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COMMITTEE ON CIVIL PRACTICE LAW AND RULES

Legislative Report

COMMITTEE ON CIVIL PRACTICE AND RULES

REPORT NO.___

By:
Committee:
Effective Date:

AN ACT to

LAW & SECTION REFERRED TO:

REPORT PREPARED BY THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES

Proposed Amendment to CPLR 5501

§ 5501. Scope of review.

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

1. any [order or interlocutory] ~~non-final~~ judgment ~~or order~~ which necessarily affects the final judgment, including any which was adverse to the respondent on the 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 [order or interlocutory] ~~non-final~~ judgment ~~or order~~ has not previously been reviewed by the court to which the appeal is taken;

Supporting Memornadum

New York practice generally permits appeals from both orders and final judgments, in contrast to the federal system which generally permits appeals only from final judgments. Under CPLR 5701(a)(1) an appeal to the Appellate Division may generally be taken as of right "from any final or interlocutory judgment" and under CPLR 5701(a)(2)(iv) from an order that "involves some part of the merits" and under CPLR 5701(a)(2)(v) from an order that "affects a substantial right." The appeal from an interim order, however, is designed to be optional and CPLR 5501(a)(1) provides that "[a]n appeal from a final judgment brings up for review: (1) any non-final judgment or order which necessarily affects the final judgment . . . provided that such non-final judgment or order has not been previously reviewed by the court to which the appeal is taken."

Under prior practice statutes and under CPLR 5501(a)(1) as written, an aggrieved party was not required to appeal from an order made during the course of an action or proceeding but could wait to the

end of the case to see if the determination embodied in that order affected its outcome. If it did, the aggrieved party could appeal from the paper that granted or withheld the relief demanded in the pleadings and thereupon seek review of the earlier, outcome-affecting order. In drafting what became CPLR 5501(a)(1), the New York State Advisory Committee on Practice and Procedure made some changes to the language of its predecessor in Civil Practice Act § 580, which in turn had been derived from the earlier Code of Civil Procedure §§ 1316 and 1358, and from the yet earlier Code of Procedure § 329, but did not intend to restrict the general rule that an appeal from interim order would be optional. "CPLR 5501(a)(1). . . is designed to assure an appellant that dispositions that do not put an end to the whole case don't have to be taken up on appeal forthwith, but can be reviewed later, on appeal from the final judgment." Siegel, Practice Commentaries C5501:3.

For this assurance to work, any order that ultimately affects the final judgment must be reviewable by an appeal from the final judgment when it is ultimately entered. However, certain cases have now held that some orders are final, and that even though an order itself can never dispose of the whole case, the failure to take an appeal from that order will preclude the appellant from raising the issue on an appeal from the final judgment.

In *Pollak v. Moore*, 85 A.D.3d 578, 926 N.Y.S.2d 434 (1st Dept' 2011), the First Department was faced with an appeal from a final judgment, which was based on an order that had granted defendants summary judgment dismissing all of plaintiff's causes of action. The plaintiff had appealed from both the order and the judgment, but perfected the appeal from the judgment rather than the order. The First Department held that review could not be had from an appeal from the final judgment because although the summary judgment order clearly "affected" the final judgment, the "order did not meet the further criterion that the underlying order sought to be reviewed on appeal from the judgment be 'non-final'" 85 A.D.3d at 578. (citing CPLR 5501[a][1]). Although the First Department went on to review the merits in dicta, the effect of its decision was that the failure to appeal from the order as opposed to the judgment deprived the plaintiff of the opportunity for appellate review.

Pollack relied on the Court of Appeals decision in *Burke v. Crosson*, 85 N.Y.2d 10, 623 N.Y.S.2d 524 (1995) and follows directly from that decision. There the plaintiffs had been granted summary judgment on some of their causes of action but the order dismissed others and directed a hearing on counsel fees to be awarded. Plaintiffs appealed from that order, while defendants waited for the fee hearing and appealed from the paper that decided the counsel fees question as well. Both appeals went to the Fourth Department which described the earlier paper as a judgment and the latter one as an order merely dealing with the counsel fee issue. Taking that view of the case, the Fourth Department held that the defendants' failure to take a timely cross-appeal from the "judgment" granting summary judgment prevented the court from reviewing the issues that could have been raised on such a cross-appeal, on defendants' appeal from the later "order" deciding the counsel fees issue. The court noted that "[t]he earlier judgment was final and, thus, cannot be brought up for review on appeal from the latter order" (*Burke v Crosson*, 191 AD2d 997).

