St. John's Law Review

Volume 53, Fall 1978, Number 1 Article 7

CPLR 1012: Stockholder Allowed to Appeal Dismissal or Derivative Action Although Not a Party to Action at Trial Stage

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occurs at the time a petitioner is notified of the results of an appeal[56] are inapposite, since, in those cases, the individual petitioner knew that he was "aggrieved" immediately upon notification without reference to his status in relation to other appellants.[57] In *Martin*, however, the purpose of the senior dispatcher examination was to determine a list of promotable employees, and a "final and binding" result could not be reached until the list was issued. Thus, the *Martin* decision represents an application of traditional article 78 principles to those narrow circumstances in which the effect of an appeal determination on the petitioner depends upon the disposition of other appeals.

Marian A. Campbell

ARTICLE 10—PARTIES GENERALLY

CPLR 1012: Stockholder allowed to appeal dismissal of derivative action although not a party to action at trial stage

CPLR 1012 grants a nonparty the right to intervene in an action "[u]pon timely motion, . . . when the representation of [his] interest is or may be inadequate and [he] is or may be bound by the judgment."[58] While the statute has been construed to give courts

[56] Munice v. Board of Examiners, 31 N.Y.2d 683, 289 N.E.2d 179, 337 N.Y.S.2d 258 (1972) (mem.); Presti v. Board of Examiners, 71 Misc. 2d 232, 336 N.Y.S.2d 171 (Sup. Ct. Kings County 1968); Chavich v. Board of Examiners, 43 Misc. 2d 1090, 252 N.Y.S.2d 718 (Sup. Ct. Kings County 1964), *rev'd on other grounds*, 23 App. Div. 2d 57, 258 N.Y.S.2d 677 (2d Dep't), *aff'd mem.*, 16 N.Y.2d 810, 210 N.E.2d 359, 263 N.Y.S.2d 7 (1965); Furman v. Marsh, 185 Misc. 209, 56 N.Y.S.2d 690 (Sup. Ct. N.Y. County 1945).

[57] In the typical situation, when a terminated employee learns that his appeal for reinstatement has been denied, he is clearly aware that he has been aggrieved. *See, e.g.*, McGirr v. Division of Veterans Affairs, 43 N.Y.2d 635, 374 N.E.2d 123, 403 N.Y.S.2d 212 (1978); Walling v. Schechter, 9 Misc. 2d 621, 167 N.Y.S.2d 861 (Sup. Ct. N.Y. County 1957), *aff'd mem.*, 8 App. Div. 2d 605, 185 N.Y.S.2d 735 (1st Dep't), *aff'd mem.*, 7 N.Y.2d 814, 164 N.E.2d 716, 196 N.Y.S.2d 695 (1959); *cf.* Bishop v. Allen, 5 Misc. 2d 676, 165 N.Y.S.2d 813 (Sup. Ct. Albany County 1956) (action final when agency denied appeal of decision placing petitioner at lower pay scale). Similarly, dismissal of an appeal challenging an administrative determination which denies the petitioner an opportunity to take a promotional examination immediately informs the petitioner that he has been adversely affected. *See, e.g.*, Mallen v. Morton, 199 Misc. 2d 805, 99 N.Y.S.2d 521 (Sup. Ct. N.Y. County 1950); Hecht v. Kern, 178 Misc. 571, 34 N.Y.S.2d 794 (Sup. Ct. N.Y. County 1942). Even where an appeal is brought seeking review of a civil service examination, denial of such appeal is considered a final and binding determination if the petitioner knows at the time that the grade he received will not qualify him for the position being offered. *See, e.g.*, Greenbaum v. Ingraham, 48 App. Div. 2d 969, 369 N.Y.S.2d 556 (3d Dep't 1975); Keays v. Conway, 105 N.Y.S.2d 944 (Sup. Ct. Albany County 1951); *cf.* Abramson v. Commissioner of Educ., 1 App. Div. 2d 366, 150 N.Y.S.2d 270 (3d Dep't 1956) (order became final and binding when persons affected by rescission of 5% credit were notified).

