), citing CPLR 5517(b).
requiring respondent to pay a surcharge of $25,824.45 for the invasion of trust principal in 14 separate years. Both parties appealed from the January 2006 order. Respondent then moved in Surrogate's Court to renew and reargue, claiming that it was not afforded a chance to respond to petitioner's allegations concerning invasion of principal. The court granted the motion and issued an amended order on April 11, 2006, adhering to its prior order except by amending the finding of principal invasion to only four separate years, thereby reducing the surcharge to $16,014.90. As a result of the amended order, respondent did not move forward with its appeal, but petitioner did.FN1

undisputed fact that all claims had been dismissed]; Bullion v. Metropolitan Transp. Auth., 161 A.D.2d 168, 168, 554 N.Y.S.2d 878 [1990] [denial of motion to resettle which does not modify any substantive portion of judgment is appealable]).


Miller v. Lanzisera, 273 A.D.2d 866, 709 N.Y.S.2d 286 (4th Dept., 2000), appeal dismissed 95 N.Y.2d 887, 715 N.Y.S.2d 378 [2000]: We reject the contention of defendant that his then attorney was precluded from perfecting the appeal from the 1990 order due to the court's failure to decide the motion to resettle that order. “The purpose of resettlement is to revise an order to reflect the court's decision * * *. Resettlement is not to be used to effect a substantive change in or to amplify the decision of the court” ( Barretta v. Webb Corp., 181 A.D.2d 1018, 581 N.Y.S.2d 508, lv. dismissed 80 N.Y.2d 892, 587 N.Y.S.2d 909). It does not appear from the record that, in seeking resettlement, defendant contended that the 1990 order did not substantially reflect the court's decision, and thus “the time to appeal [was] measured from the original order” ( Matter of Kolasz v. Levitt, 63 A.D.2d 777, 779, 404 N.Y.S.2d 914).


Schanback v. Schanback, 159 A.D.2d 498, 552 N.Y.S.2d 370 (2nd Dept., 1990): In an action for a divorce and ancillary relief, (1) the parties cross-appeal from stated portions of a judgment of the Supreme Court, entered September 19, 1988, which determined the financial issues presented, and (2) the defendant husband appeals from so much of an order of the same court, dated November 9, 1988, as denied that branch of his motion which was to resettle the judgment to “omit the compounding of the interest on the distributive award”.

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The appeal from the order [November 9, 1988] is dismissed, as no appeal lies from an order denying resettlement of the decretal paragraphs of a prior judgment. However, the issue raised on that motion may be reviewed upon the defendant's appeal from the judgment.


A[n order [] denying a motion to resettle which does not modify any ‘substantive or decretal portion of the judgment’ is appealable...Manifestly, the Authorities are entitled to the entry of a resettled judgment which is in conformity with the record.

**Stevenson v. Lazzari, 16 A.D.3d 576, 793 N.Y.S.2d 428 (2nd Dept., 2005):**

Since the appellants' motion merely sought to amend the judgment by adding language to reflect the undisputed fact that all claims against the respondents had been dismissed, the denial of the motion is appealable (4 N.Y. Jur.2d, Appellate Review § 57).

**Lewin v. New York City Conciliation and Appeals Bd., 88 A.D.2d 516, 450 N.Y.S.2d 1 (1st Dept., 1982), aff'd 57 N.Y.2d 760, 454 N.Y.S.2d 990:**

Unmodified, the judgment gives the tenant an unwarranted windfall and is not consistent with the Memorandum Decision. Since respondent's motion to resettle does not seek to modify the substantive or decretal portion of the judgment so as to obtain a ruling not adjudicated on the original application or to modify the decision which has been made, but is being used because the judgment improperly reflects the decision, an appeal lies from its denial (Bergin v. Anderson, 216 App.Div. 844, 215 N.Y.S. 800 [2nd Dept. 1926]; Weinstein-Korn-Miller: New York Civil Practice § 5701.25).

**Bergin v. Anderson, 216 A.D. 844, 215 N.Y.S. 800 (2nd Dept. 1926):**

[The] order, in so far as it denies a motion to resettle an order, so as to recite all papers used upon the original motion, reversed upon the law and the facts...Decisions holding that an order denying a motion for resettlement is not appealable relate to motions made to modify or change the relief granted by the original order.

**Smith v. Field, 302 A.D.2d 585, 756 N.Y.S.2d 83 (2nd Dept., 2003):**

The appeal from the judgment is dismissed, [where] judgment was superseded by the resettled judgment. The issues raised on the appeal and cross appeal from the order are brought up for review and have been considered on the appeal and

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cross appeal from the resettled judgment (CPLR 5501[a][1])

**Fitzgerald v. Fitzgerald, 302 A.D.2d 356, 754 N.Y.S.2d 666 (2nd Dept.,2003):**
The preferred remedy when a party alleges that a judgment does not accurately incorporate the terms of a stipulation is by motion in the trial court for resettlement or vacatur of the judgment, rather than by appeal” (Pizzuto v. Pizzuto, 162 A.D.2d 443, 556 N.Y.S.2d 390, citing CPLR 5019 [a]...). However, CPLR 5019(a) gives this court the discretion to cure the mistake...

>It is well settled that a trial court has no revisory or appellate jurisdiction to vacate, sua sponte, its own order (CPLR 5019; see Osamwonyi v. Grigorian, 220 A.D.2d 400, 631 N.Y.S.2d 906). The parties agree that the Supreme Court exceeded its authority by, sua sponte, recalling and vacating its [] order...The respondent contends, nevertheless, that the [] order is reviewable on appeal pursuant to CPLR 5501. We disagree. Under CPLR 5501(a)(1), an appeal from a final judgment brings up for review “any non-final judgment or order which necessarily affects the final judgment” provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken” (CPLR 5501[a][1]). The [] order was final and, thus, cannot be brought up for review on appeal from the later order (Crystal v. Manes, 130 A.D.2d 979, 516 N.Y.S.2d 823; Acres v. Hitchcock, 77 A.D.2d 744, 431 N.Y.S.2d 188, lv. denied 53 N.Y.2d 601; cf., Burke v. Crosson, 85 N.Y.2d 10, 623 N.Y.S.2d 524).
ORDERED...the order dated September 26, 1994, is reinstated.

We are unpersuaded by defendant's contention that Supreme Court did not have the authority to issue the second amended judgment. It is well settled that a trial court may “cure mistakes, defects and irregularities that do not affect substantial rights of [the] parties” (Kiker v. Nassau County, 85 N.Y.2d 879, 881, 626 N.Y.S.2d 55 [1995]; see CPLR 5019 [a]...). This authority includes “‘amend[ing] a judgment to make it reflect what the court's holding ... clearly intended’ ” (Matter of Glazier v. Brightly, 81 A.D.3d at 1199, 917 N.Y.S.2d 728, quoting Matter of Owens v. Stuart, 292 A.D.2d 677, 678, 739 N.Y.S.2d 473 [2002]...). Here, the original amended judgment provided that the sums owed for the pension payments “may be off-set against” plaintiff’s child support arrears, reflecting language in the court's prior decision and order. When defendant objected to plaintiff's attempt to claim the offset, Supreme Court issued the second amended judgement to provide that plaintiff “shall be entitled” to the offset, as well. In our view, the second amended judgment appropriately clarified the intent of the court's original holding (CPLR 5019[a]; Matter of Glazier v. Brightly, supra...). In doing so, Supreme Court did not affect the amount of child support owed by plaintiff or the amount of defendant's pension to which plaintiff was entitled and, thus, did not alter any substantial rights of the parties (Follender v. Maxim, 44 A.D.3d at 1228–1229, 845 N.Y.S.2d 484; Gerenstein v. Gerenstein,
the stipulation of settlement by including terms that are inconsistent therewith is not preserved for appellate review since there is no record that defendant raised any objection to plaintiff's proposed judgment, as required by 22 NYCRR 202.48(c)(2). Defendant's claim that he had no opportunity to object to plaintiff's proposed judgment because he was not served with a copy thereof is directed to Supreme Court in a motion to vacate the judgment pursuant to CPLR 5015(a)(1), not to this Court on appeal (McCue v. McCue, 225 A.D.2d 975, 976, 639 N.Y.S.2d 551 [1996]; Levy v. Blue Cross & Blue Shield of Greater N.Y., 124 A.D.2d 900, 901, 508 N.Y.S.2d 660 [1986]).
CPLR 5520. Omissions; appeal by improper method

CPLR 5520(a):
If an appellant either serves or files a timely notice of appeal or notice of motion for permission to appeal, but neglects through mistake or excusable neglect to do another required act within the required time, the court from or to which the appeal is taken or the court of original instance may grant an extension of time for curing the omission.

Failure to include a preargument statement with a notice of appeal may result in the clerk's office refusing to accept the notice of appeal for filing.

– mistakes as to form and content of the notice may well be excused.
– CPLR 5520 and 5512(a).

CPLR 5520(b):
Appeal by permission instead of as of right. An appeal taken by permission shall not be dismissed upon the ground that the appeal would lie as of right and was not taken within the time limited for an appeal as of right, provided the motion for permission was made within the time limited for taking the appeal.

-- CPLR 5520(b) overlaps CPLR 5014(a).

CPLR 5520(c). Defects in form.
Where:
[1] a notice of appeal is premature
or
[2] contains an inaccurate description of the judgment or order appealed from, the appellate court, in its discretion, when the interests of justice so demand, may treat such a notice as valid

-- See, CPLR 104 and 2001.


38 Leonard v. Leonard, 109 A.D.3d 126, 968 N.Y.S.2d 762 (4th Dept.,2013) (Defendant wife appeals from an order issued by the Judicial Hearing Officer (JHO). Defendant attributes multiple errors to the JHO, whose order was later subsumed in a judgment of divorce entered in Supreme Court. Although no appeal lies from the order, "we exercise our discretion to treat the notice of appeal as valid and deem the appeal [as] taken from the judgment."); Hughes v. Hughes, 84 A.D.3d 1745, 922 N.Y.S.2d 839 (4th Dept. 2011); Chin v. Kaplan, 280 A.D.2d 892, 720 N.Y.S.2d 862 (4th Dept.,2001)
Although the order appealed from was subsumed within the final judgment (CPLR 5501[a] ), in the exercise of our discretion we treat the appeal as taken from the judgment ( see, CPLR 5520[c]; Chin v. Kaplan, 280 A.D.2d 892, 720 N.Y.S.2d 862).

References

– See, generally, Practice Commentaries 5512:1, 5514:1 through 5514:3, and 5520:1 under CPLR 5512, 5514, and 5520; Siegel, New York Practice § 534 (2d ed.); and

TIMELY OBJECTIONS

GENERAL v. SPECIFIC OBJECTIONS

Tooley v. Bacon, 70 N.Y. 34 (1877).\(^{39}\)

[1] When evidence is excluded upon a mere general objection, the ruling will be upheld, if any ground in fact existed for the exclusion. It will be assumed, in the absence of any request by the opposing party or the court to make the objection definite, that it was understood, and that the ruling was placed upon the right ground.

[2] If in such a case a ground of objection be specified, the ruling must be sustained upon that ground unless the evidence excluded was in no aspect of the case competent, or could not be made so.

[3] But where there is a general objection to evidence and it is overruled, and the evidence is received, the ruling will not be held erroneous unless there be some ground which could not have been obviated if it had been specified, or unless the evidence in its essential nature be incompetent. (Levin v. Russell, 42 N. Y., 251; Williams v. Sargeant, 46 N. Y., 481.)

Under New York evidentiary law, if testimony is excluded pursuant to a specific objection, then a reviewing court may uphold the ruling in two circumstances: (1) if the specific objection was correctly sustained, or (2) if “‘the evidence excluded was in no aspect of the case competent, or could not be made so.’”

Wightman v. Campbell, 217 N.Y. 479 (1916):
The rule is well settled that when evidence is received under a general objection, the ruling will not be held erroneous, unless there is some ground which could not have been obviated if it had been specified, or unless the evidence in its essential nature is incompetent. Tooley v. Bacon, 70 N. Y. 34.

A general objection is to no avail when overruled if not followed by a specific objection directing the court, and the adversary, to the particular infirmity of the evidence (Bergmann v. Jones, 94 N.Y. 51, 58). To this there is the general exception, that if the proffered evidence is inherently incompetent, that is, there appears, without more, no purpose whatever for which it could have been admissible, then a general objection, though overruled, will be deemed to be sufficient (Richardson, Op. cit., supra, s 543).

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\(^{39}\) Bloodgood v. Lynch, 293 N.Y. 308 (1944).
[7] The function of the specific objection is not only to cure formal defects. The requirement of the specific objection is also intended to serve and serves judicial economy by eliminating the need for new trials where a proper objection would have alerted the Judge or even elicited a concession from opposing counsel by withdrawal of the offending matter (cf. Turner v. City of Newburgh, 109 N.Y. 301, 308; Ward v. Kilpatrick, 85 N.Y. 413, 417; Fountain v. Pettee, 38 N.Y. 184). Hence, the additional factor required to support a general objection without a following specification, is that it appear from the record that the offending material is inadmissible and that nothing could cure the inadmissibility.

The objection was a bare one without specification of the grounds and it is the general (court-made not statutory, see Code of Criminal Procedure, s 420-a) rule that grounds for an objection should be stated. But the rule has limitations (People v. Murphy, 135 N.Y. 450, 455; Wightman v. Campbell, 217 N.Y. 479, 482; People v. Coffey, 11 N.Y.2d 142, 227 N.Y.S.2d 412; People v. O'Neill, 11 N.Y.2d 148, 227 N.Y.S.2d 416; Richardson, Evidence (7th ed.), s 612).

Defendant failed to introduce evidence of valuation on the date that he now contends was controlling and failed to object on this ground to the evidence relied upon by the court.

WHERE A SPECIFIC OBJECTION MADE AND SUSTAINED
Bloodgood v. Lynch, 293 N.Y. 308 (1944):
Where a specific objection is made on one ground, other possible grounds cannot be considered on appeal. Adams v. Saratoga & W. R. Co., 10 N.Y. 328:...‘When the offer was made ‘the defendants' counsel objected on the ground that the record was conclusive evidence of the facts stated therein;’ and the court sustained the objection and excluded the evidence. We think that we are not at liberty to regard the objections as sustained on a different ground from that taken by the counsel.'

Respondents rely upon Beste v. Burger, 110 N.Y. 644. There it was held that where an objection was made that the evidence offered was incompetent, it was not error to sustain the objection even though the evidence was competent as against some of the defendants. We do not think that case is applicable, since the

objection here was not a general one as to incompetency of the evidence but specifically related to section 270-b of the Penal Law. Counsel for plaintiff was thus not apprised that the objection might relate to the competency of the evidence as against Henrietta Lynch. In the Beste case, if counsel did not understand the objection, he could have requested the reason for it. In the instant case the reason was apparently given by defendants' counsel and plaintiff's counsel could not be fairly required to ask any further reason for the objection. He did give the court his understanding of the ruling and the court said that that understanding was correct.

[T]he objection made on erroneous grounds at the trial and overruled may only be considered on appeal as to the ground specified (Richardson, Evidence, § 543) since it was properly admissible if limited to use as impeaching testimony. And, of course, it is still necessary that an exception be taken to the court's charge or failure to charge (Code Crim.Proc. s 420-a).

[1] [T]he trial court erred in failing to explain to defense counsel the reason for sustaining the prosecutor's objections to certain testimony from the two female defense witnesses. In New York, ‘an admission against penal interest will be received where material and where the person making the admission is dead, beyond the jurisdiction and thus not available; or where he is in court and refuses to testify as to the fact of the admission on the ground of self incrimination’ (People v. Brown, 26 N.Y.2d 88, 94, 308 N.Y.S.2d 825, 829).

At bar, Leary took the stand and denied that he or appellant had left the car in question at any time prior to its being stopped by the police, but he was never asked whether he had admitted to anyone that he committed the crimes for which appellant stands convicted, and thus never invoked his privilege against self-incrimination. Accordingly, the proper foundation was never laid and the hearsay objection was never overcome; thus, the testimony of the two female defense witnesses was properly excluded. The trial court never explained to defense counsel that it was technically necessary for him to ask certain questions of Leary first, and refused, although requested to do so, to explain its reasons for sustaining the People's objection. Such an explanation would have afforded defense counsel the opportunity to cure the prosecutor's objections. At the Wade hearing, one of the aforementioned female witnesses testified as to Leary's admission of guilt; the Trial Judge knew exactly what information defense counsel was trying to elicit and its importance to appellant's case.
WHEN A GENERAL OBJECTION IS OVERRULED:

People v. Murphy, 135 N.Y. 450 (1892):
The genuine specimens were received in evidence, and the expert witnesses called and permitted to make the comparison and give their opinion upon the subject, without any intimation from the defendant that such proof was inadmissible. The defendant himself even called two expert witnesses, and had the benefit of an opinion from them, after a comparison of the letters with the genuine specimens, to the effect that at least one of the letters was not written by the same person as the concededly genuine exhibits. When the letters were offered in evidence there was no objection to their reception, on the ground that the proof of their genuineness was insufficient, but they were objected to solely on the ground that the letters themselves were incompetent and improper as evidence,—an objection which pertains to the subject-matter of the proof offered, and not to the method of its presentation, or to any of the preliminary steps to be observed in its introduction. If the defendant had seasonably objected to the evidence of comparison of handwriting, and the objection had been sustained, the prosecution might have been able to have furnished sufficient common-law proof of the genuineness of the letters to have authorized their admission as evidence; for one of the expert witnesses was a bank officer, who had seen the defendant write, and who might have testified from his personal knowledge of the defendant's handwriting that, in his opinion, he wrote the letters in question; and other like testimony might have been produced. The evidence objected to was not in its essential nature incompetent, and therefore all grounds of objection which might have been obviated, if they had been specifically stated, must be deemed to have been waived. Turner v. City of Newburgh, 109 N. Y. 30; Bergmann v. Jones, 94 N. Y. 51.

Defendant has been convicted of second degree murder relating to the killing of his wife. The most substantial issue raised on this appeal is whether certain statements made by the individual who fatally assaulted defendant's wife, which were admitted as a part of the wife's dying declarations, constituted inadmissible hearsay. The assailant's statements, as communicated by the victim before she died, implicated defendant in a plot to kill his wife, and were received in evidence on the theory that defendant and the assailant were coconspirators. Defendant now argues, inter alia, that the statements were not made in furtherance of the conspiracy and thus should not have been admitted under the coconspirator exception to the hearsay rule.

Whatever the merits of this contention, the issue is not preserved for review. For, although defendant specifically objected to the admissibility of the dying declaration qua dying declaration, and also specifically objected to the alleged failure of the prosecution to establish a prima facie case of conspiracy, no question was raised as to whether the assailant's statements were made in
furtherance of the conspiracy. These objections in this instance preserved only the grounds specified (see, generally, Richardson, Evidence (10th ed. Prince), s 538) and thus the precise issue argued is beyond our power of review.

**In re Budziejko's Will, 277 A.D. 829, 97 N.Y.S.2d 307 (4th Dept.1950):**

In this will contest the attending physician was asked for his opinion as to whether the testatrix possessed sufficient mental capacity to make a will. A mere objection without statement of grounds therefor was made. The Court asked upon what ground counsel objected and counsel said it was upon the ground that the witness was not competent to testify as a physician. He then conducted a preliminary examination as to the qualifications of the witness after which he renewed his objection stating no further ground. The objection was overruled and after the opinion was stated counsel proceeded to cross-examine upon it. There was no objection to the form of the question or as to the testimony itself being incompetent, nor was any exception taken nor motion to strike out made. Having restricted the objection to the competency of the witness to testify as an expert and give an opinion, the appellant may not, on appeal, rely on the claimed incompetency of the testimony itself as no such objection was raised at the trial. Had such objection been made, the respondent would have had the opportunity to reframe the question so that it would not have been objectionable...Moreover, there was sufficient other evidence to justify the finding of the jury as to incompetency of the testatrix.

