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Appellate Motion Practice: A Tactical Approach

BY WILLIAM B. STOCK, ESQ.*

There is more to appellate practice than writing briefs. In 2004, the Second Department decided 15,625 motions while calendaring only 3,951 appeals.

Though motion practice in the Appellate Division, shown in the above statistic, is widely practiced, it is this author's perception that the role it can play in winning an appeal is not well-known. This article seeks to acquaint a litigator in the Appellate Division with motion practice tactics that can help win a case on appeal. (Note: while the principles to be discussed are applicable in all of New York's Departments, this article is focused on Second Department procedure.)

Statutes will be paraphrased and ancillary points silently omitted. The reader is advised to review the actual text. A bibliography is appended to point the way to further research.

I. THE "HOW" OF APPELLATE MOTION PRACTICE

Litigators with little appellate experience seldom appreciate the broad scope of motion practice in the Second Department. However, it is clear that the Second Department is as much a court of motions as it is of appeals.

Motion practice in the Second Department is governed by CPLR Article 22 and local court rules which can be found in the N.Y.C.R.R. In the Second Department it is in 22 N.Y.C.R.R. Part 670 (5-6). Highlights of these provisions include:

- All motions require a $45 fee;
- All motions are returnable on Fridays at 9:30 A.M.;
- Except for applications for temporary injunctive relief, (*infra*) there are no personal appearances in motion practice[1];
- All motions must contain a copy of the determination being appealed as well as the notice of appeal.

Before engaging in any motion practice it is a courtesy, when practical to do so, to contact one's adversary to attempt to resolve the controversy.

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TEMPORARY STAY OR INTERIM RELIEF:

A single justice of the Appellate Division can grant a temporary restraining order, but only a full bench can grant an interim stay.

The Second Department does not lightly grant *ex parte* injunctive relief. Notice must be given to one's adversary for every application for "a temporary stay or other interim relief pending determination of a motion"[3] or when application for relief under CPLR §5704 (discussed *infra*) is made. Every such order to show cause or application must contain:

> [a]n affidavit or affirmation stating the time, place, by whom given, the manner of such notification, and to the extent known, the position taken by the opposing party. If notice has not been given, the affidavit or affirmation shall state whether the applicant has made an attempt to give notice and the reasons for the lack of success. *If the applicant is unwilling to give notice, the affidavit or affirmation shall state the reasons for such unwillingness.*[4]

Finally, in contrast to the submission-only procedure for motions an "order to show cause providing for a temporary stay or other interim relief or an application pursuant to CPLR §5704 must be personally presented for signature by the party's attorney or by the party if such a party is proceeding pro se."[5]

Once at the Second Department, the parties typically argue in front of a court attorney as to whether temporary relief should be granted. The court attorney then reviews their arguments with the sitting justice who decides whether to grant the temporary relief.[6]

PRACTICE POINTS:

• Motions are decided much more quickly than appeals; make your arguments correspondingly stronger and more direct in your papers. You need not attach copies of records and briefs if they have already been filed with the court.

• Injunctive relief will only be granted when there is a showing of irreparable harm or that one's case is so strong on appeal that proceeding with the action in the court below, especially at trial, would be a waste of judicial time and effort.

• Bring your request for interim relief as quickly as possible. Don't wait. Equity seldom favors the vigilant more than in this situation.

• If you cannot be physically present when your adversary is making an application for the relief, contact the court, preferably in writing by fax, and let the appropriate staff know where you can be reached.

A litigant can also bring an order to show cause to the chambers of a justice of the Second Department. The Second Department published a two-page guide on its website entitled "Guide to Service, Filing and Fees for Orders to Show Cause Signed in Chambers" that provides more information. In essence, the order to show cause is brought to the justice's chamber for signature. After it is signed and conformed, the order to show cause is then served as directed and then the movant must then either

mail or deliver the original order to show cause to the motion support office of the Second Department. Remember to include the affidavit of service and the $45 fee.

II. THE NOTICE OF APPEAL

Appeals are commenced by serving the adverse party with a Notice of Appeal and filing it in the office where the judgment or order of the court of original instance is entered.[7] CPLR §5515(1) ("Taking an appeal, notice of appeal") provides in pertinent part that "A notice [of appeal] shall designate the party taking the appeal, *the judgment or order or specific part of the judgment or order* appealed from and the court to which it is taken." (emphasis added). If the notice of appeal does not contain these elements, one can move in the Appellate Division to strike it. Similarly, one can move to strike the notice if the appeal is not taken within the statutory time limit.[8]

As indicated in the emphasized language, one can only appeal from a judgment or an order. [9] Indeed, as will be seen, even some types of orders are not appealable.