The Court of Appeals reversed the Appellate Division and, in doing so, switched the nomenclature, calling the paper granting summary judgment an order and the latter paper dealing with counsel fees a judgment, thus affording the defendants review of the earlier grant of summary judgment. In so doing, the Court held that "the concept of finality as used in CPLR 5501(a)(1) is identical to the

concept of finality that is routinely used to analyze appealability under article VI, § 3 (b) (1), (2) and (6) of the State Constitution and the related statutory provisions (see, CPLR 5601, 5602)." 85 N.Y.2d at 10. The Court further held that

> 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). (*Burke v Crosson,* 85 NY2d *supra,* at 15.) 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).

15 N.Y.2d 15-16.

But the Court recognized that sometimes, causes of actions or counterclaims that have been deemed to have been resolved are "impliedly severed," in which case "the order resolving a cause of action or counterclaim is treated as a final one for purposes of determining its appealability or reviewability." 15 N.Y.2d at 16. The Court recognized that the implied severance is not always clear:

> Under this approach to implied severance, an order that disposes of some but not all of the causes of action asserted in a litigation between parties may be deemed final under the doctrine of implied severance only if the causes of action it resolves do not arise out of the same transaction or continuum of facts or out of the same legal relationship as the unresolved causes of action (*see, Heller v State of New York*, 81 N.Y.2d 60, 62, n 1; *Lizza Indus. v Long Is. Light. Co., supra*). Thus, for example, an order dismissing or granting relief on one or more causes of action arising out of a single contract or series of factually related contracts would not be impliedly severable and would not be deemed final where other claims or counterclaims derived from the same contract or contracts were left pending. Similarly, where a negligence cause of action has been dismissed but there remain other claims for relief based on the same transaction or transactions, the doctrine of implied severance is not available, even though the underlying legal theories may be very different.[3] Finally, implied severance is not applied where the court's order "decides some issues of relief but leaves pending between the same parties other such issues[, thereby] in effect divid[ing] a single cause of action" (*Sontag v Sontag*, 66 N.Y.2d 554, 555).

Burke v Crosson means that finality for purposes of CPLR 5501(a)(1) is identical to finality for purposes of Court of Appeals review under article VI, § 3 (b) (1), (2) and (6) of the State Constitution and the related statutory provisions (see, CPLR 5601, 5602). But the two concepts are logically distinct and serve very different roles. The Court of Appeals, as a general rule reviews decisions of the Appellate Division, which are normally reflected in an order either affirming, modifying or reversing a result at the trial court level. Because the Court of Appeals normally reviews only matters that are final, it is necessary in the context of CPLR 5601 to have a "final" order. CPLR 5601 and 5602 explicitly use the phrase "an order of the appellate division which finally determines an action." Actions at the trial court level end not with an order but a final judgment.CPLR 5011. CPLR 5501(a)(1) does use the phrase "final order" and since the adoption of the CPLR, both actions and special proceedings end with a final judgment

The approach taken in *Burke v. Crosson,* appears to have been developed from two earlier Appellate Division cases. In *Matter of Burke v. Axelrod*, 90 A.D.2d 577 (3d Dep't 1982), the Third Department held that it could not review an earlier order dismissing portions of a petition on an appeal from later order which dismissed the balance of the petition. Without citation to authority, the Third Department held that:

> Although CPLR 5501 (subd [a], par 1) specifies that an appeal from a final judgment brings up for review "any non-final judgment or order which necessarily affects the final judgment", the prior order of Special Term dismissing part of the petition was final with respect to the two exempt positions approved by the commission on May 24, 1978. Where an intermediate order dismisses one of several causes of action or one of several challenges to distinct and multiple determinations of an administrative agency, as here, such order impliedly severs the struck action or challenge from the remainder of the complaint or petition (see *Sirlin Plumbing Co. v Maple Hill Homes*, 20 N.Y.2d 401). Accordingly, the propriety of Special Term's earlier ruling dismissing that portion of the petition seeking to challenge the commission's May 24, 1978 order is not properly before us on this appeal.