**People v. Ross, 21 N.Y.2d 258, 287 N.Y.S.2d 376 (1967):**

[D]efendant points to section 813-f of the Code of Criminal Procedure which provides: ‘In a case where the people intend to offer a confession or admission in evidence upon a trial of a defendant, the people must, within a reasonable time before the commencement of the trial, give written notice of such intention to the defendant, or to his counsel if he is represented by counsel.’ He argues that the statements made to Patrolman Zilinske were admissions; therefore, reversible error was committed by allowing Zilinske to testify as to them since no notice of intention to offer such admissions was given to him by the District Attorney, pursuant to the mandate of the above statute.

[2] [3] [B]y failing to object to Zilinske's testimony on the ground that the statute had not been complied with, the defendant waived his right. It is significant also that he did not object on the ground that the statements were involuntary, for the obvious purpose of the statute is to give a defendant adequate time to prepare his case for questioning the voluntariness of a confession or admission (People v. Herman, 50 Misc.2d 644, 270 N.Y.S.2d 809; cf. People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838; People v. Lee, 27 A.D.2d 700, 277 N.Y.S.2d 79). The defendant did not request a Huntley hearing, and in no way demonstrated that he was prejudiced by the failure to comply with the statute. Indeed, even on this appeal, the defendant does not seek to move this court by urging the involuntariness of his statements.
[4] It would also seem that defendant has not saved the question for review. His first two objections to Zilinske's testimony were general objections 'to conversations'. It is well settled that, when a general objection is overruled, 'all grounds of objection which might have been obviated, if they had been specifically stated, must be deemed (on appeal) to have been waived’ (People v. Murphy, 135 N.Y. 450, 455; Richardson, Evidence (Prince, 9th ed.), s 543). A specific objection addressed to the failure to comply with the statute might well have obviated the ground of objection. The court could have postponed the trial pending the outcome of a Huntley type hearing if the defendant intended to controvert the voluntariness of the 'admissions'.

[5] The defendant's other objection to the testimony was on the specific ground of hearsay, and only that ground can be considered on appeal unless there is no purpose for which the evidence was admissible. Defendant, however, makes no argument on this appeal as to hearsay.

Defendant's arguments concern evidentiary rulings made during the trial, most important of which was the admission of a portion of testimony by Demerest in which she told the jury of a conversation between Doyle and Schiaroli... as follows: “Well, I heard *** [Schiaroli] ask *** [Doyle], you know, ‘Should we help?’ and *** [Doyle] said, ‘Yes, Norm [Green] asked us to help him’.” The trial court denied defendant's objection grounded on irrelevancy and admitted the testimony under the res gestae exception to the hearsay.

FN Defendant contends that the evidence is inadmissible as hearsay. However, this new ground for objection cannot be offered for the first time upon appeal unless there is no viable purpose for which the evidence was admissible (... J. Prince, Richardson on Evidence § 538, at 531 [10th ed 1973]).

In re New York City Asbestos Litigation, 188 A.D.2d 214, 593 N.Y.S.2d 43 (1st Dept., 1993):
Defendant at trial, argued against admission of a ...[report] on the ground that the report was irrelevant to it. Only now does [defendant] argue that the report is hearsay, an objection that cannot be raised for the first time on appeal.

The mother did not object to the admission of certain “progress notes” as hearsay during the fact finding hearing, and cannot now raise the issue for the first time (Matter of New York City Asbestos Litigation, 188 A.D.2d 214, 593 N.Y.S.2d
43, affd., 82 N.Y.2d 821).

Gonzalez v. State Liquor Authority, 30 N.Y.2d 108, 331 N.Y.S.2d 6 (1972): [1] [2] In this case [] no specific objection was taken on constitutional grounds to the introduction of the allegedly illegally obtained evidence. The rule is, that in order to preserve on appeal ‘[t]he constitutional and legal issue on admissibility of evidence’, a specific objection on constitutional and legal grounds must be made during the trial or hearing. (Matter of Leogrande v. State Liq. Auth., 19 N.Y.2d 418, 425, 280 N.Y.S.2d 381, 384; People v. Gates, 24 N.Y.2d 666, 670, 301 N.Y.S.2d 597, 600.) Where, as here, no specific objection on constitutional grounds to the receipt of the subsequently suppressed evidence was made during the hearing, the issue of admissibility of evidence is not available on judicial review. (Matter of Sowa v. Looney, 23 N.Y.2d 329, 333, 296 N.Y.S.2d 760, 2 Am.Jur.2d, Administrative Law, s 425; cf. United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 111, 47 S.Ct. 302; cf. Ann., 36 A.L.R.3d 30-31.) Petitioner's general objection is, of course, to no avail since it was not followed by the requisite specific objection, nor does it appear from the record that the hearing officer could ‘infer from anything said by licensee's counsel that there was any objection on constitutional grounds to the admission of this evidence.’ (cf. Finn's Liq. Shop v. State Liq. Auth., 24 N.Y.2d, Supra, at p. 657, n. 2, 301 N.Y.S.2d at p. 590.)

Defendant's sole claim of error—that he was denied a fair trial when the court permitted testimony by the arresting officer regarding the general practices of drug sellers-has not been preserved for our review. Defense counsel simply made a general objection when the testimony was proffered, and failed to advise the trial court that the present claimed error was the basis for his objection. The word “objection” alone was insufficient to preserve the issue for our review ( People v. Fleming, 70 N.Y.2d 947, 948, 524 N.Y.S.2d 670; People v. West, 56 N.Y.2d 662, 663, 451 N.Y.S.2d 711).

A party's failure to specify the basis for its general objection renders its argument unpreserved for this Court's review.

People v. Escobar, 79 A.D.3d 469, 912 N.Y.S.2d 202 (1st Dept., 2010): Defendant did not preserve any of his arguments for appellate review. ► It is well established that “[t]he word ‘objection’ alone [is] insufficient to preserve [an] issue” for review as a question of law. Defendant argues that this principle should

not apply because the trial court prohibited “speaking objections” and instructed counsel to make unelaborated objections. However, defense counsel made no effort to make a record, at any point in the trial, of the grounds for his objections. Moreover, the court specifically invited counsel to make such a record at the first recess following an objection, and offered to reconsider its rulings and take curative actions where appropriate.

CONTINUING OBJECTIONS

[I]n view of the unpredictability of live testimony, we note that it is sometimes almost impossible for a Trial Judge to ascertain in advance whether the evidence offered through a witness regarding a defendant's past crimes would be sufficiently relevant to justify its admission at trial.

[13] It is for this reason that we disapprove of defense counsel's decision in this case to rely upon a “continuing objection” to the District Attorney's entire line of proof. While defense counsel's anticipatory “continuing objection” may have served the technical function of preserving a “question of law” for appellate review (see CPL 470.05, subd. 2), it did not provide the Trial Judge with an opportunity to consider the specific relevance of each fact as it was being presented through testimony. Had individual objection been taken each time prejudicial information was elicited, the Trial Judge might have been moved to require the prosecutor to articulate his theory of relevancy with more specificity, and the defects in the instant proceeding might have been avoided (cf. People v. Michael, 48 N.Y.2d 1, 6, 420 N.Y.S.2d 371, 373). In light of the difficulties encountered in this case, we find that the trial court's acceptance of defendant's “continuing objection” was ill-advised and that the interests of all parties would have been better served had individual objection been required.

Wightman v. Campbell, 217 N.Y. 479 (1916):
When an objection is taken after the testimony is given a motion to strike out should be made (Link v. Sheldon, 136 N. Y. 1, 9), and it is urged that defendant's failure to make such motion deprived him of the benefit of his exception. But the objection here was to further reference to the field notes by Ogden in giving his testimony, and the ruling clearly implied that the court would receive such evidence over defendant's objection and exception. The answer already given was in itself unimportant. A motion to strike out was therefore unnecessary, and the failure to make such motion was inconsequential. The objection pointed out generally that defendant objected to all of Ogden's testimony based on the notes, and it was sufficient to give defendant the benefit of his exception, if the general objection was good and sufficiently definite.
The rule is well settled that when evidence is received under a general objection, the ruling will not be held erroneous, unless there is some ground which could not have been obviated if it had been specified, or unless the evidence in its essential nature is incompetent. Tooley v. Bacon, 70 N. Y. 34. The evidence of Ogden was clearly open to the specific objection that it was hearsay, for which no proper foundation had been laid. He knew nothing of the location of the lines he was testifying about, except as he was informed by the memoranda of another. But if the objection had been made in this form, it could have been, or at least it might have been, obviated by laying a proper foundation for the introduction in evidence of the Arnold notes.

**FAILURE TO OBJECT TO A PROPOSED JUDGMENT RENDERS THE OBJECTION UNPRESERVED**

Altmann v. Finger, 46 A.D.3d 720, 848 N.Y.S.2d 698 (2nd Dept., 2007): Finger contends that the judgment inaccurately reflects the parties' agreement insofar as it directed them to discuss the establishment of a nonbinding trust agreement to provide for their children's future college and medical expenses. Her contention is unpreserved for appellate review since she failed to object to that portion of the proposed judgment submitted by Altmann.

Mora v. Mora, 39 A.D.3d 829, 835 N.Y.S.2d 626 (2nd Dept., 2007): The judgment of the Supreme Court directed distribution of the husband's pension according to the equitable distribution formula articulated in Majauskas v. Majauskas, 61 N.Y.2d 481, 474 N.Y.S.2d 699, pursuant to the parties' stipulation, which was placed on the record in open court. To the extent the husband contends that the judgment inaccurately reflects the stipulation, his objection is not preserved for appellate review since he failed either to submit a proposed judgment within 60 days of the order directing settlement, or to object to the portion of the proposed judgment submitted by the wife (22 NYCRR 202.48; Salamone v. Wincef Props., 9 A.D.3d 127, 777 N.Y.S.2d 37; cf. Rouleau v. La Pointe, 11 A.D.3d 773, 774, 784 N.Y.S.2d 162).

**OBJECTION MUST BE CLEAR TO APPRISE THE COURT OF THE NATURE OF THE OBJECTION**
See:
Evidence in New York State and Federal Courts, Barker and Alexander.

REBUTTING EVIDENCE ADMITTED OVER OBJECTION;

REBUTTING EVIDENCE AGAINST OBJECTED TO EVIDENCE
DOES NOT CONSTITUTE A WAIVER OF THE OBJECTION

Mance v. Hossington, 205 N.Y. 33 (1912):
Where evidence is admitted subject to objections the party against whom the testimony is received is entitled to produce testimony of the same general character without waiving his objections to the evidence received because he must try the case in view of the evidence admitted therein even although it is taken subject to his objections to its receipt.

OFFER OF PROOF

– When A Court Sustains An Objection To Exclude Evidence

– Must Be Clear And Unambiguous

When a trial court sustains an objection to exclude evidence, the party seeking to admit the evidence must make a clear and unambiguous offer of proof to preserve the point for appeal.43

People v. Williams, 6 N.Y.2d 18, 159 N.E.2d 549, 187 N.Y.S.2d 750 (1959), cert. denied, 361 U.S. 920, 80 S.Ct. 266, 4 L.Ed.2d 188 (1959):
It is a cardinal and well-settled principle that offers of proof must be made clearly and unambiguously. ‘Before a party excepts on account of the rejection of evidence, he should make the offer in such plain and unequivocal terms as to leave no room for debate about what was intended. If he fails to do so, and leaves the offer fairly open to two constructions, he has no right to insist, in a court of review, upon that construction which is most favorable to himself, unless it appears that it was so understood by the court which rejected the evidence.’...And the eloquence of appellate counsel must bend to the weight of the record whether it be favorable or unfavorable to his argument.

Similarly unavailing to Marine Midland is its assertion that the court should have instructed the jury on the theory of money paid out by mistake. No retreat from

the policy of liberality in allowing pleadings to be conformed to proof...is sounded by our insistence that such a request and any objection to its denial be sufficiently focused to permit the Trial Judge and opposing parties to do more than guess at the precise nature of the change to be effected. In the case before us, plaintiff neither specified in what manner the proof varied from the pleadings nor suggested the alternative theories in its favor to which the defendants would now need to be alert. Rather, silence reigned supreme until the requests to charge were submitted, and very few decibels were registered when, after the jury had been instructed, plaintiff summarily and un informatively asked that the court “charge in the language of what we (sic) requested and those requests which are not charged”. Surely, a court need not reroute the course of an entire trial without being given a chance to take a look at the pig in a poke it is being asked to buy. And, since there is to be a new trial, we add that the legal merits of such a cause of action will, we assume, be delved into at nisi prius on a motion to amend made anew by the plaintiff, if it be so advised, in the context of whatever proof or offer of proof it then relies on.

“[O]ffers of proof must be made clearly and unambiguously.” We conclude that defendant failed to provide the court with an adequate factual basis for his proposed line of questioning.

WHEN AND HOW OFFER OF PROOF MADE
The offer of proof is properly made after witnesses, jurors, and parties are asked to leave the courtroom. “By following such procedure, a free discussion can be had without fear of anything being said by counsel or the court which will prejudice either party with the jury.”45

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ARGUMENTS AND ISSUES RAISED FOR FIRST TIME ON APPEAL

ISSUE: Was it a contention that could have been “obviated or cured by factual showings or legal countersteps”?

It is quite true that an appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had they been presented at the trial.

It should [ ] be noted that the general rule concerning questions raised neither at the trial nor at previous stages of appeal is far less restrictive than some case language would indicate. Thus, it has been said: ‘if a conclusive question is presented on appeal, it does not matter that the question is a new one not previously suggested. No party should prevail on appeal, given an unimpeachable showing that he had no case in the trial court.’ (Cohen v. Karger, op. cit. Supra, pp. 627-628.) Of course, where new contentions could have been obviated or cured by factual showings or legal countersteps, they may not be raised on appeal. But contentions which could not have been so obviated or cured below may be raised on appeal for the first time. There are some exceptions to this liberalizing rule, none relevant to this case: they include concessions made by counsel, new questions on motions for reargument, and most constitutional questions. (See,


47 Ta-Chotani v. Doubleclick, Inc., 276 A.D.2d 313 (1st Dept., 2000) (Where an issue might have been obviated by the submission of documentary evidence, it may not be raised for the first time on appeal.); Altshuler Shaham Provident Funds, Ltd. v. GML Tower LLC, 83 A.D.3d 1563, 921 N.Y.S.2d 601 (4th Dept., 2011), leave to appeal denied, 86 A.D.3d 934 (4th Dept., 2011), leave to appeal denied, 18 N.Y.3d 892 (2012) (We do not address plaintiff's contention...That contention is raised for the first time on appeal and ‘could have been obviated or cured by factual showings or legal countersteps’ in Supreme Court.); Dipizio v. Dipizio, 81 A.D.3d 1369, 1370, 916 N.Y.S.2d 449 (4th Dept.,2011) (Defendant's contention, that the postnuptial agreement was unenforceable because her signature was not acknowledged, was raised for the first time in her reply papers and thus was not properly before Supreme Court.); Smith v. Besanceney, 61 A.D.3d 1336, 877 N.Y.S.2d 538 (4th Dept.,2009) (Defendant's contention concerning the failure of plaintiffs to allege in their bill of particulars that plaintiff suffered a serious injury under the permanent consequential limitation of use category is not properly before us. Defendant failed to challenge the sufficiency of the bill of particulars, and "[a]n issue may not be raised for the first time on appeal ... where it ‘could have been obviated or cured by factual showings or legal countersteps’ in the trial court"...Here, plaintiffs could have cured that alleged deficiency by moving for leave to amend the bill of particulars.)
generally, Cohen & Karger, op. cit. Supra, ch. 17, Review of New Questions on Appeal, pp. 624-643.)

Were the former argument a new one, it would nonetheless be proper for us to consider it because it is not a contention that could have been “obviated or cured by factual showings or legal countersteps” (Telaro v. Telaro, 25 N.Y.2d 433, 439, 306 N.Y.S.2d 920), turning as it does on legislative intent. Moreover, the issue being legislative intent, the rule requiring strict construction of tax statutes yields to the explicit declaration of that intent in the statute itself.

[A]ppellants do not now challenge the Appellate Division's finding that there was substantial evidence to support the award. They contend...for the first time, that a claimant is excluded from compensation benefits, as a matter of law, if he is engaged in an illegal activity at the time of the accident. Normally, they would not be permitted to raise the issue when they challenged only the factual basis of the Administrative Law Judge's finding that decedent had not deviated from the scope of his employment before the Board (Matter of Middleton v. Coxsackie Correctional Facility, 38 N.Y.2d 130, 132-133, 379 N.Y.S.2d 3; Workers' Compensation Law § 23). The argument raises solely a question of statutory interpretation, however, which we may address even though it was not presented below (Telaro v. Telaro, 25 N.Y.2d 433, 439, 306 N.Y.S.2d 920; Cohen and Karger, Powers of the New York Court of Appeals, at 627-628 [rev ed]).

The plaintiffs argue for the first time on appeal that the doctrine of res ipsa loquitur applies to this case, precluding an award of summary judgment. This court will not consider that issue, as proof might have been offered to refute or overcome the application of the doctrine had it been presented to the court of first

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49 McCormick v. Favreau, 82 A.D.3d 1537, 919 N.Y.S.2d 572 (3rd Dept. 2011) (Plaintiff[s] cannot raise for the first time on appeal new facts on which to base the accrual of [their] causes of action in order to avoid the time restraints of the applicable [s]tatute of [l]imitations" (Velaire v. City of Schenectady, 235 A.D.2d 647 (3rd Dept.,1997), lv. denied 89 N.Y.2d 816 (1997)); Provident Bank v. Giannasca, 55 A.D.3d 812, 866 N.Y.S.2d 289 (2nd Dept.,2008); Vogel v. Blade Contracting, Inc., 293 A.D.2d 376, 714 N.Y.S.2d 34 (1st Dept. 2002) (Defendants' contention that Beal failed expressly to state that he ‘saw’ the events that he described was not presented to the motion court, and will not be considered for the first time on appeal since the issue could have been obviated by a supplemental submission by plaintiff in the motion court.)

50 In re Cohn, 46 A.D.3d 680, 849 N.Y.S.2d 271 (2nd Dept.,2007).
instance.

We note at the outset that, although no appeal lies as of right from a qualified domestic relations order (QDRO), we treat plaintiff's notice of appeal from the amended QDRO herein as an application for leave to appeal and grant leave to appeal...\(^5\) [P]laintiff contends for the first time on appeal that Supreme Court erred insofar as it directed plaintiff to execute documents “irrevocably designat[ing]” defendant, plaintiff's former husband, as the beneficiary of preretirement death benefits from the NYS Teachers' Retirement System in accordance with the formula set forth in Majauskas v. Majauskas, 61 N.Y.2d 481. We nevertheless address the contention...despite her failure to preserve it for [] review because “the issue [raised therein] is one of law appearing on the face of the record that [defendant] could not have countered had it been raised in the court of first instance.”

[T]he amount of child support set by the Hearing Examiner was illegal. Respondent's income consisting solely of SSI benefits, was below the poverty level; therefore, it was error to require respondent to pay the amount of $25 per week...We reject the conclusion of Family Court, set forth in its decision underlying the order denying respondent's objections, that respondent consented to the amount of child support. The consent of respondent was obtained in violation of his right to counsel. We further note that the Hearing Examiner's order also violates the nonwaivable provision of Family Court Act § 413(1)(h) requiring that an order incorporating the parties' agreement to deviate from the basic child support obligation must contain the court's reasons for approving the deviation (Michelle W. v. Forrest James P., 218 A.D.2d 175, 178). Although that issue is raised for the first time in respondent's brief, it is nevertheless properly before us; the issue is one of law appearing on the face of the record that petitioner could not have countered had it been raised in the court of first instance (Oram v. Capone, 206 A.D.2d 839, 840).