[58] CPLR 1012 (a)(2) (1976). *See generally* 2 WK&M ¶¶ 1012.01-.08.

considerable discretion in determining whether an intervention motion is "timely,"[59] there has been a general reluctance to permit intervention after judgment has been entered at the trial court level.[60] Recently, however, in *Auerbach v. Bennett*,[61] the Appellate Division, Second Department, ruled that where the stockholder who brought a derivative action refuses to appeal an adverse judgment, a stockholder who was not a party to the original action may intervene and take an appeal.[62]

Plaintiff Auerbach brought a derivative action[63] against the board of directors of a corporation in which he owned stock, alleging

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[59] *See* Krenitsky v. Ludlow Motor Co., 276 App. Div. 511, 513-14, 96 N.Y.S.2d 102, 104-05 (3d Dep't 1950); 2 WK&M ¶ 1012.06; *cf.* Meyer v. Title Guar. & Trust Co., 228 App. Div. 641, 238 N.Y.S. 48 (2d Dep't 1929) (per curiam) (right to intervene is subject to court's discretion).

[60] 2 WK&M ¶ 1012.07; *see, e.g.*, 128 Willow Assocs. v. Yoswein, 50 App. Div. 2d 551, 375 N.Y.S.2d 1020 (1st Dep't 1975); White v. Globe Indem. Co., 14 App. Div. 2d 743, 220 N.Y.S.2d 37 (1st Dep't 1961) (per curiam); Krenitsky v. Ludlow Motor Co., 276 App. Div. 511, 514, 96 N.Y.S.2d 102, 105 (3d Dep't 1950). Post-judgment intervention has been permitted in only a few cases. *See* Ginsberg v. Lomenzo, 23 N.Y.2d 94, 242 N.E.2d 734, 295 N.Y.S.2d 475, *rev'g per curiam* 30 App. Div. 2d 982, 294 N.Y.S.2d 201 (3d Dep't 1968); Soto v. Lenscraft Optical Corp., 7 N.Y.2d 747, 162 N.E.2d 740, 193 N.Y.S.2d 655 (1959); Unitarian Universalist Church v. Shorten, 64 Misc. 2d 851, 315 N.Y.S.2d 506, *vacated on other grounds*, 64 Misc. 2d 1027, 316 N.Y.S.2d 837 (Sup. Ct. Nassau County 1970). The hesitancy with which courts grant post-judgment intervention reflects the view that a person should not be permitted to reap the benefits of a lawsuit in which he has not participated. *See* 2 WK&M ¶ 1012.07.

[61] 64 App. Div. 2d 98, 408 N.Y.S.2d 83 (2d Dep't 1978).

[62] *Id.* at 106, 408 N.Y.S.2d at 87.

[63] The nature of a stockholder's derivative action has been defined as follows:

> The contrasting difference between a stockholder's suit for his corporation and a suit by him against it, is crucial. In the former, he has no claim of his own; he merely has a personal controversy with his corporation regarding the business wisdom or legal basis for the latter's assertion of a claim against third parties. Whatever money or property is to be recovered would go to the corporation, not a fraction of it to the stockholder. When such a suit is entertained, the stockholder is in effect allowed to conscript the corporation as a complainant on a claim that the corporation, in the exercise of what it asserts to be its uncoerced discretion, is unwilling to initiate. This is a wholly different situation from that which arises when the corporation is charged with invasion of the stockholder's independent right.

Smith v. Sperling, 354 U.S. 91, 99 (1957) (Frankfurter, J., dissenting); *see* Carruthers v. Jack Waite Mining Co., 306 N.Y. 136, 140, 116 N.E.2d 286, 288 (1953); Teich v. Lawrence, 291 N.Y. 245, 249, 52 N.E.2d 115, 116 (1943) (per curiam); Fifty States Management Corp. v. Niagara Permanent Sav. & Loan Ass'n, 58 App. Div. 2d 177, 179, 396 N.Y.S.2d 925, 927 (4th Dep't 1977). Derivative actions brought in New York courts are governed by N.Y. Bus. Corp. Law §§ 626-627 (McKinney 1963 & Supp. 1978-1979). The basic requirements for bringing such an action are that the plaintiff be a stockholder, both at the "time of bringing the action and . . . at the time of the transaction of which he complains," that previous attempts have been made to "secure the initiation of such action by the board," or reasons have been offered to explain why such attempts were not made. *Id.* § 626(b)-(c). Under certain circumstances, the plaintiff may be required to furnish security to cover the reasonable expenses incurred in the action by the corporation. *Id.* § 627. A derivative action cannot be terminated prior to