The types of non-appealable paper that attorneys might mistakenly attempt to appeal would make a very long list. Some examples include an interim ruling,[10] verdicts and trial minutes,[11] an order denying reargument,[12] an opinion,[13] a memorandum decision,[14] a clerk's minutes of a trial[15] and a default judgment (unless the appealing party is not the defaulter).[16]

EX PARTE ORDERS AND CPLR §5704:

Ex parte orders are typically not appealable.[17] However, there are several ways to obtain relief from the Appellate Division from such orders. Move on notice in the trial court to modify or vacate the *ex parte* order and then appeal the resulting order.[18] CPLR §5704(a) lets a single Appellate Division justice vacate or modify any *ex parte* order granted in a lower court from which an appeal would be taken to the Appellate Division. The Appellate Division (*i.e.,* not a single justice of the court) may grant any order or provisional remedy refused by a lower court from which an appeal would be taken to the Appellate Division.

PRACTICE POINT:

• When seeking relief under CPLR §5704(a) in the Second Department, one must observe the notification rules of 22 N.Y.C.R.R. 670(e) and also use a Request for Appellate Division Intervention ("RADI") form.

MOTIONS TO ENLARGE TIME TO PERFECT APPEALS:

The Second Department has what might be deemed a "user friendly" method for seeking more time to perfect an appeal or file an opposing brief. The parties involved can stipulate amongst themselves, within certain parameters, to enlarge the time.[19] However, if the parties cannot stipulate, then a letter application to enlarge time can be sent to the clerk of the court.[20] There must be some grounds shown (*e.g.,* other appeals due at the same time, and it is probably a good idea to list them.) Letter requests can be contested by a motion on notice.[21]

The saddest circumstance under which to move for an enlargement of time is when a filing deadline is missed. One should move quickly with a sound explanation for the delay and a demonstration of the merits.

PRACTICE POINTS:

• The Second Department has said in a different context that conclusory assertions of "law office failure" are insufficient.[22] Be specific.

• It is a good strategy to attach a complete copy of one's proposed brief to the motion.

• Where an appellant fails to perfect the appeal or extent its time to do so, the appeal will be deemed abandoned.

III. RESOLVING PROCEDURAL AND SUBSTANTIVE APPELLATE ISSUES BY MOTION PROCEDURAL ISSUES

When in receipt of a brief and record, one should not take them at face value. Instead, scrutinize them to see if they comply with court rules and case law. A litigant is not entitled merely to good-faith efforts by her adversary to provide a proper brief and record; both sides must follow the rules of court. If briefs and records are improper, one can move to strike either or both.

The rules for what a brief and record must contain are set forth in CPLR §5526, §5528, and §5529.[23] For example, if a brief contains a statement of facts that does not include page references to the record or appendix, a motion to strike is proper.

Another procedural motion is to move for a preference under CPLR §5521.[24] Such preferences "may be obtained upon good cause shown by a motion directed to the court" on notice to the other parties.[25] Any party entitled by law to a preference can serve and file a demand for one, setting forth the relevant provisions of law and good cause.

SUBSTANTIVE ISSUES

There are some things that a brief and record may not contain. A brief may not contain references to matters extraneous to the record,[26] addendum not permitted by court rules,[27] arguments not raised in the court below,[28] and abusive and offensive comments.[29] In a reply brief, one cannot raise an argument not raised in appellant's initial brief.[30]

In a record, a brief and record may not contain materials not submitted to the court below.[31] Please note that material in a brief that is *dehors* the records can take subtle forms. This writer once encountered a brief with a footnote that contained a website. The appellant invited to court to go on-line, look up various records and take judicial notice of them. A motion to strike to footnote promptly followed: it argued that the brief sought to smuggle material into the record on appeal that was not before the trial court. The motion was granted by the Appellate Division and the Record had to be re-done.

Also, a brief can be stricken when it purports to be an appeal of a motion to renew but is, in actuality, a motion to reargue, whose denial cannot be appealed.[32]

MOTIONS TO SETTLE THE RECORD:

Distinct from a motion to strike the record is a motion to settle it. When a disagreement arises as to what constitutes the record, a litigant can move in either the

lower court or at the appellate level for an order settling the record. If one moves in the latter, the Appellate Division will either decide the matter itself or refer it back to the lower court. These motions are comparatively rare. [33]

WITHDRAWING APPEALS, A WORD OF CAUTION:

Litigators frequently file notices of appeal only to let them be dismissed by the Appellate Division for want of prosecution. As explained by the Court of Appeals in *Faricelli v. TSS Seedman's Inc.*,[34] this can have disastrous consequences.