**Fish King Enterprises v. Countrywide Ins. Co., 88 A.D.3d 639, 930 N.Y.S.2d 256 (2nd Dept., 2011):**
[P]laintiffs are correct that the relied-upon employee exclusion, which excluded coverage for “[b]odily injury to any employee of the insured arising out of and in the course of his or her employment by the insured,” did not exclude coverage for third-party claims for contribution and indemnity related to such injury...While

\(^5\) Page v. Page, 31 A.D.3d 1172, 817 N.Y.S.2d 551 (4th Dept. 2006): Although no appeal lies as of right from a qualified domestic relations order and plaintiff has not sought leave to appeal, we nevertheless treat the notice of appeal in appeal No. 3 as an application for leave to appeal and grant leave to appeal.
plaintiffs failed to raise this contention before the Supreme Court, it may be reached by this Court as it is an issue of law that appears on the face of the record which, had it been brought to the attention of the Supreme Court, could not have been avoided (Lischinskaya v. Carnival Corp., 56 A.D.3d 116; Romain v. Grant, 60 A.D.3d 838; Matter of Besedina v. New York City Tr. Auth., 47 A.D.3d 924).

Matter of Baby Girl, 206 A.D.2d 932, 615 N.Y.S.2d 800 (4th Dept.,1994): The father's contention that section 308 of the Military Law and its Federal counterpart (50 U.S.C., Appendix § 501 et seq.) toll the six-month period in which he can “claim his parental rights” is raised for the first time on appeal. We nonetheless consider it because it could not have been “‘obviated or cured by factual showings or legal countersteps' in the trial court” (Oram v. Capone, 206 A.D.2d 839, 840, 615 N.Y.S.2d 799 [decided herewith], quoting Telaro v. Telaro, 25 N.Y.2d 433, 439, 306 N.Y.S.2d 920, 255 N.E.2d 158, rearg. denied 26 N.Y.2d 751, 309 N.Y.S.2d 1031, 257 N.E.2d 296). The statutes protect members of the armed services who are unable to commence timely actions or proceedings in judicial or quasi-judicial tribunals as a result of their military obligations.

1. **EVEN IF AN ARGUMENT IS NOT SPECIFICALLY ARTICULATED, BUT IT CAN BE INFERRED/INTUITED THAT AN ISSUE WAS PRESERVED IN THE COURT BELOW “WHERE THE ARGUMENT WAS EVIDENT”:**

2. **JUST BECAUSE A COURT DOES NOT REACH AN ARGUMENT DOES NOT MAKE IT UNPRESERVED**

Galetta v. Galetta, 21 N.Y.3d 186, 991 N.E.2d 684, 969 N.Y.S.2d 826 (2013): The wife argues that this issue was not preserved in the motion court but we agree with the Appellate Division majority that such an argument was evident from the husband's submission of the notary public affidavit in response to the wife's motion for summary judgment, a submission that was cited by Supreme Court in the oral decision denying summary judgment. Since the parties admitted in Supreme Court that their signatures were authentic and made no claims of fraud or duress, there was only one reason for the husband to proffer the notary public affidavit—to cure the purported deficiency in the certificate of acknowledgment.

The fact that Supreme Court did not reach the “cure” argument because it concluded (incorrectly) that the acknowledgment was not defective does not render the issue unpreserved for review.

**ARGUMENTS FIRST RAISED TO THE COURT OF APPEALS,**

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WHILE NOT RAISED TO THE APPELLATE DIVISION
BUT WERE RAISED AT THE TRIAL LEVEL

Apart from the law of the case, it is well established that questions raised in the trial court or in the record, even if not argued in the intermediate appellate court, are nevertheless available in the Court of Appeals. Thus, it has been stated in the definitive treatise on the jurisdiction and practice of this court, that ‘If the question is properly presented in the court of first instance, it is available in the Court of Appeals even though not suggested in the Appellate Division’ (Cohen and Karger, Powers of the New York Court of Appeals, n. 1, at p. 624).

The rule was best stated in Cohn v. Goldman, 76 N.Y. 284, 287: ‘It is, indeed, a rule, that questions not raised at the trial court, which might have been obviated by the action of the court then, or by that of the other party, will not be heard on appeal as ground of error...But we know of no rule which prevents counsel from urging, in an appellate court, a point distinctly made and preserved at the trial court, because it has not been made to an intermediate appellate court. If the exception presents clear error, and one of materiality, which may have influenced the fate of the trial, an appellant may be indulged in bringing it to notice on his final appeal.’

More recently, in discussing the effect of waiver in the Appellate Division upon a party's right to present an argument on appeal to the Court of Appeals, this court, in Ross v. Caywood, 162 N.Y. 259, 264, said: ‘In thus discussing the question of waiver upon the theory of the respondent, we do not wish to be understood as holding by implication that a waiver may be implied from the failure to raise the point upon the intermediate appeal.’

Seitelman v. Lavine, 36 N.Y.2d 165, 366 N.Y.S.2d 101 (1975): This court will consider a question that has been raised in the tribunal of original jurisdiction even though it may not have been argued in the Appellate Division (Persky v. Bank of Amer. Nat. Assn., 261 N.Y. 212; Cohen and Karger, Powers of the New York Court of Appeals, s 161). However, as noted in the discussion that follows, the converse does not obtain.

Oneida Bank v. Ontario Bank, 21 N.Y. 490 (1860):\textsuperscript{53}

It may well be true, as we were told on the argument, that the plaintiff's counsel, both at the trial and in the Supreme Court, failed to urge the particular reasons which, we think, entitled the plaintiff to recover. There is nothing in the record to show that such was the fact, and there is no law or rule of practice which required the points on either side to be stated. Nor is it material whether the case was well presented to the court below, in the arguments addressed to it. It was the duty of the judges to ascertain and declare the whole law upon the undisputed facts spread before them; and it is our duty now to give such a judgment as they ought to have given.

\textsuperscript{53} Persky v. Bank of America Nat. Ass'n, 261 N.Y. 212 (1933).
POST DECISION EVENTS IN CUSTODY CASES
RAISED FOR THE FIRST TIME ON APPEAL WHICH
INDICATE THAT “THE RECORD IS NO LONGER SUFFICIENT” TO
MAKE A PROPER DETERMINATION

The Court has been informed that, during the pendency of the appeal, appellant
was charged with—and admitted—neglect of the children in his custody (not
Michael), and that those children have been removed from his home and are again
in the custody of the Commissioner of the Social Services. The neglect petitions
allege that appellant abused alcohol and controlled substances including cocaine,
and physically abused the children. Orders of fact finding have been entered by
Family Court recognizing appellant's admission in open court to “substance
abuse, alcohol and cocaine abuse.” Moreover, an Order of Protection was entered
prohibiting appellant from visiting the children while under the influence of drugs
or alcohol.

Appellant's request that we ignore these new developments and simply grant
him custody, because matters outside the record cannot be considered by an
appellate court, would exalt the procedural rule—important though it is—to a
point of absurdity, and “reflect no credit on the judicial process.” (Cohen and
Karger, Powers of the New York Court of Appeals § 168, at 640.) Indeed,
changed circumstances may have particular significance in child custody matters
(Braiman v. Braiman, 44 N.Y.2d 584, 587, 407 N.Y.S.2d 449; Matter of Angela
D., 175 A.D.2d 244; Matter of Kelly Ann M., 40 A.D.2d 546). This Court would
therefore take notice of the new facts and allegations to the extent they indicate
that the record before us is no longer sufficient for determining appellant's fitness
and right to custody of Michael, and remit the matter to Family Court for a new
hearing and determination of those issues. Pending the hearing, Michael should
physically remain with his current foster parents, but legal custody should be
returned to the foster care agency.

New facts and allegations which this Court may properly consider, including that
the father is awaiting sentencing for attempted assault, indicate that the record
before us is no longer sufficient to determine which custodial arrangement is in
the child's best interests (Matter of Michael B...) Accordingly, the matter must be
remitted to the Family Court...for a re-opened hearing and a new custody
determination thereafter. We express no opinion as to the appropriate
determination.

The attorney for the child on this appeal has raised significant issues regarding
developments that have arisen since the date of the order on appeal that preclude
us from determining which custodial arrangement is in the child's best interests.
NEW CONTENTION FIRST MADE IN REPLY PAPERS – NOT PROPERLY BEFORE APPELLATE COURT

It is well settled that contentions raised for the first time in reply papers are not properly before the court.

Contrary to the Supreme Court's conclusion that plaintiffs' papers did not properly make out a request for renewal, their motion did advance new facts not previously available (see Martin v. Triborough Bridge & Tunnel Authority, 180 A.D.2d 596, 182 A.D.2d 545, 580 N.Y.S.2d 305). In that regard, the new facts included the admission contained in defendant's answer, the expiration of the statute of limitations and the sequence of events on the prior motion. Plaintiffs' failure to present these matters in connection with the original motion was clearly justified since they had not had an opportunity to respond to a claim raised for the first time in the reply papers. Indeed, the court should never even have considered arguments making their initial appearance in reply papers (Dannasch v. Bifulco, 184 A.D.2d 415, 585 N.Y.S.2d 360; Ritt v. Lenox Hill Hospital, 182 A.D.2d 560, 582 N.Y.S.2d 712). As this court explained in Dannasch v. Bifulco, supra, “[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion” (184 A.D.2d at 417, 585 N.Y.S.2d 360). Defendant herein has been permitted to engage in precisely the sort of maneuvers specifically rejected in Ritt v. Lenox Hill Hospital, supra, wherein we observed (182 A.D.2d at 562, 582 N.Y.S.2d 712):

As we view it, the function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion (see, Lazar v. Nico Indus., 128 AD2d 408, 409–410 [, 512 N.Y.S.2d 693 ]). Nor does it avail defendant to shift to plaintiff, by way of a reply affidavit, the burden to demonstrate a material issue of fact at a time when plaintiff has neither the obligation nor opportunity to respond absent express leave of court (CPLR 2214[c]; Lazar v. Nico Indus., supra ). We perceive no reason to protract a procedure designed “to expedite the disposition of civil cases where no issue of material fact is

presented to justify a trial” (Di Sabato v. Soffes, 9 AD2d 297, 299 [, 193 N.Y.S.2d 184] ) by encouraging submission of yet another set of papers, an unnecessary and unauthorized elaboration of motion practice. If a movant, in preparation of a motion for summary judgment, cannot assemble sufficient proof to dispel all questions of material fact, the motion should simply not be submitted.

Dipizio v. Dipizio, 81 A.D.3d 1369, 916 N.Y.S.2d 449 (4th Dept.,2011): Defendant appealed from a judgment granting the relief requested in an amended complaint insofar as that judgment brought up for review a 2008-order which denied defendant's motion to dismiss the amended complaint to enforce the terms of the parties' postnuptial agreement. Defendant’s contention, that the postnuptial agreement was unenforceable because her signature was not acknowledged, was raised for the first time in her reply papers and thus was not properly before Supreme Court. Supreme Court did not address that contention in its 2008 order.

The defendants' argument that the plaintiff lacked standing was in response to the plaintiff's submission of the assignment, presented for the first time in the papers the plaintiff submitted in opposition to the motion. Accordingly, the Supreme Court, in the exercise of its discretion, properly considered the response to the new evidence offered for the first time in the reply

Cf., Citibank, N.A. v. Herrera, 64 A.D.3d 536, 881 N.Y.S.2d 334 (2nd Dept.,2009): Herrera waived any challenge to the plaintiff's standing by raising this argument for the first time only in opposition to the plaintiff's summary judgment motion, and not in his answer or in a pre-answer motion to dismiss
Subject Matter Jurisdiction, Ripeness, Mootness, Standing, Public Policy

-- Subject Matter Jurisdiction

Subject matter jurisdiction concerns a court's competence to entertain a particular kind of application55 – it is a question of judicial power: whether the court has the power, conferred by the Constitution or statute, to entertain the case before it.56 Jurisdiction of the subject-matter is the power lawfully conferred to deal with the general subject involved in the action.57

It is blackletter law that a judgment rendered without subject matter jurisdiction is void, and that the defect may be raised at any time and may not be waived.58 A challenge to subject matter jurisdiction may be raised at any time,59 and may not be waived,60 whether sua sponte, by the court on its own motion,61 or even for the first time on appeal.62

Family Court is a statutory court which lacks equity jurisdiction,63 and may not reform, vacate, or in any way modify or set aside any provisions of separation agreement not merged into


57 Hunt v. Hunt, 72 N.Y. 217 (1878).


63 Brescia v. Fitts, 56 N.Y.2d 132, 451 N.Y.S.2d 68 (1982); In re E.M., 7 Misc.3d 1005(A), 801 N.Y.S.2d 233 (Fam.Ct. Nassau Co. 2005) (Family Court is a statutory court and equity is irrelevant (with a few exceptions, such as the equitable estoppel doctrine in a paternity matter)); Matter of Lawrence T., 165 Misc.2d 1008, 630 N.Y.S.2d 910 (Fam.Ct. Oneida Co.1995) (Family Court, which is a statutory court whose jurisdiction and powers are derived from and limited by statute.)

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a judgment,\textsuperscript{64} as such, it cannot entertain issues of fraud and breach of contract,\textsuperscript{65} nor does it have subject matter jurisdiction to enforce or interpret a separation agreement which stands as an independent contract.\textsuperscript{66}

Actions instituted to enforce a separation agreement, as opposed to those actions seeking support within the meaning of the jurisdictional statutes or constitutional provisions pertaining to the Family Court (N.Y. Const, Art. VI, §§ 13, 19; Family Ct. Act, §§ 411, 466), do not fall within the court's limited jurisdiction.\textsuperscript{67}

\textit{Kleila v. Kleila}\textsuperscript{68} presented a method of circumventing the interdiction against impermissibly conferring jurisdiction on a court while still obtaining the intended result. Even though Family Court cannot modify an agreement, parties may, however, voluntarily agree that any modification of its order will also serve as a modification of the agreement.

\textbf{-- Ripeness and Mootness}

Judicial jurisdiction extends only to live controversies.\textsuperscript{69} An appeal presents a live controversy where the rights of the parties will be directly affected by the determination and where the judgment has “immediate consequence” for them.\textsuperscript{70} In general an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment.\textsuperscript{71}

\begin{itemize}
\item \textsuperscript{65} Sparacio v. Sparacio, 283 A.D.2d 481, 724 N.Y.S.2d 204 (2\textsuperscript{nd} Dept., 2001); Clune v. Clune, 57 A.D.2d 256, 394 N.Y.S.2d 556 (3\textsuperscript{rd} Dept., 1977).
\item \textsuperscript{66} Hiser v. Hiser, 175 A.D.2d 353, 572 N.Y.S.2d 431 (3\textsuperscript{rd} Dept., 1991).
\item \textsuperscript{67} Handa v. Handa, 103 A.D.2d 794, 477 N.Y.S.2d 670 (2\textsuperscript{nd} Dept., 1984).
\item \textsuperscript{68} Kleila v. Kleila, 50 N.Y.2d 277, 428 N.Y.S.2d 896 (1980).
\item \textsuperscript{69} Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 766 N.Y.S.2d 654 (2003).
\item \textsuperscript{71} Hearst Corp. v. Clyne 50 N.Y.2d 707, 409 N.E.2d 876, 431 N.Y.S.2d 400 (1980).
\end{itemize}
Mootness is a doctrine related to subject matter jurisdiction and thus must be considered by the court sua sponte.\textsuperscript{72} The fundamental principle that a court's power to declare the law is limited to determining actual controversies in pending cases is subject to an exception that permits the courts to preserve particular issues which are recurring (is likely to recur, either between the parties or other members of the public\textsuperscript{73}), substantial and novel, and typically evade review.\textsuperscript{74}

Ripeness is a matter pertaining to subject matter jurisdiction which may be raised at any time, including sua sponte.\textsuperscript{75}

\textbf{-- Ripeness}

\textbf{Hearst Corp. v. Clyne, 50 N.Y.2d 707, 431 N.Y.S.2d 400 (1980):}


\textsuperscript{74} Matter of David C. 69 N.Y.2d 796, 513 N.Y.S.2d 377 (1987); Hearst Corp. v. Clyne 50 N.Y.2d 707, 431 N.Y.S.2d 400 (1980), amplified the exceptions:

\textquote{"(N)ovel and important question of statutory construction" (Le Drugstore Etats Unis v. New York, State Bd. of Pharmacy, 33 N.Y.2d 298, 301, 352 N.Y.S.2d 188, 190); "of a character which is likely to recur not only with respect to the parties before the court but with respect to others as well" (East Meadow Community Concerts Ass'n. v. Board of Educ., 18 N.Y.2d 129, 135, 272 N.Y.S.2d 341, 346); "only exceptional cases, where the urgency of establishing a rule of future conduct is imperative and manifest will justify a departure from our general practice" (Matter of Lyon Co. v. Morris, 261 N.Y. 497, 499); question of "importance and interest and because of the likeliness that they will recur (Matter of Jones v. Berman, 37 N.Y.2d 42, 57, 371 N.Y.S.2d 422, 433); "question of general interest and substantial public importance is likely to recur" (People ex rel. Guggenheim v. Mucci, 32 N.Y.2d 307, 310, 344 N.Y.S.2d 944, 946); question "of major importance and (that) will arise again and again" (Matter of Rosenbluth v. Finkelstein, 300 N.Y. 402, 404); questions of "general interest, substantial public importance and likely to arise with frequency" (Matter of Gold v. Lomenzo, 29 N.Y.2d 468, 476, 329 N.Y.S.2d 805, 810); "importance of the question involved, the possibility of recurrence, and the fact that orders of this nature quickly expire and thus typically evade review" (Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 437, 423 N.Y.S.2d 630; "crystalizes a recurring and delicate issue of concrete significance" (Matter of Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 376, 401 N.Y.S.2d 756, 759.)

\textsuperscript{75} Agoglia v. Benepe, 84 A.D.3d 1072, 924 N.Y.S.2d 428 (2nd Dept.,2011).
It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal ...(Matter of State Ind. Comm., 224 N.Y. 13, 16; California v. San Pablo & Tulare R.R., 149 U.S. 308, 314, 13 S.Ct. 876, 878). This principle, which forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions, is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common-law judiciary.

“It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal” (Matter of Hearst Corp. v. Clyne, 50 N.Y.2d 707, 713, 431 N.Y.S.2d 400, 409 N.E.2d 876). Courts are prohibited from rendering advisory opinions and “an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment” (id. at 714, 431 N.Y.S.2d 400, 409 N.E.2d 876; see Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801, 810, 766 N.Y.S.2d 654, 798 N.E.2d 1047; Matter of Jimin J., 46 A.D.3d 826, 847 N.Y.S.2d 475; Becher v. Becher, 245 A.D.2d 408, 667 N.Y.S.2d 50).

CPLR 3001 states that “[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed”. A declaratory judgment action “ requires an actual controversy between genuine disputants with a stake in the outcome [and may not be used as a] vehicle for an advisory opinion” (Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3001:3, at 433). In addition to the requirement that the controversy be genuine or ripe, the declaratory judgment may be used only for a “justiciable” controversy. If the court has jurisdiction over the subject matter, and if the dispute is genuine, and not academic, “the dispute will be deemed ‘justiciable’ and CPLR 3001 will in that regard be satisfied” (Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3001:4, at 434).