Significantly *Sirlin Plumbing Co.* did not involve CPLR 5501(a)(1) but rather whether an Appellate Division order was final for purposes of a further appeal to the Court of Appeals. *Matter of Burke v. Axelrod* could have reached the same result on the grounds that the appeal from the second order was not an appeal from a final judgment but from an interim order itself. Instead, the Third Department appears to have initiated the concept that an interim final order must be appealed immediately.

Matter of Burke v. Axelrod and *Sirlin Plumbing Co.* were relied upon in *Crystal v. Manes*, 130 A.D.2d 979 (4th Dep't 1987) where two orders were entered, the first dismissing some of plaintiff's causes of action and the other dismissing the remainder. The plaintiff appealed from the latter order, and the Fourth Department held that that appeal did not bring up the earlier dismissal, CPLR 5501(a)(1) notwithstanding. The Court correctly pointed out that the appeal was from an order and not a judgment, and therefore CPLR 5501(a)(1) did not apply. In dicta, the Court, citing *Matter of Burke v. Axelrod* and *Sirlin Plumbing Co.* remarked that prior order was a "final order and thus, could not be brought up for review on appeal even from an appeal from a final judgment." 130 A.D.2d at 979. The dicta in *Crystal*

v. Manes would thus require that a review of both orders only be had by two separate appeals and not an appeal from the final judgment, thus forcing piecemeal appellate review.

Neither the language of CPLR 5501(a)(1) nor its history suggest that such piecemeal appellate review is necessary. The term "non-final" in CPLR 5501(a)(1) ("any non-final judgment or order which necessarily affects the final judgment") modifies "judgment" and not "order." CPLR 5501(a)(1) derives from the Code of Civil Procedure § 1316, which used the term "intermediate order," an "made after the commencement of the action and before the entry of judgment" *Fox v Matthiessen* (155 NY 177, 179 [1898]). Under the Civil Practice Act, which went into effect in 1921, civil actions terminated in a "final judgment" and special proceedings terminated in something called a "final order." Under that act the essential provisions of former Code of Civil Procedure §§ 1316 and 1358 were combined into § 580, which stated in relevant part:

> § 580 Review of interlocutory judgment or intermediate order. An appeal taken from a final judgment or from a final order in a special proceeding brings up for review an interlocutory judgment or an intermediate order, as the case may be, which is specified in the notice of appeal and necessarily affects the final judgment or order: and which has not already been reviewed, upon a separate appeal therefrom, by the court or the division or term of the court to which the appeal from the final judgment or order is taken.

The CPLR eliminated the distinction between special proceedings and actions, making both end in a final judgment. (CPLR 411, 5011.) CPLR 5501(a)(1) was intended to broaden the scope of review. As the Advisory Committee notes make clear, the intent

> has been broadened slightly in scope through the use of the words "non-final judgment or order" in place of specific reference to "an interlocutory judgment or intermediate order." This achieves two results. It specifically permits review of any interlocutory order—the analogue, in special proceedings, of an interlocutory judgment—on an appeal from a final order. This may be done under existing case law. See, e.g., In re Satterlee's Will, 2 N.Y.2d 285, 290, 140 N.E.2d 543, 545 (1957) (dictum). *It also permits the review of any order which meets the conditions of subparagraph 1, even if it is not an "intermediate" one within the meaning of the present statute.* The words "intermediate order" have been given a literal interpretation: it is necessary that the order be made after commencement of the case and before its final determination. See Cohen & Karger, Powers of the New York Court of Appeals 337-39 (rev. ed. 1952); 9 Carmody-Wait, Cyclopedia of New York Practice 58-59 (1954). This may occasionally require two separate appeals where all the issues could easily be raised on a single appeal, as is possible under the language of subparagraph 1 of the proposed subdivision.