> As we stated in *Bray v. Cox*, 38 N.Y.2d 350, 353, 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" (*see also, Rubeo v. National Grange Mut. Ins. Co.,* 93 N.Y.2d 750 [decided today]). However, an appellate court has the authority to entertain a second appeal in the exercise of its discretion, even where a prior appeal on the same issue has been dismissed for failure to prosecute (*see, Aridas v. Caserta,* 41 N.Y.2d 1059, 1061).

Hoping to successfully invoke the discretion of an appellate court in such a situation is a risky tactic. It is far better to send the clerk of the Appellate Division a brief, timely letter, which will be regarded as a motion, explaining that one is withdrawing an appeal.

IV. POST-DECISION MOTIONS IN THE APPELLATE DIVISION

The rules of the Second Department[35] list several types of post-decision and order motions, such as motions to reargue, resettle, amend, leave to appeal and admission pro hace vice. The reader is advised to read this section with the rules close at hand.

Reargue:

Motions to reargue are always a challenge. It is difficult enough to convince one justice that he or she has overlooked or misapprehended a point, let alone a panel of jurists.[36] Professor David Siegel memorably comments that "Good chance or not, it is the loser's last one, and the magnetism of a last hurrah is, for many a loser, irresistible." The vast majority of these motions are denied. Nevertheless, it can be done.[37]

The losing party ordinarily has 30 days to move for reargument after service of the decision and order with notice of entry to move "except that with good cause shown, the court may consider any such motion when made at a later date."[38]

The best circumstance in which to move to reargue is when a higher court has reversed or modified a critical point of law involved in the decision, or the time to take a further appeal from it has not yet run. [39] Courts like finality.

PRACTICE POINTS:

• If an advocate becomes aware of a pending case in the Court of Appeals that could impact on a matter before the Appellate Division, the wise move would be to ask to stay consideration of the appeal until the higher court has ruled.

• Further, it is well to consider *Intercontinental Credit Corp. v. Roth*,[40] wherein a defendant moved to reargue a denial of a motion for leave to appeal. The Court of Appeals deemed the motion a frivolous delaying tactic and imposed a $5,000 sanction, half on the litigant, and half on the lawyer.

CONCLUSION

The first step a litigator should take when he or she realizes he or she is involved in an appeal is to consider the possibility of motion practice. It has the ability to pare down the issues one must ultimately address, correct errors in the record and, in certain cases, end the appeal before it has even begun.

Endnotes

[1] 22 N.Y.C.R.R. 670.5(e).
[2] 22 N.Y.C.R.R. 670.5(d) (1-2).
[3] 22 N.Y.C.R.R. 670.5[e].
[4] *Id*., emphasis added.
[5] *Id.*
[6] The stay of an impending trial, a frequent request, should be regarded as extraordinary relief.
[7] *See* CPLR §5515 for a fuller discussion.
[8] CPLR §5513.
[9] CPLR §5512(a).
[10] *Mehar v. City of New York*, 260 A.D.2d 554, 688 N.Y.S.2d 617, 618-619 (2d Dept. 1999) ("Preliminarily, we note that as a general principle, rulings made during the course of a trial are not appealable. Rather, these rulings, even if reduced to a written order, are brought up for review on an appeal from the ensuing judgment.") (citations omitted).
[11] *Rockman v. Brosman*, 280 A.D.2d 591, 720 N.Y.S.2d 538 (2d Dept. 2001) ("Ordered that the appeal from the purported interlocutory judgment is dismissed, without costs or disbursements, as it is a jury verdict embodied in an extract of the trial minutes, which is not appealable…").
[12] *Nastassi v. Nastassi*, 26 A.D.3d 32, 39, 805 N.Y.S.2d 585, 591 nn.4 (2d Dept. 2005) ("Since the order denying reargument is not appealable, this submission is not properly before us.") An order denying renewal can be appealed.
[13] *Eberhardt v. 11 West 42nd Street, Inc.*, 69 N.Y.S.2d 126, 127 (App. Term 1st Dept. 1947) ("The appeal is taken from a non-existent order. What is termed an 'order' is the opinion of the court.").
[14] *White Bay Enters., Ltd v. Newsday, Inc.,* 258 A.D.2d 520, 685 N.Y.S.2d 257, 258 (2d Dept. 1999) ("[a]s no appeal lies from an order made upon renewal and reargument of a decision…").
[15] *Davidson v. Ha Il-Bo*, 117 A.D.2d 776, 499 N.Y.S.2d 105 (2d Dept. 1986).
[16] *See CPLR §5511.* ("An aggrieved party of a person substituted for him may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party.").
[17] *Household Finance Realty Corporation of New York v. Winn*, 19 A.D.3d 544 (2d Dept. 2005) "[n]o appeal lies from an order issued *ex parte* (*see* CPLR §5701)".
[18] *See* CPLR §5701(a)(3).
[19] *See* 22 N.Y.C.R.R. 670 (d)(1).
[20] *See* 22 N.Y.C.R.R. 670(d)(2).
[21] *Id.*