Mootness
– Enduring Consequences

To the extent that the father contends on appeal that a jail term was improperly imposed upon his violation of the child support order, we conclude that such contention is moot inasmuch as that part of the order has expired by its own terms (see Matter of Cattaraugus County Dept. of Social Servs. v. Gore, 101 A.D.3d 1739, 1740, 955 N.Y.S.2d 910; Matter of Alex A.C. [Maria A.P.], 83 A.D.3d 1537, 1538, 921 N.Y.S.2d 759). We further conclude, however, that the court erred in confirming the Support Magistrate's finding that the father had willfully violated the existing support order before counsel appeared before the Support Magistrate on the father's behalf (see Family Ct. Act § 262[a][vi]; see generally Matter of Kissel v. Kissel, 59 A.D.2d 1036, 1036–1037, 999 N.Y.S.2d 781). We therefore modify the order accordingly. Given the enduring consequences flowing from the finding of a willful violation of a Family Court order, we note that the father's challenge to the Support Magistrate's finding of willfulness is not rendered moot because the jail sentence has been served (see Matter of Tesla Z. [Rickey Z.], 75 A.D.3d 776, 777 n., 904 N.Y.S.2d 813). Inasmuch as the court's bench decision reflects that the court's determination that the father violated his probation is independent of the Support Magistrate's finding of a willful violation of an existing child support order, we decline to disturb the part of the order determining that the father violated the terms of his probation. To the extent that the order reflects that the father was found to have violated his probation due to a willful breach of an existing child support order, we note that the court's bench decision rendered following the hearing includes no such finding as to willfulness and, “where ‘an order and decision conflict, the decision controls’ ” (Matter of Triplett v. Scott, 94 A.D.3d 1421, 1421, 942 N.Y.S.2d 303).

Although the order of protection expired by its own terms on February 24, 2013, in light of the enduring consequences which may potentially flow from a finding that the appellant committed a family offense, the appeal has not been rendered academic (see e.g. Matter of Wallace v. Wallace, 45 A.D.3d 599, 844 N.Y.S.2d 711; Matter of DeSouza–Brown v. Brown, 38 A.D.3d 888, 831 N.Y.S.2d 332; Matter of Rochester v. Rochester, 26 A.D.3d 387, 388, 809 N.Y.S.2d 178; Matter of Kravitz v. Kravitz, 18 A.D.3d 874, 796 N.Y.S.2d 376).

Marquardt v. Marquardt, 97 A.D.3d 1112, 948 N.Y.S.2d 484 (4th Dept., 2012):
Respondent wife appeals from an “Order of Fact–Finding and Disposition” in which Family Court concluded that she committed acts constituting the family offense of harassment in the first or second degree against petitioner husband... Initially, we note that the order of protection issued in conjunction with the order on appeal has expired, and we thus generally would dismiss the appeal as moot (Matter of Kristine Z. v. Anthony C., 43 A.D.3d 1284, 1284–1285, lv. denied 10 N.Y.3d 705). Here, however, respondent challenges only Family Court's finding
that she committed a family offense and, “‘in light of enduring consequences which may potentially flow from an adjudication that a party has committed a family offense,’ the appeal from so much of the order ... as made that adjudication is not academic” (Matter of Hunt v. Hunt, 51 A.D.3d 924, 925).

-- Recurring Issues, Likelihood of Repetition

It is clear that the claim asserted by Coleman under former section 133 is not capable of repetition, nor will it evade review, because the amended Social Services Law § 133 addresses applicants who are in “immediate need” of “emergency needs assistance or care” who may be entitled to a “monetary grant.” The distinctions between the two provisions may be significant. Under the former section 133, Coleman's situation arguably did not need to rise to the level of an emergency, whereas under the new section, it must necessarily rise to that level if an applicant is to meet the “immediate need” requirement. Moreover, former section 133 called for the provision of “temporary assistance or care” for qualifying individuals, whereas the current section 133 states that notice shall be provided concerning “the availability of a monetary grant adequate to meet emergency needs assistance or care” (emphasis supplied). On the other hand, future claimants may rely on the newly-added words “under this chapter” as support for their argument that section 133 applies to all benefits available under the Social Services Law—to Medicaid payments as well as to payments for food and shelter. So the claims asserted by Coleman under former section 133 cannot recur in light of this change in the law. Interpretation of a defunct statute under which Coleman is admittedly receiving benefits is of little value to future claimants who must now proceed under the current section 133, and, because Coleman's section 1983 claim is premised on that defunct statute, that claim is similarly moot. I would therefore answer the certified question in the negative.

-- Kendra’s Law, Repetition

Mental Hygiene Law § 9.60, commonly known as Kendra's Law, was enacted to provide “a system of assisted outpatient treatment (AOT) pursuant to which psychiatric patients unlikely to survive safely in the community without supervision may avoid hospitalization by complying with court-ordered mental health treatment” (Matter of K.L., 1 N.Y.3d 362, 366, 774 N.Y.S.2d 472, 806 N.E.2d 480). The statute sets forth who may file a petition for an assisted outpatient treatment (hereinafter AOT) order, the requirements for the petition, and the procedures for a hearing on the petition (see Mental Hygiene Law § 9.60[e][1]-[3]; [h][1]).
In the instant matter, the order and judgment dated January 22, 2009, expired by its own terms on July 22, 2009. Although the appeal from the order and judgment generally would be moot, the issues raised on appeal fit within the mootness exception. Due to the truncated nature of the hearing, there are issues as to whether Gail R.'s due process rights were sufficiently protected, whether the Supreme Court exceeded its authority by issuing the AOT order without the type of testimony described in the statute, and whether the petition and supporting physician's affirmation, in the absence of substantive testimony from that physician, constitute clear and convincing evidence to authorize AOT. These issues have a likelihood of repetition, either between Gail R. and the petitioner due to her chronic mental illness, or other patients who may be the subject of AOT proceedings. In addition, these issues would typically evade appellate review, as AOT orders have a maximum duration of six months unless extended by a subsequent court order (Mental Hygiene Law § 9.60[j][2], [k]). Moreover, the issues raised on appeal have not been the subject of prior appellate review and are substantial and novel (see Mental Hygiene Legal Servs. v. Ford, 92 N.Y.2d 500, 505–506, 683 N.Y.S.2d 150, 705 N.E.2d 1191; Matter of Hearst Corp. v. Clyne, 50 N.Y.2d at 714–715, 431 N.Y.S.2d 400, 409 N.E.2d 876; Matter of William C., 64 A.D.3d 277, 880 N.Y.S.2d 317; Matter of Manhattan Psychiatric Ctr., 285 A.D.2d 189, 191, 728 N.Y.S.2d 37). Consequently, Gail R.'s appeal will not be dismissed as moot.

In re Anthony H., 82 A.D.3d 1240, 919 N.Y.S.2d 214 (2nd Dept., 2011):

Generally, an appeal “will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment” (Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714; Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801, 810–811, cert. denied 540 U.S. 1017, 124 S.Ct. 570). But an exception to the mootness doctrine permits courts to preserve for review important and recurring issues which, by virtue of their relatively brief existence, would be rendered otherwise nonreviewable (Matter of M.B., 6 N.Y.3d 437, 447, 813 N.Y.S.2d 349).

Here, the resettled order and judgment dated... has already expired by its own terms. Although the appeal from the resettled order and judgment generally would be academic, the issues raised on appeal fit within the mootness exception. There is an issue as to whether the diagnoses in Anthony H.'s medical records, stating that his hospitalizations resulted from his failure to take his medication, constituted admissible evidence in support of an AOT order. This issue has a likelihood of repetition, either between the petitioner and Anthony H. due to his chronic mental illness, or between the petitioner and other patients who may be the subject of AOT proceedings. In addition, this issue would typically evade...
appellate review, as AOT orders have a maximum duration of six months unless extended by a subsequent court order (Mental Hygiene Law § 9.60[j][2]; § 9.60[k]). Further, the issue raised on appeal has not been the subject of prior appellate review and is substantial and novel (Mental Hygiene Legal Servs. v. Ford, 92 N.Y.2d 500, 505–506, 683 N.Y.S.2d 150; Matter of Gail R. [Barron], 67 A.D.3d 808, 811, 891 N.Y.S.2d 411).


--- Appeal Is Not Moot Notwithstanding Modification when the Appellant Has Not Relinquished the Right to Appeal and the Issue in the Underlying Order/Judgment Remains the Same

Chittick v. Farver, 279 A.D.2d 673, 719 N.Y.S.2d 305 (3rd Dept., 2001): While the appeal was pending respondent brought a[visitation] enforcement proceeding... The parties reached a settlement...culminating in [an] order of Family Court which provided for a change in the visitation schedule...but otherwise reaffirmed the custody and visitation provisions of Supreme Court's judgment of divorce. Respondent argue[d, inter alia,] that the parties' resolution of the enforcement proceeding render[ed] th[e] appeal moot.

[1] Since neither the transcript of the [] proceeding nor the [] order establishes that petitioner unequivocally relinquished her right to continue to press this appeal, we do not find her appeal to be moot.

Poremba v. Poremba, 93 A.D.3d 1115, 940 N.Y.S.2d 707 (3rd Dept., 2012): Pursuant to a consent-order, the [parties] had joint legal custody of the child, with the mother having physical custody. The parties filed several modification petitions with Family Court which, following a hearing, awarded the father sole legal and physical custody, with visitation to the mother. The mother appealed. The father moved to dismiss the appeal as moot.

We reject the father's argument that this appeal is moot. After the appealed-from order was issued, the parties resolved all outstanding issues in their divorce action by stipulation, including those related to custody. While the parties did agree to modify the terms of Family Court's order in some respects, it was left intact in relevant part and incorporated but not merged into the judgment of divorce. The mother inquired about the stipulation's impact upon the present appeal, and was assured on the record that the stipulation did not affect her right to appeal the order at issue. Inasmuch as the appeal is not moot under these circumstances, the father's motion to dismiss is denied.
[The parents divorced in 2005.] The judgment incorporated a stipulation that they share joint custody of their son, which included a schedule in which the parents had substantially equal time with the child, but did not address, [inter alia,] schooling. When the child reached school age, the father filed a petition seeking an order of primary physical custody so the child could attend school in the district where the father resided. The mother filed a petition seeking sole custody. In December 2008, Family Court granted the mother's petition. The father appeals.

Initially, this matter is not moot. In the order on appeal, Family Court specifically noted that the parties' schedules were likely to change within a short time and that either party could petition the court for a new visitation schedule. In March 2010, the parties consented to entry of an order setting forth a specific visitation schedule and not otherwise superceding any prior orders. The stipulation noted that the father did not waive his right to continue the present appeal. Considering the reservations in the December-2008 order and the provision in the March 2010 stipulation that the new order would only supercede prior orders with respect to visitation, the appeal from the December 2008 order is not moot.

Siler v. Wright, 64 A.D.3d 926, 882 N.Y.S.2d 574 (3rd Dept.,2009):
Family Court granted sole custody to the father and visitation to the mother. The mother appealed. Th[e] appeal [w]as not rendered moot by a subsequent order of Family Court. While this appeal was pending, the parties appeared before the court concerning a petition to modify visitation brought by the father and a violation petition filed by the mother. At that time, the parties agreed to withdraw their petitions and stipulated to an order which made minor adjustments to the visitation schedule but otherwise left unchanged the custody provision. This order was engendered solely as a result of petitions dealing with visitation issues and, in the absence of the transcript of the proceeding before Family Court, does not establish that the mother relinquished her right to pursue this custody appeal Chittick v. Farver, 279 A.D.2d 673 [2001]; Rush v. Rush, 201 A.D.2d 836 [1994].

Supreme Court awarded the father sole legal custody and continued the parenting schedule provided in the temporary order, with additional provisions relating to holidays and birthdays. The mother appealed. The Appellate Division affirmed.

Initially, the [mother’s] appeal [was not] rendered moot by a subsequent Family Court order which resolved custody enforcement and family offense petitions filed by the parties. That order was issued upon stipulation and clarified existing provisions of the order appealed from concerning communication and notice, while leaving intact the provisions of the order on appeal with respect to legal custody and parenting time. Accordingly, there is no basis to conclude that the
mother relinquished her right to pursue this appeal.

-- Public Policy

“[C]ertain issues which impact public policy may be reviewed by this Court despite being raised for the first time on appeal.”

“So strong is public policy that where a contract provision is arguably void as against public policy, that issue may even be raised for the first time at the appellate level by a party, or by the court on its own motion.”

-- Where public policy is found

**Glaser v. Glaser, 276 N.Y. 296 (1938)**:

What is the public policy of a state and where do we look to find it? The decision of this court have given it a limited legal meaning, for in People v. Hawkins, 157 N.Y. 1, at page 12 this court said: ‘The term ‘public policy’ is frequently used in a very vague, loose or inaccurate sense. The courts have often found it necessary to define its juridical meaning, and have held that a state can have no public policy except what is to be found in its Constitution and laws. (Vidal v. Girard's Ex'r's, 2 How. [U.S.] 127 [11 L.Ed. 205]; Hollis v. Drew Theological Seminary, 95 N.Y. 166; Cross v. United States Trust Co., 131 N.Y. [330]; Dammert v. Osborn, 140 N.Y. [30].) Therefore, when we speak of the public policy of the state, we mean the law of the state, whether found in the Constitution, the statutes or judicial records.'


Upon our review of the terms of the parties' agreement, we conclude that it is an agreement between a nonlawyer and attorneys to split legal fees which is prohibited by Judiciary Law § 491 (Gorman v. Grodensky, 130 Misc.2d 837, 498 N.Y.S.2d 249; Stern, Henry & Co. v. McDermott, 38 Misc.2d 50, 236 N.Y.S.2d

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778, affd. 19 A.D.2d 864, 245 N.Y.S.2d 348; Code of Professional Responsibility DR 3–102 [22 NYCRR 1200.1]). While this issue was not raised by the parties, we may consider it sua sponte (see, Matter of Niagara Wheatfield Administrators Assn. [Niagara Wheatfield Cent. School Dist.], 44 N.Y.2d 68, 72, 404 N.Y.S.2d 82, 375 N.E.2d 37; Matter of Town of Greenburgh [Police Assn. of Town of Greenburgh], 94 A.D.2d 771, 772, 462 N.Y.S.2d 718; Muscarella v. Muscarella, 93 A.D.2d 993, 994, 461 N.Y.S.2d 621).

-- Necessary Parties: May Be Added at Any Time, Even on Appeal, Sua Sponte


The court may at any stage of a case and on its own motion determine whether there is a nonjoinder of necessary parties.


A court may always consider whether there has been a failure to join a necessary party (First Nat. Bank v. Shuler, 153 N.Y. 163, 170; Matter of Lezette v. Board of Educ., 35 N.Y.2d 272, 282, 360 N.Y.S.2d 869, 876). Necessary parties are defined as “(p)ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action” (CPLR 1001, subd. (a)). An action is subject to dismissal if there has been a failure to join a necessary party (CPLR 1003). The rule serves judicial economy by preventing a multiplicity of suits. It also insures fairness to third parties who ought not to be prejudiced or “embarrassed by judgments purporting to bind their rights or interest where they have had no opportunity to be heard” (First Nat. Bank v. Shuler, supra, 153 N.Y. p. 170; see 2 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 1001.01).


This Court has previously held that a court may not, on its own initiative, add or direct the addition of a party (see LaSalle Bank Natl. Assn. v. Ahearn, 59 A.D.3d 911, 912, 875 N.Y.S.2d 595 [2009]; New Medico Assoc. v. Empire Blue Cross & Blue Shield, 267 A.D.2d 757, 758–759, 701 N.Y.S.2d 142 [1999]). That said, “[a] court may always consider whether there has been a failure to join a necessary party,” including on its own motion, and for the first time on appeal.

Necessary parties are persons “who might be inequitably affected by a judgment in the action” and must be made plaintiffs or defendants (CPLR 1001[a]). CPLR 1001(b) requires the court to order such persons summoned, where they are subject to the court's jurisdiction. If jurisdiction over such necessary parties can be obtained only by their consent or appearance, the court is to determine, in accordance with CPLR 1001(b), whether justice requires that the action proceed in their absence (see CPLR 1001[b]). The nonjoinder of necessary parties may be raised at any stage of the proceedings, by any party or by the court on its own motion, including for the first time on appeal (City of New York v. Long Is. Airports Limousine Serv. Corp., 48 N.Y.2d 469, 475, 423 N.Y.S.2d 651).

As a general rule, “points which were not raised at trial may not be considered for the first time on appeal” (People v. Thomas, 50 N.Y.2d 467, 471, 429 N.Y.S.2d 584, 407 N.E.2d 430). A narrow exception to this rule exists where a court issues an unauthorized or unlawful sentence.

Cf., In re Bobak (AIG Claims Services, Inc.), 97 A.D.3d 1103, 948 N.Y.S.2d 780 (4th Dept., 2012):
Petitioner's contention that the court erred in failing to join Travelers and the Ohio Insurance Guaranty Association (OIGA) as necessary parties is raised for the first time on appeal and thus is not properly before us.

Since the defendant's claim that the Supreme Court should have joined him as a necessary party in a related matrimonial action between the plaintiff and her husband...is raised for the first time on appeal, it is not properly before this Court.

-- Standing, Obviated?

-- Appropriate

While the issue of standing was raised by the SLA for the first time on appeal, it may nevertheless be entertained at this juncture since it poses a question of law that could not have been avoided had it been raised before the motion court.81


Petitioner lacks standing to bring the instant petition since he was represented by the union at the arbitration (Sampson v. Board of Educ., 191 A.D.2d 283, 594 N.Y.S.2d 264), and we affirm the dismissal of the petition for that reason. Although the issue of standing is first raised on appeal, it poses a question of law that could not have been avoided had it been raised before the IAS court, and therefore may be entertained at this juncture (Chateau D'If Corp. v. City of New York, 219 A.D.2d 205, 209, 641 N.Y.S.2d 252, lv. denied, 88 N.Y.2d 811).

**Standing, Improper for first time on appeal**

**People v. Stith, 69 N.Y.2d 313, 514 N.Y.S.2d 201 (1987):**

The People's argument that defendants lacked standing to contest the lawfulness of the seizure was raised for the first time at the Appellate Division and thus is not preserved for our review.


The issue of respondent's standing (Domestic Relations Law § 111[1][a] ) may not be raised for the first time on appeal because it “could have been obviated or cured by factual showings or legal countersteps” in the trial court (Telaro v. Telaro, 25 N.Y.2d 433, 439, 306 N.Y.S.2d 920, rearg. denied, 26 N.Y.2d 751, 309 N.Y.S.2d 1031; see, Oram v. Capone, 206 A.D.2d 839, 840, 615 N.Y.S.2d 799; cf., Matter of Baby Girl, 206 A.D.2d 932, 933, 615 N.Y.S.2d 800).


Hughes' argument now that defendant did not have standing to seek disqualification, raised for the first time on appeal, will not be considered.

**Unclean Hands**

“Although neither party raised the issue of unclean hands or illegality, this court is not precluded from raising the issue sua sponte for the first time on appeal.”

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82 In re Estate of Dessauer, 96 A.D.3d 1560, 946 N.Y.S.2d 760 (4th Dept.,2012).


--- Illegality
Upon our review of the terms of the parties' agreement, we conclude that it is an agreement between a nonlawyer and attorneys to split legal fees which is prohibited by Judiciary Law § 491...While this issue was not raised by the parties, we may consider it sua sponte (Niagara Wheatfield Administrators Assn. [Niagara Wheatfield Cent. School Dist.], 44 N.Y.2d 68, 404 N.Y.S.2d 82; Town of Greenburgh [Police Assn. of Town of Greenburgh], 94 A.D.2d 771).

--- Prejudgment Interest, May Not Be Raised First Time on Appeal

--- May Not Be Raised First Time
The defendant's claim that the Supreme Court erred in awarding prejudgment interest is not properly before this court, as it was raised for the first time in a reply brief on appeal.