(Second Preliminary Report of the New York State Advisory Committee on Practice and Procedure, Legis. Doc. No. 13 [1958] at 124) (emphasis supplied).

Quite simply, until *Matter of Burke v. Axelrod* and *Crystal v. Manes*, there was no concept of a final order within CPLR 5501(a)(1). Under CPLR 5501(a)(1), if an appellant appeals from a final judgment (not an order), that appeal brings up for review an earlier order so long as (1) the earlier order

"necessarily affects the final judgment," and (2) the earlier order had not been "previously been reviewed by the court to which the appeal is taken." *Matter of Burke v. Axelrod* , *Crystal v. Manes*, *Burke v. Crosson*, and *Pollak v. Moore* engraft a third requirement, namely that order not be "final," either in the sense of *Pollak v. Moore* resolving all of the issues in the case and leaving nothing left but to have final judgment entered, or in the sense of *Matter of Burke v. Axelrod* , *Crystal v. Manes*, in that there is no implied severance under that doctrine as developed for Court of Appeals review.

This development destroys the concept envisioned in CPLR 5501(a)(1) of allowing the litigant to await the final judgment and raise all issues on an appeal from the final judgment, assuming that they "necessarily affect" the judgment. When joined with the concept of implied severance, *Pollak* makes it difficult if not impossible for an appellant to determine what orders are final and which are not. If an appellant guesses incorrectly and awaits the final judgment, the appellant will find his or her right to appeal lost. While the implied severance concept might make sense with respect to appeals from the appellate division to the Court of Appeals, applying it to trial court orders leads to a trap for litigants, the potential forfeiture of appellate rights, and encourages interlocutory appeals, some of which may be obviated by the final result in the action. The resulting doctrine, which is at odds with both the wording an purpose of CPLR 5501(a)(1), appears to be the result of what is sometimes called "jurisprudential creep" in which a broad statement made in one case is applied in successive cases under different circumstances until at last an apparently logical, but unexpected and undesirable result is compelled

A second and independent problem stems from *Matter of Aho*, 39 N.Y.2d 241, 383 N.Y.S.2d 385 (1976), wherein the Court of Appeals held that entry of a final judgment terminated the earlier appeal from an intermediate order and at that point, appellate review may only be had from an appeal from the final judgment. 39 N.Y.2d at 248. This rule has been modified somewhat by an amendment to CPLR 5501(c) which provides that where an order directing summary judgment or judgment on the pleadings is appealed, and a final judgment is thereafter entered, the notice of appeal will be deemed to be from the final judgment. This is not the universe of dismissals that might occur, and there is an obvious tension and inconsistency between the rule in *Matter of Aho* and a situation in *Pollak v. Moore*, that an appeal from a final judgment may be ineffectual if the earlier order on which it is based is "final."

The proposed amendment would restore the original concept of CPLR 5501(a)(1), which does not reflect or speak of a "final order." It would make it clear that an appeal from an order is optional and that if that order necessarily affects the final judgment, the order may be reviewed upon an appeal from the final judgment. It eliminates the confusion between what orders may or may not be final, and promotes the policy goal of making interim appeals optional rather than mandatory.

An order, or an interlocutory judgment is not final and, assuming that such order or interlocutory judgment "necessarily affects" the final judgment and has not been previously reviewed, then it can be brought up for review. Nothing in the amendment would prohibit a court from ordering an explicit severance and a final judgment, but to cut off appellate rights, the paper would have to be an explicit final judgment.[1]

[1]The Federal Rules of Civil Procedure were amended in 1946 to provide that a disposition of fewer than all of the claims and parties in an action is not a final judgment unless the court makes an express determination to direct a final judgment on the partial disposition. See Fed. R. Civ. P. 54(b). As is the situation here, the prior law led to confusion and

unnecessary appeals. Notes of federal Advisory Committee on 1946 Amendments ("situations arose where district courts made a piecemeal disposition of an action and entered what the parties thought amounted to a judgment, although a trial remained to be had on other claims similar or identical with those disposed of. In the interim the parties did not know their ultimate rights, and accordingly took an appeal, thus putting the finality of the partial judgment in question").