that the directors permitted payments of more than $11,000,000 in bribes and kickbacks, and then failed to seek recovery of them.[64] The Auerbach complaint, seeking an accounting and recovery on behalf of the corporation,[65] was dismissed when the defendants successfully moved for summary judgment.[66] After the dismissal, Wallenstein, a stockholder who had commenced an independent derivative action, asked Auerbach to take an appeal.[67] When Auerbach refused, Wallenstein filed a notice of appeal himself.[68] The defen-

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judgment without court approval, and approval may not be granted if the court finds that the "interests of the shareholders or any classes thereof will be substantially affected" by such termination. *Id.* § 626(d). Upon an award of damages, the plaintiff in a derivative action is entitled only to reasonable expenses incurred in pursuing the action. The remainder of the judgment goes to the corporation. *Id.* § 626(e).

[64] 64 App. Div. 2d at 102, 408 N.Y.S.2d at 84. The derivative action in *Auerbach* was brought on behalf of General Telephone & Electronics Corp. (GTE) after the corporation's audit committee issued a report disclosing the existence of illegal domestic and foreign payments. *Id.* In addition to suing the individual directors of GTE, the plaintiff sought recovery from the corporation's auditor, Arthur Andersen & Co., for negligently failing to discover and report the illegal payments. *Id.* at 102 & n.1, 408 N.Y.S.2d at 84 & n.1.

[65] *Id.* at 102, 408 N.Y.S.2d at 84. Auerbach's lawsuit was one of six that were initiated when the existence of illegal payments was revealed. *Id.* at 102 & nn.2-3, 408 N.Y.S.2d at 84 & nn.2-3. Following the commencement of these suits, GTE's board of directors established a litigation committee to investigate the facts underlying the plaintiffs' allegations. The committee consisted of three directors, two of whom had been appointed to the board after the payments in question were made. Former Chief Judge Charles S. Desmond was appointed counsel to the committee. *Id.* at 102, 408 N.Y.S.2d at 85. After its investigation, the committee reported that it had found no evidence of bad faith on the part of either the directors or Arthur Andersen & Co. Concluding that the allegations were without merit, the committee noted that, even if they were true, it would not serve GTE's best interests to prosecute an action. *Id.* at 102-03, 408 N.Y.S.2d at 85.

[66] *Id.* at 103, 408 N.Y.S.2d at 85. Basing its findings upon the report prepared by the litigation committee, *see* note 65 *supra,* the lower court concluded that the derivative suit could not be maintained over the objection of corporate management. Invoking the "business judgment" doctrine, the lower court apparently found that "a decision made in good faith by a disinterested and independent board committee that the pursuit of a derivative action against erring directors and officers would not be in the best interests of the corporation [could not] be challenged by the stockholders." 64 App. Div. 2d at 103, 408 N.Y.S.2d at 85. The "business judgment" doctrine, which operates to insulate the acts of corporate directors, has been explained in the following manner:

> Under the business judgment doctrine, acts of directors, within the powers of the corporation, in the furtherance of its business, made in good faith and in the exercise of an honest judgment, are valid and conclude the corporation and its shareholders. Questions of management policy, contract expediency and adequate consideration are left to their honest and unselfish decision, judgment and discretion and may not be interfered with or restrained.

Heimann v. American Express Co., 53 Misc. 2d 749, 763, 279 N.Y.S.2d 867, 881 (Sup. Ct. N.Y. County 1967). *See also* Pollitz v. Wabash R.R., 207 N.Y. 113, 100 N.E. 721 (1912); Ferguson v. Fergus Enterprises, Inc., 13 Misc. 2d 235, 175 N.Y.S.2d 974 (Sup. Ct. N.Y. County 1958).