The same implied breach of lease entitles the tenant to prejudgment interest under CPLR 5001(a) (Solow v. Wellner, 86 N.Y.2d 582, 589-590, 635 N.Y.S.2d 132, 658 N.E.2d 1005). The tenant's claim that interest should have been computed from the date the landlord first began charging excess rent, rather than from the date of the District Rent Administrator's order establishing the amount of overcharge, is improperly raised for the first time on appeal, and indeed it appears that the motion court used the date specifically urged by the tenant.

The father's contention that pre-judgment interest on the arrears was improperly awarded as he was not in willful violation of the support provisions of the divorce judgment is not properly before this court, having been raised for the first time on appeal.

We decline to address the argument of TPC, made for the first time on appeal, that it is entitled to prejudgment interest on any indemnification award. [Editor's note: The Appellate Division did not state that the issue was unpreserved – it appears to read that the court declined to do so as a matter of discretion.]
Some Exceptions to First Time Rule in Criminal Matters

As a general rule points which were not raised at trial may not be considered for the first time on appeal (CPL 470.05, subd. 2; People v. Robinson, 36 N.Y.2d 224, 267 N.Y.S.2d 208; People v. Gurley, 42 N.Y.2d 1086, 399 N.Y.S.2d 650; People v. Kibbe, 35 N.Y.2d 407, 413-414, 362 N.Y.S.2d 848; affd. sub nom. Henderson v. Kibbe, 431 U.S. 145, 97 S.Ct. 1730). There is, however, one very narrow exception as we noted in People v. Patterson (supra). In that case we said that no objection is necessary to preserve a point of law for appellate review when the procedure followed at trial was at basic variance with the mandate of law prescribed by Constitution or statute (People v. Patterson, supra, 39 N.Y.2d at pp. 295-296, 383 N.Y.S.2d 573; see, also, People v. Michael, 48 N.Y.2d 1, 420 N.Y.S.2d 371). It is to be noted that in Patterson the defendant challenged the constitutionality of section 125.25 (subd. 1, par. (a)) of the Penal Law which places upon the defendant the burden of proving extreme emotional disturbance as an affirmative defense to murder. We held that this argument could be raised for the first time on appeal. It was noted (39 N.Y.2d at p. 296) that if “the burden of proof was improperly placed upon the defendant, defendant was deprived of a properly conducted trial.” We also recognized that the defendant's failure to object was excusable because the statutory practice had previously been deemed valid and had only been called into question by an intervening Supreme Court decision.

Contrary to defendants' contentions, the error, if there was any error, in the instructions does not fall within the narrow exception to the rule enunciated in People v. McLucas, 15 N.Y.2d 167, 256 N.Y.S.2d 799 that objections to the charge must be made at trial. An objection is required to preserve a point of law for appellate review except in a very small class of cases where the error results in a trial “at basic variance with the mandate of law prescribed by Constitution or statute”. (People v. Thomas, 50 N.Y.2d 467, 429 N.Y.S.2d 584.) In the case of a charge error implicating defendant's right against self-incrimination, the exception to the preservation requirement may be invoked only where the language of the charge expressly or at least unambiguously conveys to the jury that the defendant should have testified (People v. Thomas, 50 N.Y.2d, at 472; People v. McLucas, 15 N.Y.2d 167; cf., People v. Burke, 72 N.Y.2d 833, 530 N.Y.S.2d 543).
AN APPELLATE COURT MAY AFFIRM
FOR REASONS DIFFERENT THAN THOSE OF NISI PRIUS

An affirmance...does not necessarily constitute a ratification of the legal reasoning in the order appealed from, when the affirmance explicitly uses different reasoning from that employed by the court of first instance to reach the same result. Moreover, while it might be appropriate to give preclusive effect to factual findings made by a trial court which are not disturbed on appeal, different considerations come into play where the trial court's ruling, for which preclusive effect is sought, is purely one of law (O'Connor v. G & R Packing Co., 53 N.Y.2d 278, 282–283, 440 N.Y.S.2d 920 [1981]), especially when that reasoning was, at least implicitly, disturbed on appeal. The basis for giving preclusive effect to an alternative ground for a decision is that the issue was “actually litigated, squarely addressed, and specifically decided” (Atl. Mut. Ins. Co. v. Lauria, 291 A.D.2d 492, 493, 739 N.Y.S.2d 394 [2002]);

Here, once the reasoning of the Surrogate's Court was replaced by the reasoning of this Court in its order on appeal, the legal reasoning used by the Surrogate's Court, even though not explicitly disapproved, could not then continue to stand as a viable statement of the law: the issue was neither “squarely addressed” nor “specifically decided” by this Court in Matter of Singer.

This court may affirm on a theory different from the one previously argued or relied upon by Special Term (Sega v. State of New York, 60 N.Y.2d 183, 190, n. 2, 469 N.Y.S.2d 51; Matter of Trustees of Union Coll. v. Board of Assessment Review of City of Schenectady, 91 A.D.2d 713, 714-715, 457 N.Y.S.2d 970).

Supreme Court properly denied plaintiff's motion seeking “a revision of the terms and provisions of the Judgment [of divorce] so as to provide equitable . . . relief,” but our reasoning differs from that of the court. The judgment of divorce incorporated but did not merge the parties' stipulation. The court properly

85 Bell v. Xanthopoulos, 202 A.D.2d 910, 609 N.Y.S.2d 428 (3d Dept. 1994); Busy Bee Food Stores v. WCC Tank Lining Technology, Inc., 202 A.D.2d 898, 609 N.Y.S.2d 118 (3d Dept., 1994), leave to appeal dismissed, 83 N.Y.2d 953, 639 N.E.2d 418, 615 N.Y.S.2d 877 (1994); Sanders v. Grenadier Realty, Inc. 102 A.D.3d 460, 958 N.Y.S.2d 120 (1st Dept., 2013) (Plaintiffs' state law claims were properly dismissed, but not for the reason stated by the motion court, i.e., res judicata. Here, those claims were barred by the principle of collateral estoppel, since in dismissing plaintiffs' federal claims, the Federal District Court addressed issues identical to those raised by plaintiffs' state claims, despite having declined to exercise jurisdiction over the state claims.)
characterized the motion as, inter alia, seeking to revise the parties' stipulation and thus, instead of denying the motion on the merits, the court should have denied the motion on the ground that “a motion is not the proper vehicle for challenging a [stipulation] incorporated but not merged in[ ] a divorce judgment. Rather, [plaintiff] should have commenced a plenary action seeking [recession] or reformation of the [stipulation]” (Spataro v Spataro, 268 AD2d 467, 468 [2000]; see also Christian v Christian, 42 NY2d 63, 72 [1977]). We therefore do not consider the merits of plaintiff's motion.

The Tipsy-Coachman Rule

Strohm v. State, 84 So.3d 1181 (Fla.App. 4 Dist., 2012) :
Under the “tipsy coachman” rule, “if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record.”

Lee v. Porter, 63 Ga. 345  (Ga. 1879):
It not infrequently happens that a judgment is affirmed upon a theory of the case which did not occur to the court that rendered it, or which did occur and was expressly repudiated. The human mind is so constituted that in many instances it finds the truth when wholly unable to find the way that leads to it.

“[T]he pupil of impulse, it forc'd him along, His conduct still right, with his argument wrong; Still aiming at honor, yet fearing to roam The coachman was tipsy, the chariot drove home.”
JUDICIAL NOTICE

CPLR 4511:

Prince, Richardson on Evidence (11th Edition, Farrell), § 2-209;

Judicial notice may be taken by any court at any stage of the litigation, even on appeal.

Judicial notice has never been strictly limited to the constitutions, resolutions, ordinances, and regulations of government, but has been applied by case law to other public documents that are generated in a manner which assures their reliability. Thus, the concept has been applied to census data (cites omitted) ... certificates of corporate dissolution maintained by the Secretary of State (cites omitted)...the resignation of public officials (cites omitted)...legislative proceedings (cites omitted)... legislative journals (cites omitted)...the consumer price index (cites omitted)...the location of real property recorded with a clerk (cites omitted)...death certificates maintained by the Department of Health (cites omitted)...and undisputed court records and files (cites omitted). Even material derived from official government websites may be the subject of judicial notice (cites omitted).

[5] White Plains Hospital argues that the code key available on the HHS website does not qualify for judicial notice, by relying upon the language of this Court in Ptasznik v. Schultz, 247 A.D.2d 197, 679 N.Y.S.2d 665... [which] defined the test for judicial notice as “whether the fact rests upon knowledge or sources so widely accepted and unimpeachable that it need not be evidentiarily proven” ( id. at 198, 679 N.Y.S.2d 665, citing Hunter v. New York, Ontario & W.R.R. Co., 116 N.Y. 615). White Plains Hospital maintains that code numbers which require deciphering do not constitute general information widely accepted by the average lay person. However, Ptasznik discusses specifically, and the universe of case law recognizes generally, two disjunctive circumstances where information may be judicially noticed. The first is when information “rests upon knowledge [that is] widely accepted” ( Ptasznik v. Schultz, 247 A.D.2d at 198, 679 N.Y.S.2d 665 [emphasis added] ) such as calendar dates, geographical locations, and sunrise times ( id. at 198, 679 N.Y.S.2d 665). The second “rests upon ... sources [that are] widely accepted and unimpeachable” ( id. [emphasis added] ), such as reliable uncontested governmental records.
Here, the diagnosis and procedure codes key maintained by the United States Government on its HHS website is of sufficient authenticity and reliability that it may be given judicial notice. The accuracy of the codes key is not contested by White Plains Hospital, and is not subject to courtroom factfinding (Affronti v. Crosson, 95 N.Y.2d at 720, 723 N.Y.S.2d 757). The fact that the code system might not be readily understood by the lay public is of no significance, as the information is proffered for judicial notice not on the basis of being generally understood by the public, but rather, on the basis of its reliable source.

We hold, therefore, that the diagnosis and procedure codes key published by the United States Government on its HHS website may properly be given judicial notice (see CPLR 4511[b]), as the key is reliably sourced and its accuracy not contested.

Petitioner's resignation was properly accepted by respondent's director of personnel. Public Authorities Law § 352(3) provides that respondent “may delegate to one or more of its members or its officers, agents and employees such powers and duties as it may deem proper.” Here, respondent's bylaws authorize respondent's chair to delegate the power to appoint and remove employees. In September 2002, respondent's chair delegated the power to appoint and effect probationary terminations to department heads and division directors within their respective areas of employment. Acceptance of a resignation in lieu of disciplinary removal is a logical extension of that delegated authority. Although the bylaws contained in the record were not in effect at the time of the delegation, the appropriate bylaws have been submitted by respondent to the court and may properly be considered, even though dehors the record (State of New York v. Peerless Ins. Co., 117 A.D.2d 370, 374, 503 N.Y.S.2d 448 [1986]).

Contrary to the petitioner's contention, this court may take judicial notice of undisputed court records and files (Allen v. Strough, 301 A.D.2d 11, 752 N.Y.S.2d 339; Ptaszniak v. Schultz...).

[T]he Court of Claims correctly concluded that the State could not be held liable for its failure to remove or lower the median curb, even if such reconstruction could have prevented the accident. The Court of Claims properly took judicial notice of Trautman v. State of New York, 179 A.D.2d 635, 578 N.Y.S.2d 245, a case previously litigated before it, as evidence to support its conclusion that while the State had a duty to redesign and reconstruct the parkway in the vicinity of the accident site by removing or lowering the median curb, the delay in doing so was not unreasonable in light of the scope of the reconstruction project, the availability of funding and other priorities (Friedman v. State of New York, 67
N.Y.2d 271, 502 N.Y.S.2d 669; see also, Sam & Mary Housing Corp. v. Jo/Sal Market Corp., 100 A.D.2d 901, 474 N.Y.S.2d 786). Trautman which was decided by the same Judge in December of 1989, resolved a liability issue similar to that presented herein, primarily on the basis that the State was experiencing severe fiscal crises in the early 1970's, which prevented it from implementing numerous highway construction projects. Since the claimants in the present actions repeatedly cited to Trautman v. State of New York (supra) in their post-trial brief, they cannot, now, claim surprise and prejudice as a result of the judge taking judicial notice of the fiscal crises, of which the claimant was well aware, and of which the Judge clearly had personal knowledge...

The court properly dismissed Cohen's affirmative defenses and counterclaims on the basis of a lack of standing. Although this issue was not addressed by the parties in this action, it was an issue in the companion case (Cohen v. Estate of Simon Cohen, 242 A.D.2d 358, 661 N.Y.S.2d 1002 [decided herewith] ). We take judicial notice of the arguments in that case and the decision therein.


Incontrovertible Documents to Affirm or Sustain Judgments:

In concluding that no material issue of fact exists in the present case, we have considered the certificate issued by the Secretary of State, dated January 6, 1987, which substantiates the assertion made by the plaintiff's attorney in the Supreme Court, that Edward J. Cromer, Inc., was dissolved by proclamation in 1981. We recognize, of course, the general rule that documents which were not submitted to

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86 Lane v. Lane, 68 A.D.3d 995, 892 N.Y.S.2d 130 (2nd Dept., 2009); Schmidt v. Magnetic Head Corp. 97 A.D.2d 151, 468 N.Y.S.2d 649 (2nd Dept.,1983).

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the court of original instance may not be considered on appeal (e.g., Mi Suk Buley v. Beacon Tex-Print, 118 A.D.2d 630, 499 N.Y.S.2d 782; Broida v. Bancroft, 103 A.D.2d 88, 478 N.Y.S.2d 333). This rule, however, is subject to certain exceptions. It has long been the law that an incontrovertible official document, even though it dehors the record, may be considered on appeal for the purposes of sustaining a judgment ( Dunham v. Townshend, 118 N.Y. 281, 286; State of New York v. Peerless Ins. Co., 117 A.D.2d 370, 374, 503 N.Y.S.2d 448; Kirp v. Caleb's Path Realty Corp., 19 A.D.2d 744, 242 N.Y.S.2d 877). The Court of Appeals has also recognized a narrow exception, which allows the consideration, on appeal, of reliable documents, the existence and accuracy of which are not disputed, even for the purposes of modifying or reversing the order under review (cites omitted)... Also, this court may, in general, take judicial notice of matters of public record (cites omitted).

Although it is generally true that the record on appeal is limited to the documents submitted before the Supreme Court, it is well settled “that an incontrovertible official document, even though it is dehors the record, may be considered on appeal for the purposes of sustaining a judgment” ( Brandes Meat Corp. v. Cromer...). Further, a failure to dispute the accuracy of such documents amounts to a concession of their accuracy ( Brandes...).

The material to which the appellant objects consists of deeds, building permits, and tax records, all of which can be said to be “incontrovertible official documents” ( Brandes Meat...). Moreover, the petitioner has not disputed the accuracy of any of them. The respondent's brief will therefore be allowed to stand as submitted.

“[F]or the purpose of sustaining a judgment, incontrovertible, documentary evidence dehors the appeal record may be received by an appellate court” ( Kirp v. Caleb's Path Realty Corp., 19 A.D.2d 744, 745, 242 N.Y.S.2d 877; accord, Dunford v. Weaver, 84 N.Y. 445, 451; cf. Matter of Atkinson v. Marquette Mfg. Co., 24 A.D.2d 795, 263 N.Y.S.2d 927). Neither the authenticity nor the accuracy

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87 Raqiyb v. Coughlin  214 A.D.2d 788, 789, 624 N.Y.S.2d 667, 669 (3rd Dept.,1995): [T]he exception which permits receipt of incontrovertible documentary evidence outside the appeal record to sustain a judgment ( see, State of New York v. Peerless Ins. Co., 117 A.D.2d 370, 374, 503 N.Y.S.2d 448) does not apply. Here, the authenticity of the document is controverted by respondents and petitioner seeks reversal of the judgment ( see, id.).
of the document is disputed. The document is accordingly received (Matter of Dwyer, 57 A.D.2d 772, 394 N.Y.S.2d 438, lv. denied 45 N.Y.2d 709 [official document of Internal Revenue Service, not in record on appeal, considered by court]). To do otherwise would unnecessarily delay the proceedings.

**Bravo v. Terstiege, 196 A.D.2d 473, 601 N.Y.S.2d 129 (2nd Dept., 1993):**
For the purpose of sustaining a judgment, incontrovertible documentary evidence dehors the record may be received by an appellate court (State of New York v. Peerless Ins. Co...; Kirp v. Caleb's Path Realty Corp...). [T]he survey map is based on the descriptions in the contracts of sale of both parcels, which were before the Supreme Court and are part of the record on appeal, and the defendants do not contend that the map is inaccurate. Accordingly, we will consider the map on this appeal.


**JUDICIAL NOTICE OF SELF AUTHENTICATING BANK RECORDS IN THE POST MADOFF ERA**

No error was committed by the trial court in admitting into evidence, without foundation testimony, records of defendant-husband's accounts in European banks. To be sure, “[b]usiness records are not self-proving”... and “are customarily offered through a custodian or employee” of the business organization that created them (People v. Kennedy, 68 N.Y.2d 569, 577, 510 N.Y.S.2d 853), “who can explain the record-keeping of his organization”...; but, it is also true “that judicial notice can provide a foundation for admitting the records of a particular business”...when the records “are so patently trustworthy as to be self-authenticating” (People v. Kennedy, at fn. 4), or, as one commentator has said about the similar federal business records rule, “[a] foundation for admissibility may at times be predicated on judicial notice of the nature of the business and the nature of the records observed by the court, particularly in the case of bank and similar statements.”...see, Federal Deposit Insurance Corporation v. Staudinger, 797 F.2d 908, 910 (10th Cir.) Here, the bank records were procured by defendant himself (under compulsion of a court order) from the banks which supposedly created them, and thus their authenticity cannot be seriously challenged, and indeed is not challenged. They appear regular on their face, and in format conform to the type of statements with which banks customarily supply their customers on a monthly basis for the purpose of advising them of deposits, withdrawals and balances. No reasons are offered by defendant why these records should not be viewed as reliable and trustworthy, other than that they are technically hearsay and that no witness was called to testify that they were made in the regular course of the banks' business at or about the time of the transactions they describe, but, in the circumstances, we do not consider this reason enough to exclude what appears to be perfectly trustworthy evidence.

[T]he trial court did not err in allowing the admission of the bank statement into evidence inasmuch as it was a self-authenticating document (Elkaim v. Elkaim, 176 A.D.2d 116).

**People v. Ramos, 60 A.D.3d 1091, 876 N.Y.S.2d 127 (2nd Dept.,2009):**
The defendant did not dispute the authenticity or the accuracy of the bank records, and we see no reason to view them as other than reliable and trustworthy (Elkaim v. Elkaim, 176 A.D.2d at 117). Accordingly, the records were properly admitted.

[W]e would hold that plaintiff met its prima facie burden on the initial motion for summary judgment by submitting evidence of defendant Eldorado Trading's
promise to pay under the note, the guarantee by defendants Eldorado S.A. and Verpar, and nonpayment (Eastbank v. Phoenix Garden Rest., 216 A.D.2d 152, 628 N.Y.S.2d 283 [1995], lv. denied 86 N.Y.2d 711 [1995] ). Plaintiff also submitted evidence demonstrating it had purchased the note, which was held by BB Securities on its behalf in a secure account at Euroclear. Contrary to defendants' contention, the affidavit of a corporate officer with personal knowledge, together with authenticated business records, is admissible in support of a motion for summary judgment (First Interstate Credit Alliance v. Sokol, 179 A.D.2d 583, 584, 579 N.Y.S.2d 653 [1992] ). In addition, a certified statement of account issued by Euroclear was admissible under the terms of the note, which provided that such record would be “conclusive evidence” as to the identity of any holder, and because it had sufficient indicia of trustworthiness (Elkaim v. Elkaim, 176 A.D.2d 116, 117, 574 N.Y.S.2d 2 [1991], appeal and lv. dismissed 78 N.Y.2d 1072 [1991] ).

