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One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

Memorandum in Opposition

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #2 May 19, 2011

S. 5212 By: Senator Bonacic
Senate Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the civil practice law and rules, in relation to appellate review of an ex parte order or applications for provisional remedies

LAW AND SECTIONS REFERRED TO: CPLR §§ 5701, 5704, 6313

THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES OPPOSES THIS LEGISLATION

This bill would (a) provide appellate review as of right (i.e. without permission of the Appellate Division), of an order denying an application in a proceeding where there is no adverse party (proposed CPLR 5701[a][4]), (b) provide interlocutory appellate review, as a matter of right, in Article 78 proceedings (CPLR 5701[b][1]), (c) permit a single justice of the Appellate Division or the Appellate Term to grant a provisional remedy refused by a trial court subject to review by a full Appellate Division or Appellate Term panel (CPLR 5704[a] and [b]), (d) provide for the automatic expiration of a temporary restraining order after 14 days with the ability of the court to extend the period for one additional 14 day period (for a total of 28 days) (CPLR 6313[a]). For the reasons stated below, the Committee opposes this legislation.

Proposed CPLR 5701(a)(4)

CPLR 5701(a)(2) and (3) sets forth those classes of interlocutory orders that a litigant may appeal to the Appellate Division as a matter of right. Those orders must decide a motion "on notice," which means that an ex parte order or an order entered in a proceeding where there is no adverse party is not appealable as a matter of right. This legislation proposes to add to the kinds of orders that may be appealed, "an order denying in whole or in part an application for which, by its nature, there is not an adverse party." This is intended to permit an appeal in connection with those proceedings in which there is no adverse party. The most common type of such proceeding is an application for a name change (Civ. Rights Law § 63). The supporting memorandum states that the Appellate Division should be able to review these applications, when denied, through a full appeal under CPLR 5701 rather than the more limited review of CPLR 5704.

New York practice in this area has been confused and has led to difficulty. A number of courts have concluded that there is no appellate right in a non-adversarial proceeding because there is no adverse party and thus the final order cannot be on notice. *See Matter of Washington*, 216 A.D.2d 781, 628 N.Y.S.2d 837 (3d Dep't 1995); *Matter of Joint Diseases N. Gen. Hosp.*, 148 A.D.2d 873, 539 N.Y.S.2d 511 (3d Dep't 1989). The Third Department takes the view that such

matters can only be reviewed under CPLR 5704(a), id., a view apparently shared with the Fourth Department. *Matter ofHalligan*, 46 A.D.2d 170; 361 N.Y.S.2d 458 (4th Dep't 1978). The Second Department has taken the view that CPLR 5704(a) review is not available. *Matter of Cooperman*, 59 A.D.2d 749, 398 N.Y.S.2d 584 (2d Dep't 1977) (refusing to review denied application for name change under CPLR 5704[a] and dismissing motion "without prejudice to such other proceedings as petitioner may be advised to institute."). Another approach was advanced by concurrence in *Matter of Joint Diseases N. Gen. Hosp*: neither CPLR 5701 or 5704 is available, but that the Appellate Division, possessing all of the powers of the Supreme Court, can convert the matter to a new proceeding in that court. See *Matter of Joint Diseases N. Gen. Hosp*., See *In re Joint Diseases North General Hosp.*, 148 A.D.2d at 876-877 (Mahoney, P.J. concurring).

The committee disagrees with the premise that there is no avenue for appellate review for a non-adversarial proceeding. There are two methods by which a disappointed applicant could seek review. First, the applicant could reduce the order to a final judgment and then appeal from that judgment. CPLR 5701(a)(1) allows for an appeal, as a matter of right, "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." Unlike CPLR 5701(a)(2) and (3), the review under CPLR 5701(a)(1) does not require that the judgment be on notice. Second, the petitioner could seek permission to appeal. CPLR 5701(c) allows for appeal by permission where an appeal may not be taken as of right. However, it is clear that the current state of the case law and practice has led to unnecessary confusion and complication in this area. For that reason, the proposed CPLR 5701(a)(4) is salutary and should dispel any notion that such orders are not appealable as a matter of right. This portion of the bill, if it were standing alone, should be enacted.