[22] *See Solomon v. Ramlall*, 18 A.D.3d 461 (2d Dept. 2005).

[23] *See also* 22 N.Y.C.R.R. 670.10(1-3).

[24] According to Siegel's Commentaries in McKinney's, CPLR 5521(a) gives the appellate court broad discretion to grant preferences in appeals while CPLR 5521(b) grants preferences in specific family law matters.

[25] *See* 22 N.Y.C.R.R. 670.7.

[26] *Munoz v. Reyes*, 40 A.D.3d 1059, 836 N.Y.S.2d 698 (2d Dept. 2007)("To the extent that the appellant's brief refers to matter dehors the record, such matter is not properly before this court and has not been considered in the determination of the appeal.")

[27] *See* 22 N.Y.C.R.R. 670.10.(3)(h).

[28] *County of Orange v. Grier*, 30 A.D. 3d 556 (2d Dept. 2006)("The appellants' arguments … are not preserved for appellate review, since they were not raised by the appellants in opposition to the county's motion for summary judgment." (citation omitted).

[29] *In re Moran*, 23 A.D.2d 623 (4th Dept. 1965)("Appellant's reply brief is permeated with accusations and criticisms directed against respondents' counsel and the Surrogate which we deem to be wholly unjustifiable. It should, therefore, be expunged from the records of this court.")

[30] *Soon Rae Kim v. Caesar Chemists*, 297 A.D.2d 797, 798 (2d Dept. 2002)("We have not considered the plaintiff's arguments regarding the trial court's alleged improper questioning of witnesses, since this issue was raised for the first time in the reply brief submitted to this Court. *See Parratta v. McAllister*, 283 A.D.2d 625)."

[31] *See* CPLR §5526 and 22 N.Y.C.R.R. 670.10(1); *See Mele v. Okubo*, 36 A.D.3d 599, 826 N.Y.S.2d 569 (2d Dept. 2007) ("ORDERED that the motion to strike those portions of the record and the appellant's brief which contained or refer to matter *dehors* the record is granted, and those references are stricken and have not been considered in the determination of the appeal.")

[32] *See Ferri v. Creative Food Unlimited, et al.*, 2002 NY Slip Op 40461U (App. Term. 9th & 10th Jud. Dist. 2002).

[33] *Polyfusion Electronics v. AirSep Corp.*, 30 A.D.3d 984, 816 N.Y.S.2d 783 (4th Dept. 2006) ("The record establishes that the court granted plaintiff's motion to settle the record on appeal, ordering that, pursuant to CPLR §5525 (b), plaintiff "'need not include in the Record on Appeal the transcript of the trial testimony ….'").

[34] 94 N.Y.2d 772, 774 (1999).

[35] 22 N.Y.C.R.R. 670.6.

[36] Siegel, *New York Practice*, 4th ed. Sec. 544.

[37] *See Tiffany at Westbury v. Marelli Development Corp.*, 40 A.D.3d 1073 (2d Dept. 2007).

[38] 22 N.Y.C.R.R. 670.6(a).

[39] Siegel, *Id.*

[40] 78 N.Y.2d 306, 574 N.Y.S.2d 528, 579 N.E.2d 688 (1991).

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Siegel, *New York Practice*, 4th ed. has a concise discussion of appellate practice and Siegel's commentaries in McKinney's CPLR are invaluable.

The New York State Bar Association published excellent materials on many aspects of practice including appeals. *A Compendium of Appellate Motions* is available free from Printinghouse Press; contact ekuperman@phpny.com.

The web-site of the Appellate Division, Second Department (www.nycourts.gov/courts/ad2/index.shtml) is a gateway to a wealth of useful information and the court staffers are, without exception, knowledgeable and helpful. The telephone number of the Appellate Division, Second Department is (718) 875-1300.

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