The expansion should not have been received as evidence of a section 313 cancellation unless so patently trustworthy in that respect as to be self-authenticating, which it is not ( cf. Elkaim v. Elkaim, 176 A.D.2d 116, 574 N.Y.S.2d 2 [1991], appeal dismissed 78 N.Y.2d 1072 [1991]88 ).


People v. Markowitz, 187 Misc.2d 266, 721 N.Y.S.2d 758 (N.Y.Sup., 2001):
There appears to be a divide in the departments of the Appellate Division concerning the foundation requirements of CPLR 4518 as they apply to documents created by one entity and then transferred to a second entity. Standard Textile Co. v. National Equip. Rental, 80 A.D.2d 911, 437 N.Y.S.2d 398 (2nd Dept., 1981), [held] that “the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records.” The rationale for this holding is that employees from the receiving entity would be in no position to provide the necessary foundation testimony as to the regularity and timeliness of a document's preparation. (Alexander, Practice Commentaries, McKinny's Cons. Laws of N.Y., Book 7B, CPLR 4518:1, at 105). In a similar case, the Appellate Division, Third Department ruled that it was error to admit plaintiff's bank statements and a loan

commitment prepared by plaintiff's bank and mailed to plaintiff in the ordinary course of business without foundation testimony from any bank personnel. Tomanelli v. Lizda Realty, Ltd., 174 A.D.2d 889, 571 N.Y.S.2d 171 (3rd Dept., 1991). However, the Appellate Division, First Department, has upheld the admission of bank records as business records without foundation testimony from a bank employee. Elkaim v. Elkaim, 176 A.D.2d 116, 574 N.Y.S.2d 2 (1st Dept., 1991). There the Court held “that judicial notice can provide a foundation for admitting the records of a particular business when the records are so patently trustworthy as to be self-authenticating.”
OBJECTIONS TO SUPPORT MAGISTRATE’S FINDINGS IN FAMILY COURT

In his Supplementary Practice Commentaries, FCA 439, 2012, The Objection Process, Prof. Merril Sobie states: “Filing and determining an objection to a support magistrate's determination is a condition precedent to filing an appeal with the Appellate Division; no ifs, ands or buts.”

“Following a determination of objections, an appeal may be initiated in the relevant Appellate Division pursuant to Article 11. May the parties waive the objection process, and thereby proceed directly from the support magistrate to the Appellate Division? The First Department's answer is an emphatic “no”; Comm'n of Social Serv. of the City of New York v. Harris, 26 A.D.3d 283, 810 N.Y.S.2d 175 (1st Dept. 2006).”

The record revealed that the father's obligation to pay maintenance had been terminated in an earlier order of the Support Magistrate, dated January 31, 2006, to which the mother did not file objections. “The hearing of objections in Family Court is the equivalent of an appellate review.”


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N.Y.S.2d 148 [1996]). Remittal is thus necessary so that Family Court may conduct an appropriately limited review and resolve the specific objections lodged by the father.

**Reynolds v. Reynolds, 92 A.D.3d 1109, 938 N.Y.S.2d 382 (3rd Dept., 2012):**
Family Ct. Act § 439(e) requires a judge of the Family Court to review any objections made by the parties to a Support Magistrate's final order before an appeal may be taken pursuant to Family Ct. Act article 11 (Matter of Corry v. Corry, 59 A.D.3d 618, 875 N.Y.S.2d 87 [2009]; Commissioner of Social Servs. of City of N.Y. v. Harris, 26 A.D.3d 283, 810 N.Y.S.2d 175 [2006]; Matter of Feliz v. Rojas, 21 A.D.3d 373, 800 N.Y.S.2d 187 [2005]; Matter of Dambrowski v. Dambrowski, 8 A.D.3d 913, 778 N.Y.S.2d 733 [2004]). Contrary to Family Court's conclusion, this procedure is not altered by Family Ct. Act § 464(a), which permits Supreme Court to refer an application for support in a matrimonial action to Family Court and provides Family Court with jurisdiction to determine the application with the same powers possessed by Supreme Court (see e.g. Rossiter v. Rossiter, 56 A.D.3d 1011, n. 1, 869 N.Y.S.2d 624 [2008]; Zwickel v. Szajer, 47 A.D.3d 1157, 850 N.Y.S.2d 287 [2008]).

**Costopoulos v. Ferguson, 74 A.D.3d 1457, 902 N.Y.S.2d 695 (3rd Dept., 2010):**
[T]he father's current challenge to the amount of the children's expenses is not preserved for our review due to his failure to specifically object to the Support Magistrate's findings in that regard.

**Kaplan v. Kaplan, 102 A.D.3d 873, 957 N.Y.S.2d 904 (2nd Dept., 2013):**
In a child support proceeding...the father appeals from an order of the Family Court...which denied his objections...finding that he willfully violated a child support order and directing him to pay the principal sum of $9,324.80 in arrears...The father's contentions are not properly before this Court, as they were not raised in his objections to the Support Magistrate's order.

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WHERE PROOF OF SERVICE OF PROCESS IS STATUTORILY REQUIRED SUCH AS, IN THE FAMILY COURT, FAILURE TO FILE PROOF OF SERVICE IS A CONDITION PRECEDENT AND THE UNDERLYING PAPERS ARE NOT REVIEWABLE

The issues raised by the father on this appeal are not reviewable, since he failed to file proof of service of a copy of the objections on the mother. Family Court Act § 439(e) provides, in pertinent part, that “[a] party filing objections shall serve a copy of such objections upon the opposing party,” and that “[p]roof of service upon the opposing party shall be filed with the court at the time of filing of objections and any rebuttal.” By failing to file proof of service of a copy of his objections on the mother, the father failed to fulfill a condition precedent to filing timely written objections to the Support Magistrate's order...Consequently, the Family Court lacked jurisdiction to consider the merits of the objections ( cf. Matter of Perez v. Villamil, 19 A.D.3d 501, 502, 798 N.Y.S.2d 481), and the father waived his right to appellate review.

The issues raised by the father on this appeal are not reviewable. Family Court dismissed the father's objections on the ground that he failed to file adequate proof of service of a copy of the objections on the mother. In this regard, the purported affidavit of service filed by the father did not identify any date of alleged service. Notably, no rebuttal to the objections was filed by the mother. Family Court Act § 439(e) provides, in pertinent part, that “[a] party filing objections shall serve a copy of such objections upon the opposing party,” and that “[p]roof of service upon the opposing party shall be filed with the court at the time of filing of objections and any rebuttal.” By failing to file adequate proof of service of a copy of his objections on the mother, “ ‘the father failed to fulfill a condition precedent to filing timely written objections to the Support Magistrate's order’ ”

The issues raised by the father on this appeal are not reviewable by this Court (Matter of Suffolk County Commr. of Social Servs. [ Roman] v. Carnegie, 12 A.D.3d 683, 784 N.Y.S.2d 886; Matter of Rinaldi v. Rinaldi, 239 A.D.2d 506, 657 N.Y.S.2d 443). Family Court Act § 439(e) provides, in pertinent part, that “[a] party filing objections shall serve a copy of such objections upon the opposing party,” and that “[p]roof of service upon the opposing party shall be filed with the court at the time of filing of objections and any rebuttal.” As the Family Court noted, the purported affidavit of service filed by the father did not

identify the person who allegedly served the mother with the objections. Further, the form affidavit was not signed and notarized, as required. This was tantamount to a complete failure to file any proof of service. “By failing to file proof of service of a copy of his objections on the mother, the father failed to fulfill a condition precedent to filing timely written objections to the Support Magistrate's order”

**DiFede v. DiFede, 99 A.D.3d 1003, 952 N.Y.S.2d 455 (2nd Dept.,2012):**

The issues raised by the father on this appeal are not reviewable. The Family Court properly denied the father's objections on the ground that he failed to file proof of service of a copy of the objections on the mother. Family Court Act § 439(e) provides, in pertinent part, that "[a] party filing objections shall serve a copy of such objections upon the opposing party," and that "[p]roof of service upon the opposing party shall be filed with the court at the time of filing of objections and any rebuttal." By failing to file proof of service of a copy of his objections on the mother, the father failed to fulfill a condition precedent to filing timely written objections to the Support Magistrate's order and, thus, failed to "exhaust the Family Court procedure for review of [his] objection" (Matter of Semenova v Semenov, 85 AD3d 1036, 1037, quoting Matter of Davidson v Wilner, 214 AD2d 563). Consequently, the father waived his right to appellate review of the merits of his objections (Matter of Semenova v Semenov, 85 AD3d at 1037; Matter of Lusardi v Giovinazzi, 81 AD3d 958; Matter of Hidary v Hidary, 79 AD3d 880).

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MISREPRESENTATIONS OF LAW: COURTS “WILL NOT TOLERATE ATTEMPTS TO MISLEAD THE COURT THROUGH INACCURATE RENDITIONS OF CONTROLLING AUTHORITIES OR FACTS”; COUNSEL MAY NOT DO SO BEFORE ANY COURT

Truncated recitations of events or law are contemplated in these rulings. In Peterson v. New York State Dept. of Correctional Services, 100 A.D.2d 73, 473 N.Y.S.2d 473 (2nd Dept., 1984), the Second Department “admonished” counsel:

We again admonish counsel that we will not tolerate attempts to mislead the court through inaccurate renditions of controlling authorities or facts in briefs.

COUNSEL’S OBLIGATION TO CITE ADVERSE AUTHORITY

The former Code of Professional Responsibility imposed the “affirmative duty” of appellate advocacy “to advise the court of authorities adverse to his position.” This is continued in the current Rules of Professional Conduct – the Rules of Professional Conduct forbid counsel to posit false statements of law, non-meritorious or frivolous claims and defenses before any tribunal.

Rule 3.1. Non-Meritorious Claims and Contentions provides:
(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) A lawyer's conduct is “frivolous” [in relative part] for purposes of this Rule:
   (1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;

Rule 3.3. Conduct Before a Tribunal, provides, in pertinent part:
(a) A lawyer shall not knowingly:


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(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

In Cicio v. City of New York, 98 A.D.2d 38, 469 N.Y.S.2d 467 (2nd Dept.,1983), the Second Department admonished counsel engaging in inappropriate appellate practice:
The function of an appellate brief is to assist, not mislead, the court. Counsel have an affirmative obligation to advise the court of adverse authorities, though they are free to urge their reconsideration (Code of Professional Responsibility, DR 7-106, subd. [B], par. [1], EC 7-23 ...) We trust that this case will serve as a warning that counsel are expected to live up to the full measure of their professional obligation.

“... in light of defendant's failure to draw this court's attention to the reversal of the United States District Court's decision in Denby v. Seaboard World Airlines, Inc., 575 F.Supp. 1134, revd. 737 F.2d 172, supra, we are granting costs to the plaintiff. Defendant's counsel, who relied on the lower court decision in Denby in his brief, was also counsel in the Denby case, and at the time the appeal in the instant case was submitted must have been, or should have been, aware of the reversal in Denby by the Second Circuit Court of Appeals several months earlier. There is no excuse for the failure to bring that fact to this court's attention (Cicio v. City of New York, 98 A.D.2d 38, 469 N.Y.S.2d 467 ...”;

94 Bansi v. Flushing Hosp. Medical Center, 15 Misc.3d 215, 832 N.Y.S.2d 399 (Sup.Ct. Queens Co. 2007); Yellow Book of NY L.P. v. Dimilia 188 Misc.2d 489, 729 N.Y.S.2d 286 (N.Y.Dist.Ct., 2001): “DR 7-106(B) (22 NYCRR § 1200.37), requires a lawyer to cite ‘controlling legal authority...directly adverse to the position of the client.’ This has been extremely narrowly construed ... However, the Appellate Division, Second Department, apparently imposes upon counsel a broader "affirmative obligation to advise the court of authority adverse to his position."
COURTS “CONDEMN” SUCH PRACTICE, MOTIONS TO STRIKE, ADD SUPPLEMENTAL BRIEF

Matters [dehors-the-record] will ordinarily be disregarded by the appellate court, permitted neither to buttress nor to weaken the case as the record shows it.95

It is well established that review by this Court is limited by the record on appeal and the Court is bound by the certified record on appeal. Matter contained in the briefs, not properly presented by the record, is not to be considered by this Court (Mulligan v. Lackey, 33 A.D.2d 991, 992, 307 N.Y.S.2d 371, 373). With these rules in view, the appendix at the end of plaintiff's brief will be disregarded on this appeal. Likewise, those points in plaintiff's brief with no factual basis in the record will be rejected (emphasis provided).

Preliminarily, we note that appellate review is limited to the record before the court of first instance (Broida v. Bancroft, 103 A.D.2d 88, 93, 478 N.Y.S.2d 333). Therefore, we have not considered the papers submitted in connection with the plaintiffs' unsuccessful motion for leave to reargue which were included in the record on appeal.


95 Siegel, N.Y. Prac. § 538 (5th ed.), Chapter 19, Appeals, E. Perfecting the Appeal.

In connection with this appeal, the plaintiff requests leave of this court to file a supplemental record on appeal. To the extent that the plaintiff's proposed supplemental record is comprised wholly of information not available to the nisi prius court for its consideration, the motion is denied...In turn, the defendants and the third-party defendant have moved to strike matter from the plaintiff's brief which is similarly dehors the record. This court is limited to a review of facts and information contained in the record and that which may be judicially noticed (Broida, supra). The portions of plaintiff's reply brief that defendants request stricken fall into neither of these categories, therefore, the defendants' motion to strike is granted. Thus, in deciding the instant appeal, we do not take into consideration information contained within plaintiff's reply brief that is outside of the record.


Preliminarily, it is noted that appellate review is limited to the record made at the nisi prius court and, absent matters which may be judicially noticed, new facts may not be injected at the appellate level (Interfaith Med. Center v. Shahzad, 124 A.D.2d 557, 507 N.Y.S.2d 702).

This rule is inapplicable where the appellant is not injecting new facts, but is merely arguing questions of law. In that event, the rule is that an issue which was not raised before the nisi prius court is reviewable by this court if the question presented is one of law “which appeared upon the face of the record and which could not have been avoided by [the respondent] if brought to [his] attention at the proper juncture” (Matter of Knickerbocker Field Club v. Site Selection Bd. of City of N.Y., 41 A.D.2d 539, 540, 339 N.Y.S.2d 485; Matter of Burkins v. Scully, 108 A.D.2d 743, 744, 485 N.Y.S.2d 89; Matter of Block v. Franklin Sq. Union Free School Dist., 72 A.D.2d 602, 421 N.Y.S.2d 107) [see above].

Courts "Condemn" Dehors-the-Record Documents which Are Not Properly Part of the Record on Appeal

We condemn the inclusion by the husband of documents in the appendix which are not properly part of the record of appeal (Ro–Stan Equities v. Schechter, 44 A.D.2d 577, 353 N.Y.S.2d 224), as well as his failure to settle the transcript in accordance with the rules of this court (22 NYCRR 699.10).

In a brief...a copy of an affidavit was included which was not properly part of the record on appeal. This practice must be severely condemned (cf. Golden v. Golden, 37 A.D.2d 578, 323 N.Y.S.2d 714). Counsel do not help their cases by attaching to briefs matter dehors the record.

The appendix materials were obtained by the Legal Aid Society in January of 1994, in an unrelated case pending in the Bronx, several months after the Supreme Court entered the orders appealed from herein. Since these materials were not before the justices who decided the motions, they are not a part of the record on appeal, and may not be considered by this Court.
APPELLANT IS “OBLIGATED TO ASSEMBLE A PROPER RECORD ON APPEAL”
TO “ENABLE AN INFORMED DETERMINATION ON THE MERITS”

CPLR 5526, “content and form of record on appeal”, directs, in pertinent part:
“The record on appeal from an interlocutory judgment or any order shall consist of
the notice of appeal, the judgment or order appealed from, the transcript, if any,
the papers and other exhibits upon which the judgment or order was founded and
any opinions in the case” (emphasis provided).

It is settled law that the appellant bears the burden of “assembling a proper record on
appeal”, which must comport with CPLR 5526, at the pain of a striking of the record
and dismissal of the appeal because “[w]ithout the benefit of a proper record, this Court cannot
render an informed decision on the merits” [Lynch v. Consolidated Edison, Inc., 82 A.D.3d 442
(1st Dept., 2011); Quezada v. Mensch Management Inc., 89 A.D.3d 647 (1st Dept.,2011);

A “ ‘proper record on appeal’ must include any relevant transcripts of proceedings
before the Supreme Court” [Waterside Estates at Cresthaven Homeowners Ass’n, Inc. v.
Ciafone, 108 A.D.3d 620, 968 N.Y.S.2d 388 (2nd Dept.,2013); Kruseck v. Ross, 82 A.D.3d 939,
918 N.Y.S.2d 727 (2nd Dept. 2011)] “to enable an [appellate] court to render an informed
decision on the merits.”

“An appellant's failure to provide a necessary transcript or pertinent exhibits inhibits the
court's ability to render an informed decision on the merits of the appeal (internal cites omitted)
Appeals that are not based upon complete and proper records must be dismissed” [Garnerville
Holding Co., Inc. v. IMC Management, Inc., 299 A.D.2d 450, 451, 749 N.Y.S.2d 892, 893 (2nd
Dept. 2002); Aurora Industries, Inc. v. Halwani, 102 A.D.3d 900, 958 N.Y.S.2d 479 (2nd
Dept.,2013)

“The record is inadequate to enable this Court to render an informed decision on the
merits, and therefore, the appeal must be dismissed” [Neunteufel v. Nehet Loan Services, Inc.,
104 A.D.3d 657, 959 N.Y.S.2d 923 (2nd Dept.,2013); In re Lynch, 98 A.D.3d 510, 49 N.Y.S.2d
454 (2nd Dept.,2012); Smith v. Imagery Media, LLC, 95 A.D.3d 1204, 945 N.Y.S.2d 133 (2nd

Prof. David Siegel, N.Y. Prac. § 538 (5th ed.), states:
The appellant may not put the record together selectively; he may not include
only materials favorable to his own side while omitting matter favorable to the
other [citing 2001 Real Estate v. Campeau Corp. (U.S.), Inc., 148 A.D.2d 315,
538 N.Y.S.2d 531 (1st Dept. 1989)].

It is the obligation of the appellant to assemble a proper record on appeal, which
must include any relevant transcripts of proceedings before the Supreme Court
(Rivera v. City of New York, 80 A.D.3d 595, 915 N.Y.S.2d 281; Vandenburg &
Feliu, LLP v. Interboro Packaging Corp., 70 A.D.3d 931, 932, 896 N.Y.S.2d 111; Marcantonio v. Piccozi, 46 A.D.3d 522, 523, 846 N.Y.S.2d 647). [P]laintiffs seek review of an order which denied their motion pursuant to CPLR 4404(a) to set aside a jury verdict in favor of the defendant and against them on the issue of liability, yet they failed to include the trial transcript in the record on appeal. The record is inadequate to enable this Court to render an informed decision on the merits, and therefore, the appeal must be dismissed (Schwartz v. Schwartz, 73 A.D.3d 1156, 1156–1157, 902 N.Y.S.2d 127; Nakyeoung Seoung v. Vicuna, 38 A.D.3d 734, 735, 830 N.Y.S.2d 911; Gerhardt v. New York City Tr. Auth., 8 A.D.3d 427, 778 N.Y.S.2d 536; Matison v. County of Nassau, 290 A.D.2d 494, 495, 736 N.Y.S.2d 115).

An appellant is obligated “to assemble a proper record on appeal, which must include any relevant transcripts of proceedings” before the hearing court or trial court ( Kruseck v. Ross, 82 A.D.3d 939, 940, 918 N.Y.S.2d 727; see CPLR 5525...Kociubinski v. Kociubinski, 83 A.D.3d 1006, 1007, 921 N.Y.S.2d 566; Schwartz v. Schwartz, 73 A.D.3d 1156, 902 N.Y.S.2d 127). [T]he appellant's failure to provide this Court with the transcript of the Family Court hearing renders the record on appeal inadequate to enable this Court to reach an informed determination on the merits. Accordingly, the appeal must be dismissed ...