CPLR 5701[b][1]

While interlocutory orders in plenary actions are generally appealable during the pendency of the action, in Article 78 proceedings, an interlocutory appeal cannot be taken as of right. CPLR 5701(b)(1) now explicitly excludes an order made in a proceeding against a body or officer pursuant to Article 78. The bill, however, would repeal this provision and make interlocutory orders in such proceedings appealable as a matter of right.

The supporting memorandum states that the purpose of this measure is to make temporary restraining orders and preliminary injunctions appealable as a matter of right "to the same extent as such orders issued in other actions or proceedings." The committee believes this proposed amendment is ill-advised.

First, the amendment is overbroad as drafted and would make all interlocutory orders in an Article 78 proceeding appealable as a matter of right. Many such orders do not relate to injunctive relief at all and pertain to such items as interim discovery motions or motions to dismiss on points of law. There is no reason to alter the current rule prohibiting appeals as a matter of right in such matters.

Second, temporary restraining orders are not generally appealable by full appellate review. Rather, temporary restraining orders, where they are reviewed, are generally reviewed pursuant to CPLR 5704. Since a temporary restraining order is entered on less than a full record and on an expedited basis, CPLR 5704 appears to be the better vehicle for such review. That procedure affords the party against whom a temporary restraining order is granted the opportunity to make a motion in the Appellate Division to have the order vacated. This is a faster and more appropriate procedure that a full-blown appeal, which would require the preparation of briefs and a record on appeal, and generally would be overtaken by events at the trial level (such as the grant of

a preliminary or permanent injunction, or dismissal of the proceeding) before the appeal of the temporary restraining could be decided. A plenary appeal generally assumes a full and developed record, which is rarely available on a temporary restraining order.

An appeal of a preliminary injunction that issues in an Article 78 proceeding would be somewhat better suited to an interlocutory appeal, as the Appellate Division would have a record to review that contains legal papers submitted on a fully litigated motion. In some cases, the lengthy period of time that a preliminary injunction remains in effect pending a final determination would permit an appeal to be briefed, argued and decided. Nonetheless, there does not appear to be a compelling case for altering the present process for appealing preliminary injunctions in Article 78 proceedings or for carving out an exception for one among many types of intermediate orders to the general rule prohibiting interlocutory appeals in such proceedings. An immediate appeal of a preliminary injunction is generally appropriate in a plenary action because a plenary action is generally decided after discovery and a trial, while the typical Article 78 proceeding is decided on papers. In those cases where an immediate appeal is appropriate, the Appellate Division can afford such an appeal by permission under CPLR 5701(c).

A further concern with allowing appeals of injunctive relief is the interaction of the automatic stay provided by CPLR 5519(a)(1) in favor of municipalities and other governmental units, which can obtain such a stay merely by serving a notice of appeal (which can be by mail). While there is conflicting authority concerning the scope of such a stay,[1] in the context of either a temporary restraining order or injunctive relief, the application of an automatic stay of a court order creates the prospect of a litigant unilaterally disregarding a court order.

CPLR5704

The bill also seeks to amend CPLR 5704(a) to provide that a single justice of the Appellate Division can grant a temporary restraining order applied for and refused below. The bill would also effect a similar amendment to CPLR 5704(b) with respect to the appellate term. In the event that a temporary restraining order is issued or refused by a single justice, a full panel can review, on request, within seven days, or as soon thereafter as possible. The committee believes that the proposed language is unclear and confusing. It is not clear whether a formal motion is required and it is completely unclear how the seven day period would work.

In addition, allowing a single justice to grant a temporary restraining order refused by the trial court creates a situation where it may become too easy for disappointed applicants to forum shop and would encourage sequential attempts to obtain temporary restraining orders refused by the trial court.