[67] 64 App. Div. 2d at 103, 408 N.Y.S.2d at 85.

[68] *Id.; see* CPLR 5513(a) (1978). One court has held that the time within which an appeal

dants sought a dismissal of the appeal, contending that Wallenstein was not an aggrieved party and, therefore, he lacked standing to appeal.[69] Wallenstein countered by moving for leave to intervene in the action *nunc pro tunc*.[70]

The Appellate Division, Second Department, refused to dismiss the appeal and instead granted Wallenstein's motion for intervention as of right.[71] The *Auerbach* court initially considered the respondents' contention that the appeal was barred by CPLR 5511, which permits appeals only by "aggrieved *parties*."[72] Justice Hopkins, writing for a unanimous panel,[73] noted that a derivative action is similar to a class action in that a judgment is binding on all

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must be filed does not begin until the motion to intervene has been granted. *See* Unitarian Universalist Church v. Shorten, 64 Misc. 2d 851, 856, 315 N.Y.S.2d 506, 513, *vacated on other grounds*, 64 Misc. 2d 1027, 316 N.Y.S.2d 837 (Sup. Ct. Nassau County 1970).

[69] 64 App. Div. 2d at 103, 408 N.Y.S.2d at 85; *see* note 72 and accompanying text *infra*.

[70] 64 App. Div. 2d at 103, 408 N.Y.S.2d at 85. Both Wallenstein's and the defendants' motions were denied, although leave was granted for their renewal at the argument of the appeal. Each side renewed its motions at that time. *Id.*

[71] *Id.* at 105, 109, 408 N.Y.S.2d at 87-88.

[72] CPLR 5511 (1978) provides:

> 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.

A person is aggrieved within the meaning of CPLR 5511 when a judgment or order "has a binding force against the rights, person or property of the party seeking to appeal." Grabb v. Nicholas, 2 App. Div. 2d 446, 447-48, 156 N.Y.S.2d 685, 687 (4th Dep't 1956) (per curiam); *accord*, Ross v. Wigg, 100 N.Y. 243, 246, 3 N.E. 180, 181 (1885); *In re* Richmond County Soc'y for Prevention of Cruelty to Children, 11 App. Div. 2d 236, 239, 204 N.Y.S.2d 707, 711 (2d Dep't 1960) (per curiam). Thus, standing to appeal is seldom granted to a nonparty since a nonparty rarely is bound by the outcome of litigation. 7 WK&M ¶ 5511.04; *see, e.g.*, Kipbea Baking Co. v. Strauss, 10 App. Div. 2d 987, 202 N.Y.S.2d 793 (2d Dep't 1960); Trans-Canada Assurance Agencies, Inc. v. City of Mechanicville, 2 App. Div. 2d 734, 152 N.Y.S.2d 608 (3d Dep't 1956); Ferris v. Agostinelli, 249 App. Div. 638, 291 N.Y.S.2d 668 (2d Dep't 1936) (per curiam). The term party, however, has been construed "not [to] preclude an appeal by persons aggrieved, who, though not strictly parties, are so connected with the litigation that they may be termed quasi parties." Ryder v. Cue Car Rental, Inc., 32 App. Div. 2d 143, 146, 302 N.Y.S.2d 17, 20 (4th Dep't 1969) (quoting 10 CARMODY-WAIT 2d § 70:69, at 342 (1966)). Indeed, the courts have been liberal in conferring standing to appeal upon nonparties adversely affected by judgments. *See, e.g.*, Doundoulakis v. Town of Hempstead, 51 App. Div. 2d 302, 381 N.Y.S.2d 287 (2d Dep't 1976), *rev'd on other grounds*, 42 N.Y.2d 440, 368 N.E.2d 24, 398 N.Y.S.2d 401 (1977); Sherman v. Morales, 50 App. Div. 2d 610, 375 N.Y.S.2d 377 (2d Dep't 1975) (mem.); People v. Dobbs Ferry Medical Pavillion, Inc., 40 App. Div. 2d 324, 340 N.Y.S.2d 108 (2d Dep't), *aff'd mem.*, 33 N.Y.2d 584, 301 N.E.2d 435, 347 N.Y.S.2d 452 (1973); Ryder v. Cue Car Rental, Inc., 32 App. Div. 2d 143, 302 N.Y.S.2d 17 (4th Dep't 1969); Grabb v. Nicholas, 2 App. Div. 2d 446, 156 N.Y.S.2d 685 (4th Dep't 1956) (per curiam); Posen v. Cowdin, 267 App. Div. 158, 44 N.Y.S.2d 842 (1st Dep't 1943) (per curiam); *In re* Estate of Mistrett, 75 Misc. 2d 377, 347 N.Y.S.2d 805 (Sur. Ct. Erie County 1973).