Clarke v. Clarke, 90 A.D.3d 690, 934 N.Y.S.2d 345 (2nd Dept.,2011):
An appellant is obligated "to assemble a proper record on appeal, which must include any relevant transcripts of proceedings before the Supreme Court" (CPLR 5525[a]; 5526...). The record must also "contain all of the relevant papers that were before the Supreme Court, including the transcript, if any, of the proceedings" (Matison v County of Nassau, 290 AD2d 494, 494).

Here, the plaintiff appeals from a judgment which, inter alia, failed to direct the defendant to pay child support arrears, failed to award the plaintiff maintenance, and failed to equitably distribute the value of the defendant's medical license. However, the plaintiff's failure to provide this Court with the full transcript of the nonjury trial conducted before the Supreme Court renders the record on appeal inadequate to enable this Court to reach an informed determination on the merits. Thus, the appeal must be dismissed.

We do not reach the plaintiff's remaining contentions. “It is the obligation of the appellant to assemble a proper record on appeal, which must include any relevant transcripts of proceedings before the Supreme Court” ...(Rivera v. City of New York, 80 A.D.3d 595, 915 N.Y.S.2d 281; Vandenburg & Feliu, LLP v. Interboro Packaging Corp., 70 A.D.3d 931, 932, 896 N.Y.S.2d 111). The plaintiff seeks review of the judgment awarding the defendant the principal sum of $12,257, representing his pro rata share of the children's unreimbursed medical expenses...
and 100% of their summer camp expenses, made after a hearing was held to determine the validity and reasonableness of the claimed expenses. However, the plaintiff has failed to include the hearing transcripts in the record on appeal. Accordingly, the record is inadequate to enable this Court to render an informed decision on the remaining issues raised in the plaintiff's brief (Rivera v. City of New York, 80 A.D.3d at 595, 915 N.Y.S.2d 281; Vandenburg & Feliu, LLP v. Interboro Packaging Corp., 70 A.D.3d at 932, 896 N.Y.S.2d 111), including the propriety of the amounts awarded.

-- Necessary Papers for Appendix Method

**Reale v. Reale, 104 A.D.3d 747, 961 N.Y.S.2d 484 (2nd Dept., 2013):**

"An appellant who perfects an appeal by using the appendix method must file an appendix that contains all the relevant portions of the record in order to enable the court to render an informed decision on the merits of the appeal" (Gandolfi v. Gandolfi, 66 A.D.3d 834, 835, 886 N.Y.S.2d 617, quoting NYCTL 1998–1 Trust v. Shahipour, 29 A.D.3d 965, 965, 815 N.Y.S.2d 479 [internal quotation marks omitted]; see Mure v. Mure, 92 A.D.3d 653, 937 N.Y.S.2d 870). “The appendix shall contain those portions of the record necessary to permit the court to fully consider the issues which will be raised by the appellant and the respondent” (22 NYCRR 670.10.2[c][1]; see CPLR 5528[a][5]; Mure v. Mure, 92 A.D.3d at 653, 937 N.Y.S.2d 870). Here, the plaintiff omitted from his appendix certain evidence proffered by the defendant at the trial relating to the plaintiff's restaurant business. This omission “inhibit[s] the court's ability to render an informed decision on the merits of the appeal” (Matter of Embro v. Smith, 59 A.D.3d 542, 542, 872 N.Y.S.2d 291 [internal quotation marks omitted]; see Mure v. Mure, 92 A.D.3d at 653, 937 N.Y.S.2d 870). Accordingly, the appeal from so much of the judgment as directed the plaintiff to pay the defendant the sum of $62,500, representing the defendant's share of the plaintiff's restaurant business, must be dismissed.

**Appellant’s Failure to Assemble a Proper Record Is “Highly Unprofessional” and “Can Only Be Deplored”**

**2001 Real Estate v. Campeau Corp. (U.S.), Inc., 148 A.D.2d 315, 538 N.Y.S.2d 531 (1st Dept. 1989),** calls the failure to present a “proper record” “deplorable” and “highly unprofessional”:

[T]hird-party defendant prepared a record which selectively failed to include many motion papers and supporting exhibits which had been submitted by the opposing party in the Supreme Court and were an integral part of the record before that court. In that regard, CPLR 5526 provides that the “record on appeal from an interlocutory judgment or any order shall consist of the notice of appeal, the judgment or order appealed from, the transcript, if any, the papers and other
exhibits upon which the judgment or order was founded and any opinions in the case” (emphasis added). The omission from the appeal record by third-party defendant of much of the record before the Supreme Court, specifically documents filed by third-party plaintiff, is not only in violation of the statute but is highly unprofessional as well. It appears that third-party defendant was only interested in having this court examine fully its own arguments and not those presented by the other side. Accordingly, third-party plaintiff was compelled to submit its own extensive supplemental record on appeal, which is nearly three times the length of the original record on appeal. The failure by third-party defendant to file a full and complete record can only be deplored.

**Motion to Strike the Record**


Plaintiffs have moved to strike an affidavit submitted by defendant as an appendix to its appellate brief. Inasmuch as this affidavit was not included in the record submitted and certified by plaintiffs' counsel and, further, given defendant's failure to move to strike the record and replace it, we can only conclude that this affidavit is a matter dehors the record and hence cannot properly be considered on this appeal...Plaintiff's motion to strike is accordingly granted.


Chase has objected to plaintiff's belated submission of an appendix/supplemental record to its brief for inclusion in the record on appeal which Chase had already certified and filed. Chase objects that the late submission is improper as it contains matter outside the record and is uncertified. Plaintiff made no motion to strike the record and replace it. Accordingly, plaintiff's late submission is improper and will not be considered on this appeal.
MUST ALERT THE COURT IF THE SAME ARGUMENT WAS RAISED IN A PRIOR APPEAL OR EVEN BEFORE A TRIAL COURT AND LOST

Isabella City Carting Corp. v. Martinez, 15 A.D.3d 281, 789 N.Y.S.2d 494 (1st Dept., 2005):¹

[W]e note with disapproval that counsel for petitioner has brought approximately 70 proceedings in this Court and the Second Department, in which the same or similar arguments have been repeatedly raised, and has failed to mention in his appellate briefs the existence of case law rejecting his arguments. We have previously explained that counsel has an obligation to bring adverse authority to the attention of this Court.


FN3. We are disturbed by the failure of the defendant's counsel [] to refer in his brief to People v. Scalzo, since he was the attorney of record for Scalzo and had to know of that decision. “The function of an appellate brief is to assist, not mislead, the court” (Matter of Cicio v. City of New York, 98 A.D.2d 38, 40, 469 N.Y.S.2d 467).

MOUNTAIN VIEW DOCTRINE – STARE DECISIS


Plaintiff appeals from so much of a judgment of the Supreme Court, Dutchess County, as dismissed its claim for damages for loss of use of a bus placed out of service as a result of defendant's negligence. The core issue is whether damages for loss of use are interdicted because plaintiff did not hire a substitute bus, utilizing one it maintained in reserve instead. We hold that loss of use damages are recoverable in such circumstances and decline to follow two Third Department cases to the contrary.

[A] collision occurred between a bus owned by the plaintiff and a motor vehicle owned by the defendant. The parties stipulated that the defendant was negligent, that the cost of repairs was $983.23, that the damages sustained for loss of use were $3,200, and that the facts supporting the claim for loss of use were the same as those in the two Third Department cases ( Mountain View Coach Lines v. Gehr, supra; Mountain View Coach Lines v. Hartnett, supra ), i.e., that no substitute was hired by the plaintiff during the period of repairs, plaintiff having substituted one of its own buses for the damaged bus. The loss of use claim was thus submitted to the Supreme Court as an issue of law, and was dismissed solely on constraint of the Third Department cases. We reverse the judgment insofar as appealed from and remit the case to the Supreme Court, Dutchess County, for entry of a judgment awarding plaintiff damages for loss of use.

[1] At the outset, we note that if the Third Department cases were, in fact, the only New York authorities on point, the trial court followed the correct procedural course in holding those cases to be binding authority at the nisi prius level. The Appellate Division is a single statewide court divided into departments for administrative convenience (see Waldo v. Schmidt, 200 N.Y. 199, 202; Project, The Appellate Division of the Supreme Court of New York: An Empirical Study of Its Powers and Functions as an Intermediate State Court, 47 Ford L.Rev. 929, 941) and, therefore, the doctrine of stare decisis requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule (see, e.g., Kirby v. Rouselle Corp., 108 Misc.2d 291, 296, 437 N.Y.S.2d 512; Matter of Bonesteel, 38 Misc.2d 219, 222, 238 N.Y.S.2d 164, affd. 16 A.D.2d 324, 228 N.Y.S.2d 301; 1 Carmody-Wait 2d, N.Y.Prac., § 2:63, p. 75). This is a general principle of appellate procedure (see, e.g., Auto Equity Sales v. Superior Court of Santa Clara County, 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937; Chapman v. Pinellas County, 423 So.2d 578, 580 [Fla.App.]; People v. Foote, 104 Ill.App.3d 581, 60 Ill.Dec. 355), necessary to maintain uniformity and consistency (Lee v. Consolidated Edison Co. of N.Y., 98 Misc.2d 304, 306, 413 N.Y.S.2d 826), and, consequently, any cases holding to the contrary (see, e.g.,
People v. Waterman, 122 Misc.2d 489, 495, n. 2, 471 N.Y.S.2d 968) are disapproved.


First Department
– Approval

Nachbaur v. American Transit Ins. Co., 300 A.D.2d 74, 752 N.Y.S.2d 605, (1st Dept., 2002), leave to appeal dismissed, 99 N.Y.2d 576, 755 N.Y.S.2d 709 (2003), cert. denied, 538 U.S. 987, 123 S.Ct. 1801 (2003): We particularly disapprove of the failure of plaintiff's attorney to cite adverse authority. The failure is especially glaring in this case since plaintiff's attorney represented the losing appellant in Bettan (supra), a Second Department case issued a matter of weeks before plaintiff's reply brief on the instant appeal was submitted, which precisely addresses five out of six of plaintiff's causes of action as well as the issue of class certification (Amazon Coffee Co. v. Trans World Airlines, 111 A.D.2d 776, 778, 490 N.Y.S.2d 523) and, unless and until overruled or disagreed with by this Court, is “controlling” authority that plaintiff's attorney was obligated to bring to the attention of this Court (Matter of Cicio v. City of New York, 98 A.D.2d 38, 469 N.Y.S.2d 467; Merl v. Merl, 128 A.D.2d 685, 513 N.Y.S.2d 184; Mt. View Coach Lines, Inc. v. Storms, 102 A.D.2d 663, 664-665, 476 N.Y.S.2d 918).

--See:
People v. Shakur, 215 A.D.2d 184, 627 N.Y.S.2d 341 (1st Dept. 1995);
– Lower court decisions are not on terra firma.

I therefore find that pursuant to Gloveman, 18 AD3d 812, **which likely binds me** in the absence of a First Department decision interpreting Wolinsky (see Mountain View Coach Lines v. Storms, 102 A.D.2d 663, 664 [2d Dept 1984]; Pestana, 195 Misc.2d at 836-838), respondent's loft unit is not protected under the ETPA, even though it is capable of being legalized.

**Trial Courts and the Appellate Term**
Trial courts do not consider themselves bound by Appellate Term decisions in other Departments.

-- See:

AGE OF A CASE: OLD CASES REMAIN VIABLE

Appellate counsel's apparent conclusion that Di Pasquale was not worth citing was not a reasonable one, even by the undemanding standard we apply in ineffective-assistance cases. *Di Pasquale* (People v. Di Pasquale, 161 A.D. 196, 146 N.Y.S. 523 (3rd Dept.,1914)) though old, was still a valid precedent, binding on all trial-level courts in the state (Mountain View Coach Lines v. Storms, 102 A.D.2d 663, 664-665, 476 N.Y.S.2d 918 [2d Dept.1984] ) and entitled to respect by appellate courts.

-- See:
Section 202.7. Calendaring of motions; uniform notice of motion form; affirmation of good faith

Not treated like FCA § 439(e) where failure to file precludes appealability.

(a) There shall be compliance with the procedures prescribed in the CPLR for the bringing of motions. In addition, except as provided in subdivision (d) of this section, no motion shall be filed with the court unless there have been served and filed with the motion papers (1) a notice of motion, and (2) with respect to a motion relating to disclosure or to a bill of particulars, an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.

(c) The affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held.

First Department: Not Necessary where Effort Would Be “Futile”

Under the unique circumstances of this case and in light of the frequency with which both sides have resorted to judicial intervention in discovery disputes in the three years prior to the instant motion to strike the note of issue, the failure of defendants to include an affirmation of good faith is excusable because any effort to resolve the present dispute non-judicially would have been “futile”...We find, however, that it was an improvident exercise of discretion for the motion court to have made any directive unavoidably requiring the production of medical records pertaining to the nonparty birth mother, who does not appear to have been served with the motion...

Defendant contends that plaintiff’s motion should have been denied for her failure to comply with 22 NYCRR 202.7. However, this Court has excused compliance with that rule where, as here, any effort to resolve the dispute non-judicially would have been futile.


Defendant's behavior was particularly reprehensible because defendant not only violated the motion court's conference orders, but also endeavored to undermine an appellate order by limiting its search to only a small percentage of its potentially relevant files. Defendant contends that the striking of its pleadings was unwarranted because plaintiff had not submitted proof of any good faith effort to resolve its disagreement with defendant (22 NYCRR 202.7[a][2]). But in light of defendant's multiple delays and violations of repeated court orders, its numerous improper objections to practically every demand for disclosure made by plaintiff, its unjustifiable limitation of the search of its files, its continued refusal to produce responsive documents and its utter failure to account for its behavior, the motion court, under the unique facts of this case, appropriately found it would have been futile to compel plaintiff to confer once more with defendant as a condition for moving to strike its pleadings.

Second Department – Appears to Require Strict Compliance with § 202.7
-- No Contrary Cases

Greenfield v. Board of Assessment Review for Town of Babylon, 106 A.D.3d 908, 965 N.Y.S.2d 555 (2nd Dept.,2013): The Supreme Court properly denied that branch of the petitioner/plaintiff's motion which was to compel certain disclosure on the ground that he failed to submit an affirmation of good faith pursuant to 22 NYCRR 202.7(a)(2) detailing communications between the parties evincing a diligent effort to resolve the dispute, or indicating good cause why no such communications occurred.

Zorn v. Bottino, 18 A.D.3d 545, 794 N.Y.S.2d 659 (2nd Dept.,2005): The Supreme Court providently exercised its discretion in adhering to its denial of the appellants' motion to strike the plaintiff's amended bill of particulars, and in denying that branch of the appellants' motion which was for leave to renew. The appellants did not submit an affirmation of good faith in connection with the original motion, as required by 22 NYCRR 202.7. Further, the omission was not cured by the appellants' subsequent submission asserting that the good-faith effort to resolve the issue was not made until after the motion was brought due to “time constraints” (Barnes v. NYNEX, Inc., 274 A.D.2d 368, 711 N.Y.S.2d 893).

Quiroz v. Beitia, 68 A.D.3d 957, 893 N.Y.S.2d 70 (2nd Dept.,2009): Wyckoff Imaging's motion to dismiss the Medical Center's cross claim based upon the Medical Center's failure to respond to Wyckoff Imaging's discovery demands was properly denied. Wyckoff Imaging failed to provide an affirmation of a good-faith effort to resolve any discovery disputes as required by 22 NYCRR 202.7 (Walter B. Melvin, Architects, LLC v. 24 Aqueduct Lane Condominium, 51 A.D.3d 784, 857 N.Y.S.2d 697; Barnes v. NYNEX, Inc., 274 A.D.2d 368, 711 N.Y.S.2d 893).
N.Y.S.2d 893). In any event, Wyckoff Imaging failed to establish that any alleged failure by the Medical Center to comply with its discovery demands was the result of willful or contumacious conduct (Savin v. Brooklyn Mar. Park Dev. Corp., 61 A.D.3d 954, 954–955, 878 N.Y.S.2d 178; Diel v. Rosenfeld, 12 A.D.3d 558, 784 N.Y.S.2d 379; Dennis v. City of New York, 304 A.D.2d 611, 613, 758 N.Y.S.2d 661; Ploski v. Riverwood Owners Corp., 284 A.D.2d 316, 725 N.Y.S.2d 886).

The court should have denied the cross motion because the affirmation of good faith submitted by the plaintiffs' counsel was insufficient, as it did not refer to any communications between the parties that would evince a diligent effort by the plaintiffs to resolve the discovery dispute (see 22 NYCRR 202.7[c]; Amherst Synagogue v. Schuele Paint Co., Inc., 30 A.D.3d 1055, 1056–1057, 816 N.Y.S.2d 782; Cestaro v. Chin, 20 A.D.3d 500, 501, 799 N.Y.S.2d 143; see also Baez v. Sugrue, 300 A.D.2d 519, 521, 752 N.Y.S.2d 385).

Third Department – Has a Futility Exception

Supreme Court did not err in precluding plaintiff from eliciting expert testimony regarding the value of the art objects that perished in the fire, for plaintiff's disclosure as to the substance of his appraisers' anticipated testimony did not, as Supreme Court observed, satisfy the statutory criteria (see, e.g., Chapman v. State of New York, 189 A.D.2d 1075, 593 N.Y.S.2d 104; Brossoit v. O'Brien, 169 A.D.2d 1019, 1020–1021, 565 N.Y.S.2d 299). Despite having been made aware of the ways in which defendant viewed the proffered summary of this testimony as incomplete, plaintiff still made no attempt to redress these defects prior to trial. In light of this, it would clearly have been futile (although plaintiff would have us conclude otherwise) for defendant to undertake further “good faith efforts” (see, 22 NYCRR 202.7[a]; Koelbl v. Harvey, 176 A.D.2d 1040, 575 N.Y.S.2d 189) toward resolving this dispute prior to seeking judicial intervention (see, Gardner v. Kawasaki Heavy Indus., 213 A.D.2d 840, 841–842, 623 N.Y.S.2d 416). Moreover, plaintiff's failure to make any effort to augment his responses, even after having been apprised of defendant's challenge to the level of detail provided, constitutes ample basis for concluding that plaintiff's lack of compliance was “intentional or willful” (see, Tleige v. Troy Pediatrics, 237 A.D.2d 772, 774, 654 N.Y.S.2d 486; Fuoco v. County of Nassau, 223 A.D.2d 668, 669, 637 N.Y.S.2d 428).

We agree with Supreme Court that Kawasaki's claim that plaintiff did not comply with the “good faith effort” requirement set forth in 22 NYCRR 202.7(a)(2) lacks merit, particularly in view of Kawasaki's stated position that it had given plaintiff all that “we believe you are reasonably entitled to”.

In August 1988, defendants served a demand for a bill of particulars upon plaintiffs. In September 1990 defendants moved for an order of absolute preclusion, alleging plaintiffs' failure to respond to the demand, to serve a bill of particulars, or to move to vacate or modify the demand. Plaintiffs served a bill of particulars and affidavits in opposition to defendants' motion. Supreme Court denied the motion and defendants appeal.