The bill would also add the phrase “ex parte application for provisional remedies” to the introduction of CPLR 5704(a). It is unclear what is intended by this amendment. The committee notes that the operative phrase in CPLR 5704(a) is an order “granted without notice,”

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[1] See *Matter of Pokoik v Department of Health Servs. of County of Suffolk*, 220 AD2d 13, 15, 641 N.Y.S.2d 881 (2d Dep’t 1996) (CPLR 5519[a][1] does not stay order itself only enforcement); *Hicks v. Schoetz, 261 A.D.2d 944, 691 N.Y.S.2d 219, 1999 N.Y. App. Div. LEXIS 5045 (4th Dep't 1999); Ferrer v. Appleton*, 190 A.D.2d 146, 597 N.Y.S.2d 354 (1st Dep’t 1993) (appeal stayed temporary restraining order). For a general discussion of the operation of the CPLR 5519(a)(1) automatic stay in this context, see Note, Automatic Stays and Government Operations: How New York State Protects the Government from Poor. 24 Fordham Urb. L.J. 137 (1996). For a discussion of the differences among the Departments and the problems see, Aloe, 50 Syracuse L. Rev. 367, 397-398 (2000).

which is the predicate for review under CPLR 5704(a) and (b). At one time, temporary restraining orders were normally issued without any notice to the adverse party at all. Under current practice, Uniform Rule 202.7(f) now requires at least informal notice so that the adverse party can be heard at the temporary restraining order stage. CPLR 5704(a) and (b) is unclear as to whether such information notice takes a temporary restraining order outside the realm of an order entered without notice. CPLR 5704 should be amended to make it clear that such informal notice does not preclude CPLR 5704 review. Especially in light of the concerns raised over temporary restraining orders entered with little consideration of the merits and lasting unreasonable lengths of time, CPLR 5704 review of such orders is important and should not be limited to the circumstance where the adverse party had absolutely no notice of the application.

The committee also notes that with respect to the general problem of unreasonable temporary restraining orders remaining in effect for unreasonable lengths of time, the legislature may want to consider the standard of review for such applications. See *Matter of Willmark Service System, Inc.*, 21 A.D.2d 478, 479, 251 N.Y.S.2d 267, 268 (1st Dep't 1964) ("While this court, or a Justice thereof, may, under CPLR 5704 (subd. [a]), vacate or modify any order of the Supreme Court or a Justice thereof granted without notice to an adverse party, that power is not to be invoked except in unusual circumstances").[2] A more liberal standard for review of temporary restraining orders by the Appellate Division under CPLR 5704 could alleviate the problems identified by the proponents of the legislation.

CPLR 6313

The bill would make marked changes in the procedure applicable to a temporary restraining order by restricting judicial discretion in connection with the grant and continuation of such orders. The proposed legislation sets a maximum14-day duration of a temporary restraining order contemplating an initial return; if an adjournment is not thereafter granted on consent, the temporary restraining order can be extended a single time for no more than 14 days, provided that the court finds good cause on the record within the initial 14-day period. It is difficult to understand how this time frame would work with the right to an interlocutory appeal provided elsewhere in the same bill.

In any event, this provision creates a rigid, cumbersome process that should not be imposed on the bench and bar. While there may be situations where temporary restraining orders have continued for unreasonable lengths of time, this is often the fault of the court in failing to decide the preliminary injunction motion within the twenty-day time limit set forth in CPLR 2219(a) ("An order determining a motion relating to a provisional remedy shall be made within twenty days. . .").[3] Under this amendment, movants with a legitimate and real need for protection of a temporary restraining order would find those orders automatically terminated by operation of the proposed CPLR 6313. While the procedure for automatic expiration of temporary restraining orders may work well in federal courts, where judges have adequate time to address preliminary injunction motions in a timely fashion, given the sheer crushing number of preliminary injunction motions pending in New York State courts, a similar rule in state procedure is impractical and will lead to injustice and unfair prejudice.

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[2]The various Departments apply slightly different standards. For a general discussion, see 7 Weinstein-Korn-Miller, New York Civil Practice ¶ 7404.04; *see also* Siegel, N.Y. Prac. § 244 (4th ed.).

[3]For a discussion concerning various attempts to have courts issue motions in a timely fashion, see 4 Weinstein-Korn-Miller, New York Civil Practice ¶ 2219.01.

For the reasons stated above, the Committee **OPPOSES** this legislation.

Person Who Prepared the Report: Paul H. Aloe, Esq.
Chair of the Committee: Hon. Stephen G. Crane