[73] Justice Hopkins was joined in his opinion by Justices Latham, Suozzi and Rabin.

stockholders, whether or not they were parties to the action.[74] Observing that, under prior case law, nonparties had been permitted to appeal judgments that adversely affected them,[75] the court found that the res judicata effect of Auerbach's derivative action was sufficient to justify according Wallenstein "appellant status."[76]

Turning to Wallenstein's motion to intervene, the court analogized a derivative action to a class action in its effect on other members of the class, engrafting the class action requirement of "fair and adequate representation of the members of the class" onto derivative actions.[77] The court noted that, when the stockholder who brings an action chooses not to appeal an adverse judgment, the court may permit another stockholder to intervene for the purpose of taking an appeal.[78] Acknowledging that intervention is not normally permitted after the entry of judgment at trial,[79] Justice Hopkins nevertheless found that post-judgment intervention was appropriate under the "unusual circumstances" present in the case.[80] While the original plaintiff could not be compelled to take an appeal, Justice Hopkins reasoned, "he should not be allowed to enlarge his lack of enthusiasm into an insurmountable barrier against others of the class readier to take up the cudgels."[81]

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[74] 64 App. Div. 2d at 104, 408 N.Y.S.2d at 86; *see* Dresdner v. Goldman Sachs Trading Corp., 240 App. Div. 242, 269 N.Y.S. 360 (2d Dep't 1934); Gerith Realty Corp. v. Normandie Nat'l Sec. Corp., 154 Misc. 615, 276 N.Y.S. 655 (Sup. Ct. N.Y. County 1933), *aff'd mem.*, 241 App. Div. 717, 269 N.Y.S. 1007 (1st Dep't 1934), *aff'd mem.*, 266 N.Y. 525, 195 N.E. 183 (1935); *cf.* Sylvander v. Farmers & Traders Life Ins. Co., 21 App. Div. 2d 851, 251 N.Y.S.2d 298 (4th Dep't 1964) (outcome of prior action not binding with respect to issues of fact not previously litigated); Darraugh v. Carrington, 50 N.Y.S.2d 481 (Sup. Ct. N.Y. County 1944), *aff'd per curiam*, 270 App. Div. 932, 62 N.Y.S.2d 241 (1st Dep't 1946) (outcome of first action res judicata only with respect to issues litigated).

[75] 64 App. Div. 2d at 104, 408 N.Y.S.2d at 85 (citing People v. Dobbs Ferry Medical Pavillion, Inc., 40 App. Div. 2d 324, 325, 340 N.Y.S.2d 108, 110 (2d Dep't), *aff'd*, 33 N.Y.2d 584, 301 N.E.2d 435, 347 N.Y.S.2d 452 (1973)). The court stated that the true test is "whether the nonparty may be bound by the judgment if he does not take affirmative action in the litigation to protect his rights." 64 App. Div. 2d at 104, 408 N.Y.S.2d at 86 (citations omitted).

[76] 64 App. Div. 2d at 101, 408 N.Y.S.2d at 84.

[77] 64 App. Div. 2d at 104, 408 N.Y.S.2d at 86. Federal and state class action statutes both require that all class members be fairly and adequately represented. FED. R. CIV. P. 23(a)(4); CPLR 901(a)(4) (1976). There is no similar requirement, however, in derivative actions at the state level, although the federal statute expressly mandates fair and adequate representation. FED. R. CIV. P. 23.1(2); *see* N.Y. BUS. CORP. LAW § 626 (McKinney 1963).