[1][2] We affirm. There is no question that defendants failed to fulfill the requirement of 22 NYCRR 202.7(a)(2) that, with respect to a motion relating to a bill of particulars, “no motion shall be filed with the court unless there has been served and filed with the motion papers * an affirmation that counsel has conferred with * the opposing party in a good faith effort to resolve the issues raised by the motion”. Accordingly, Supreme Court was justified in summarily denying defendants' motion (Eaton v. Chahal, 146 Misc.2d 977, 983, 553 N.Y.S.2d 642). Contrary to the position taken by defendants that it was not their obligation to make a further request for a bill of particulars or to serve “reminders” upon plaintiffs, they were required to communicate with plaintiffs in a good-faith effort to obtain the requested particulars without filing a motion with Supreme Court (see, id., at 982, 553 N.Y.S.2d 642)....Under the circumstances, and in view of the fact that plaintiffs have now served a bill of particulars, we need not consider the merits of defendants' motion.

Fourth Department – Has a “Futility” Exception

Supreme Court erred in granting plaintiffs' motion, and we therefore modify the order accordingly. Plaintiffs failed to comply with 22 NYCRR 202.7(a). Pursuant to that regulation, a movant seeking to compel disclosure is required to serve and file “an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.” The affirmation of the good faith effort ‘shall include the time, place and nature of the consultation and the issues discussed and any resolutions’...It is well established that the failure to file that affirmation or a deficiency in that affirmation may justify denial of a motion to compel (Natoli v. Milazzo, 65 A.D.3d 1309, 1310–1311, 886 N.Y.S.2d 205; Kane v. Shapiro, Rosenbaum, Liebschutz, & Nelson, L.L.P., 57 A.D.3d 1513, 871 N.Y.S.2d 794; Amherst Synagogue, 30 A.D.3d at 1056–1057, 816 N.Y.S.2d 782). The failure to include the good faith
affirmation may be excused, however, where “any effort to resolve the present
dispute non-judicially would have been ‘futile’ ” Carrasquillo v. Netsloh Realty
A.D.2d 782–783, 681 N.Y.S.2d 408). In Carrasquillo, the Court determined that
such efforts would have been futile “[u]nder the unique circumstances of [that] case and in light of the frequency with which both sides have resorted to judicial intervention in discovery disputes in the three years prior to the instant motion” (279 A.D.2d at 334, 719 N.Y.S.2d 57). In Diamond State Ins. Co., the effort was
deemed futile “in light of [the] defendant's multiple delays and violations of repeated court orders, its numerous improper objections to practically every demand for disclosure made by [the] plaintiff, its unjustifiable limitation of the search of its files, its continued refusal to produce responsive documents and its utter failure to account for its behavior” (67 A.D.3d at 613, 889 N.Y.S.2d 566). In Qian, any effort would have been futile because, “[d]espite having been made aware of the ways in which [the] defendant viewed the proffered summary of [the] testimony [in question] as incomplete, [the] plaintiff still made no attempt to redress [those] defects prior to trial” (256 A.D.2d at 782, 681 N.Y.S.2d 408).


We further conclude in any event that the court should have denied defendants' motion in its entirety because defendants' affirmation setting forth that defendants' counsel conferred with plaintiff's counsel in a good faith effort to resolve the discovery dispute was deficient ( see Uniform Rules for Trial Cts. [22 NYCRR] § 202.7[a][2]; Cestaro v. Mun Yuen Roger Chin, 20 A.D.3d 500, 799 N.Y.S.2d 143). The affirmation of the good faith effort “shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions” (§ 202.7[c] ). Here, after plaintiff objected to the interrogatories and responded in part and objected in part to the discovery demands, defendants made no effort to modify or simplify the demands. Instead, they informed plaintiff in two letters that plaintiff's rejection of their discovery demands was improper, and they demanded responses to their requests. Defendants thus “failed to demonstrate that they made a diligent effort to resolve this discovery dispute” ( Baez v. Sugrue, 300 A.D.2d 519, 521, 752 N.Y.S.2d 385).
EFFECTIVE COUNSEL – BRIEFING EVERY ARGUMENT?
Appellate advocacy is meaningful if it reflects a competent grasp of the facts, the law and appellate procedure, supported by appropriate authority and argument. Effective appellate representation by no means requires counsel to brief or argue every issue that may have merit. When it comes to the choice of issues, appellate lawyers have latitude in deciding which points to advance and how to order them. With that in mind, we turn to the claim before us.
ASSIGNMENT OF NEW COUNSEL WHEN ASSIGNED COUNSEL DOES NOT DEMONSTRATE HAVING ACTED “AS AN ACTIVE ADVOCATE HIS CLIENT’S BEHALF”

In re Kenneth S., 104 A.D.3d 951, 961 N.Y.S.2d 577 (2nd Dept., 2013):
In two related child custody proceedings pursuant to Family Court Act article 6, Bethzaida P. appeals from an order of the Family Court which denied her motion to vacate an order of the same court, awarding custody of the subject children to Kenneth S. upon her default in appearing at a hearing. The mother's assigned counsel has submitted a brief in accordance with Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, in which he moves for leave to withdraw as counsel. The brief...is deficient because it fails to adequately analyze potential appellate issues or highlight facts in the record that might arguably support the appeal (Matter of Dylan Mc. [Michelle M. Mc.], 95 A.D.3d 1016, 943 N.Y.S.2d 767; Matter of Giovanni S. [Jasmin A.], 89 A.D.3d 252, 931 N.Y.S.2d 676).

Since the brief does not demonstrate that assigned counsel acted “as an active advocate on behalf of his ... client” ( Matter of Giovanni S. [Jasmin A.], 89 A.D.3d at 256, 931 N.Y.S.2d 676 [internal quotation marks omitted] ), or that he diligently examined the record, we must assign new counsel to represent the appellant ( see People v. Singleton, 101 A.D.3d 909, 954 N.Y.S.2d 910; People v. Brown, 96 A.D.3d 869, 946 N.Y.S.2d 254; Matter of Dylan Mc. [Michelle M. Mc.], 95 A.D.3d 1016, 943 N.Y.S.2d 767).
LOWER COURT MUST STRICTLY CONFORM TO THE REMITTITUR ON REMAND

A trial court, upon remittitur from a higher court, must obey the mandate of the higher court.

Family Court Act § 467(a) permits the Supreme Court to refer an application to modify visitation to the Family Court. The Supreme Court's June 18, 2003, order was, however, contrary to and beyond the scope of the March 17, 2003, remittitur (Gittelson v. Gittelson, 263 A.D.2d 527, 693 N.Y.S.2d 212). “It is well settled that a trial court, upon a remand or remittitur, is without power to do anything except to obey the mandate of the higher court, and render judgment in conformity therewith” (United States v. Pink, 36 N.Y.S.2d 961, 965). “The judgment or order entered by the lower court on a remittitur must conform strictly to the remittitur, and it cannot afterwards be set aside or modified by the lower court” ( Matter of Minister, Elders and Deacons of the Reformed P.D. Church of City of N.Y. v. Municipal Court of City of N.Y., Borough of Manhattan, 185 Misc. 1003, 1007, 57 N.Y.S.2d 864, affd. 270 App.Div. 993, 63 N.Y.S.2d 214, affd. 296 N.Y. 822).

If the remittitur is erroneous in any respect, or if there is any uncertainty as to the effect of the language employed, the appropriate remedy is an application to amend it (CPLR 5524; Matter of Minister, Elders and Deacons of the Reformed P.D. Church of City of N.Y. v. Municipal Court of City of N.Y., Borough of Manhattan, supra at 1006, 57 N.Y.S.2d 864). Moreover, when a referral to the Family Court is warranted, it must be to a county within the same judicial district (FCA § 469[b] ). The Supreme Court “erred in failing to adhere to the terms of this court's remittitur” ( Campbell v. Campbell, 302 A.D.2d 345, 346, 754 N.Y.S.2d 651) and had no authority to refer this matter to the Family Court, Bronx County. “Trial courts are without authority to vacate or modify orders of the Appellate Division” ( Maracina v. Schirmeister, 152 A.D.2d 502, 502–503, 544 N.Y.S.2d 13). Accordingly, we reverse and remit this matter to the Supreme Court, Queens County, to comply with our earlier directive.

A trial court, upon remittitur, lacks the power to deviate from the mandate of the higher court and must render judgment in conformity therewith. The order or judgment entered by the Supreme Court must conform strictly to the remittitur and cannot thereafter be modified or set aside by the Supreme Court ( see Wiener v. Wiener, 10 A.D.3d 362, 363, 780 N.Y.S.2d 759). Therefore, when the decision and order of this court dated October 22, 2001, was affirmed by the Court of Appeals, the proceeding “had to be remitted by the Court of Appeals to the trial court (22 NYCRR 500.15), and on that remittitur the Supreme Court had to enter a judgment” ( Moran Towing & Transp. Co., Inc. v. Navigazione Libera
Triestina, S.A., 92 F.2d 37, 40 [2d Cir.1937], cert. denied 302 U.S. 744, 58 S.Ct. 145, 82 L.Ed. 575). The petitioner's filing of a note of issue was contrary to the terms of the remittitur (...Campbell v. Campbell, 302 A.D.2d 345, 346, 754 N.Y.S.2d 651).

**Berry v Williams, 106 A.D.3d 935, 966 N.Y.S.2d 462 (2nd Dept 2013):**
A trial court, upon remittitur, lacks the power to deviate from the mandate of the higher court" (see Matter of Ferrara, 50 AD3d 899, 900; Sweeney, Cohn, Stahl & Vaccaro v Kane, 33 AD3d 785, 786; Kopsidas v Krokos, 18 AD3d 822, 823; Wiener v Wiener, 10 AD3d 362, 363). "An order or judgment entered by the lower court on a remittitur must conform strictly to the remittitur” (Matter of Ferrara, 50 AD3d at 900, quoting Wiener v Wiener, 10 AD3d at 363).

**DeMille v. DeMille, 32 A.D.3d 411, 820 N.Y.S.2d 111 (2nd Dept.,2006):**
ORDERED...the order is modified, on the law...and the matter is remitted to the Supreme Court, Nassau County, for further proceedings before a different Justice.

The issue ... was argued and determined on a prior appeal ... Thus, upon renewal, the Supreme Court should not have granted the plaintiff's prior motion for summary judgment dismissing the defendant's second counterclaim to enforce the agreement and should not have set aside the agreement based on such challenges.

By memorandum decision and order dated November 29, 1984, this court granted plaintiff partial summary judgment on the issue of liability and ordered an assessment of damages in Supreme Court (105 A.D.2d 672, 482 N.Y.S.2d 14). Jury selection was completed on April 25, 1989, and the case was assigned for trial to Justice Carol E. Huff. On May 1, 1989, before there had been any opening statements, or other proceedings before the jury, the court orally granted a motion to dismiss the complaint. Three days later, on May 4, 1989, the court entered a written order, reading as follows: “Upon the court's own motion after trial, settle order/judgment” [ sic ]. As noted, no trial had ever taken place.

Respondent cites no authority, and...none exists, to support the judge's disregard of the earlier order of this court. Trial courts are without authority to vacate or modify orders of the Appellate Division, or to reverse holdings of this court.

Supreme Court properly found that it lacked subject matter jurisdiction to overturn a judgment of the Civil Court which had been affirmed by the Appellate Term and for which leave to appeal had been denied by this court (...Fleet Credit Corp. v. Cabin Service Co., 210 A.D.2d 57, 620 N.Y.S.2d 944; Brown v. Brown, 169 A.D.2d 487, 564 N.Y.S.2d 166).

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Following a jury trial in this divorce action, Supreme Court made findings of fact and issued a judgment stating that plaintiff was entitled to the divorce, but that a final judgment of divorce would not be issued until the resolution of ancillary issues. Although defendant timely filed a notice of appeal, we conclude that this appeal must be dismissed. Domestic Relations Law § 236(B)(5)(a) specifically states that, in divorce actions such as the instant one, equitable distribution must be made in the final judgment of divorce. In the absence of a final judgment awarding equitable distribution, a finding of divorce is not effective. Accordingly, the “judgment” appealed from is nothing more than a decision stating the intention on the part of the court to divorce the parties in the future and, as such, is both nonbinding and nonfinal, as well as without legal effect. Because defendant cannot be aggrieved by such a “judgment” (CPLR 5511), dismissal of the appeal is proper. Although we recognize that we have considered appeals such as these in the past (e.g., McKilligan v. McKilligan, 156 A.D.2d 904, 550 N.Y.S.2d 121), we now fully see the futility of such a course and will not consider such an appeal if it is presented to us in the future.

While defendant filed a timely notice of appeal from the judgment of divorce, this court has recently noted that “[i]n the absence of a final judgment awarding equitable distribution, a finding of divorce is not effective” (Sullivan v. Sullivan, 174 A.D.2d 862, 571 N.Y.S.2d 154). Therefore, because Supreme Court's judgment only granted plaintiff a divorce but failed to make an award of equitable distribution, the judgment appealed from was nonbinding, nonfinal and without legal effect (see, id.; see also, Domestic Relations Law § 236[B][5][a]); the appeal therefrom must accordingly be dismissed.

FN1. In doing so, we decline defendant's request that this Court consider the merits of her appeal by departing from its established case law and adopt the rationale of the Fourth Department in Zack v. Zack, 183 A.D.2d 382, 590 N.Y.S.2d 632 [1992], [see below].

The order awarding summary judgment, establishing that plaintiff is entitled to a divorce on the stated grounds, is nonfinal and not itself appealable; given Supreme Court's failure, as statutorily required (DRL § 236[B][5][c]), to also render a final award of equitable distribution as part of the final judgment of divorce, dismissal of the appeals is required [cites omitted].

Plaintiff's assertions in her complaint that “equitable distribution is not an issue” and that “[t]here are no marital assets or liabilities that need to be addressed” did not relieve Supreme Court of its statutory obligation, absent a stipulation of the parties not present here, to make an award of equitable distribution (Domestic Relations Law § 236[B][5][a] ). Thus, we must remit this action to Supreme Court to resolve the issue of equitable distribution of the parties' marital property and to issue a final judgment of divorce. We strongly encourage the court to proceed without delay, given defendant's past behavior.

The Fourth Department

Defendant appeals from a judgment which...granted plaintiff a judgment of divorce dissolving the parties' marriage. The judgment directed that the remaining ancillary issues would be resolved at a later date. Defendant maintains that the evidence was insufficient as a matter of law to support a cause of action for divorce on the ground of cruel and inhuman treatment.

[1] At the outset, before considering the merits of defendant's argument, we must address an issue raised by plaintiff about whether defendant may properly appeal the judgment of divorce. Plaintiff contends that the appeal should be dismissed because the judgment appealed from is a nonfinal judgment, interlocutory in nature, since it does not award equitable distribution (DRL § 236[B][5][a] ).

In dismissing similar appeals, the Third Department has held that, in the absence of a final judgment awarding equitable distribution, a finding of divorce is not effective (Garcia v. Garcia, 178 A.D.2d 683, 577 N.Y.S.2d 156) and that the judgment “is nothing more than a decision stating the intention on the part of the court to divorce the parties in the future and, as such, is both nonbinding and nonfinal, as well as without legal effect” (Sullivan v. Sullivan, 174 A.D.2d 862).

DRL § 236(B)(5) requires that in all matrimonial cases, a final judgment shall be rendered determining all the respective rights of the parties including dissolution of the marriage as well as the economic issues. Plaintiff construes that statute as prohibiting the issuance of an appealable interlocutory divorce judgment prior to the final judgment awarding equitable distribution. In our view, that statute does not mandate such a result. That statute pertains only to disposition of property rights in the final judgment.

A judgment is the determination of the rights of the parties in an action and may be interlocutory or final (CPLR 5011). The court has the inherent power to order a severance and may direct judgment upon a part of a cause of action (CPLR 5012). Historically, the final judgment in a matrimonial action did not become final for a period of time. That was generally recognized as a cooling off period for the purpose of encouraging reconciliation of the parties. Those provisions
requiring a waiting period were repealed.

[2] In our view, when the Legislature repealed DRL §§ 241 and 242 (L.1968, ch. 645, effective June 16, 1968) pertaining to interlocutory judgments in matrimonial actions, it did not prohibit the court from entering an interlocutory judgment. The significant effect of the repeal of those sections was to eliminate the waiting period. If the Legislature had intended to abandon interlocutory judgments in matrimonial cases, it would have specifically done so. The goals of judicial economy will not be fostered by forcing litigants to wait until the court has heard all ancillary issues before a judgment of divorce can be appealed, especially when there are no grounds for that divorce. Accordingly, we decline to follow the rationale of the Third Department and will resolve the substantive issue on the merits.

The Second Department

-- Suffolk County
While the failure on the part of the court to determine the rights of the parties in their separate or marital property has been held by the Appellate Division, Third Department, to render a judgment dissolving the marriage nonbinding, nonfinal, and without effect ( Garcia v. Garcia, 178 A.D.2d 683, 577 N.Y.S.2d 156; Sullivan v. Sullivan, 174 A.D.2d 862, 571 N.Y.S.2d 154), these case authorities have been rejected by the Appellate Division, Fourth Department ( Zack v. Zack, 183 A.D.2d 382, 590 N.Y.S.2d 632). In Zack, the court found that the provisions of § 236B(5) requiring that a final judgment shall be rendered determining all of the respective rights of the parties, including the dissolution of the marriage and the economic issues contemplated therein, do not preclude issuance of an interlocutory divorce judgment prior to the entry of a final judgment awarding equitable distribution. Nothing precludes this court from adopting the holding of the Fourth Department in Zack v. Zack, supra, as neither the Court of Appeals nor the Appellate Division, Second Department has ruled upon the issue.

The court thus finds that bifurcation of the issues of marriage dissolution and economic rights which are the subject of DRL § 236B(5) is permissible since the court may enter an interlocutory judgment of divorce, annulment or dissolution prior to its issuance of a judgment determining economic rights of the parties to the marriage. Accordingly, issuance of this decision favorably determining the petitioners' entitlement to a judgment annulling the subject marriage without a concomitant determination of the parties' economic rights does not effect a violation of the mandate of DRL § 236B(5). If necessary, the court will direct a severance and the entry of an interlocutory judgment annulling the subject marriage pending determination of the economic rights of the parties under DRL § 236B(5). In the interim, the economic issues not decided herein are continued
pending the submission of proof on such issues...

-- Westchester County

As has been recognized, “[t]he Appellate Division is a single State-wide court divided into departments for administrative convenience ..., [and] the doctrine of stare decisis requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule” (Mountain View Coach Lines, Inc. v. Storms, 102 A.D.2d 663,664 [2d Dept.1984] ). Therefore, if there is authority on the bifurcation and interlocutory judgment issues from the Second Department, this Court would be bound to follow the rule enunciated by that department of the Appellate Division.

* * *

The Court recognizes that there is a split of authority between the Third and Fourth Departments on the issue of whether a trial court may enter an interlocutory judgment of divorce, while the First Department has not directly addressed this question (Powers v. Powers, NYLJ, 11/1/05, p. 18 [Sup.Ct. N.Y.2005] ). The Third Department considers an interlocutory judgment of divorce to be “nothing more than a decision stating the intention on the part of the court to divorce the parties in the future”, which, “as such, is both nonbinding and nonfinal, as well as without legal effect” (Sullivan v. Sullivan, supra, 174 A.D.2d, at 862). That view has been rejected, however, by the Fourth Department, which has determined that a Trial Court is “not prohibit[ed] ... from entering an interlocutory judgment [of divorce]” (Zack v. Zack, supra, 183 A.D.2d, at 384).

Under these circumstances, “where the Court of Appeals has not spoken and there is no applicable Appellate Division decision in [this Court's] own Department, conflicting decisions in the other Departments are not binding on [this] court; and it is then free to fashion a decision which it deems to be appropriate and consistent with the overall objectives sought to be achieved by the applicable statute” (Matter of Daniel [MVAIC], 81 Misc.2d 941,952 [N.Y.C. Civ.Ct.1999] ).

As explained by the Fourth Department [citing Zack]... For those reasons, the Court agrees with plaintiff that it is authorized to enter an interlocutory judgment divorcing the parties following a ground trial.