[78] 64 App. Div. 2d at 105, 408 N.Y.S.2d at 86.

[79] *Id.; see* note 60 *supra.*

[80] 64 App. Div. 2d at 105, 408 N.Y.S.2d at 86; *accord,* Krenitsky v. Ludlow Motor Co., 276 App. Div. 511, 514, 96 N.Y.S.2d 102, 105 (3d Dep't 1950). The court noted that a motion for intervention is a matter for judicial discretion. 64 App. Div. 2d at 105, 408 N.Y.S.2d at 86.

[81] 64 App. Div. 2d at 105, 408 N.Y.S.2d at 86. Having granted Wallenstein permission

Auerbach represents the first case in which a New York appellate court has considered the problems created by the refusal of a party to appeal an adverse judgment that binds similarly situated nonparties.[82] It appears, however, that the court's grant of Wallen-

to intervene and take the appeal, the *Auerbach* court considered the action on its merits. The court reversed special term's grant of summary judgment, finding that the lower court erred in invoking the business judgment doctrine prior to the discovery and deposition stages of the action. *Id.* at 108, 408 N.Y.S.2d at 88; *see* note 66 *supra.* Justice Hopkins noted that, although the doctrine is often applied to insulate corporate directors' acts, it may not be utilized when their good faith is at issue. 64 App. Div. 2d at 106, 408 N.Y.S.2d at 87; *accord,* Koral v. Savory, Inc., 276 N.Y. 215, 217, 11 N.E.2d 883, 885 (1937); *cf.* Ripley v. International Rys. of Cent. America, 8 App. Div. 2d 310, 317, 188 N.Y.S.2d 62, 72 (1st Dep't 1959), *aff'd,* 8 N.Y.2d 430, 171 N.E.2d 443, 209 N.Y.S.2d 289 (1960) (refusal of corporation to sue effective only if "based on the exercise of discretion or business judgment"); Syracuse Television, Inc. v. Channel 9, Syracuse, Inc., 51 Misc. 2d 188, 194, 273 N.Y.S.2d 16, 25 (Sup. Ct. Onondaga County 1966) (demand that a corporation sue "must be met by a wrongful refusal"). *See generally* 3A W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1039 (rev. perm. ed. 1975). Rejecting the respondents' contention that good faith was conclusively established by the findings of the litigation committee, *see* note 65 *supra,* the *Auerbach* court found that there were sufficient indicia of the directors' bad faith to preclude summary judgment "practically at the pleading stage." 64 App. Div. 2d at 108, 408 N.Y.S.2d at 88. Particularly persuasive to the *Auerbach* court was that, although the litigation committee itself had been satisfied that the defendants had acted in good faith, the committee report contained substantial evidence of wrongdoing. *See id.* at 106, 408 N.Y.S.2d at 87. The court also suggested that, despite the fact that the directors who made the report were unconnected to the topic of investigation, they might have great difficulty overcoming a natural hesitancy to implicate their fellow directors. *Id.* at 107, 408 N.Y.S.2d at 88. *See also* Nutt, *A Study of Mutual Fund Independent Directors,* 120 U. PA. L. REV. 179, 216 (1971). Relying upon the resolution of a recently decided federal case with nearly identical facts, Lasker v. Burks, 567 F.2d 1208 (2d Cir.), *cert. granted,* 47 U.S.L.W. 3221 (Oct. 2, 1978), the court stated that "summary judgment which ends a derivative action at the threshold, before the plaintiff has been afforded the opportunity of pretrial discovery and examination before trial, should not be the means of foreclosing a nonfrivolous action." 64 App. Div. 2d at 107-08, 408 N.Y.S.2d at 88. Thus, the *Auerbach* court has limited the scope of the business judgment doctrine to situations in which preliminary judicial fact finding takes place and the possibility of bad faith has been excluded. *See* Fox, *Nonparty Stockholder Wins Appeal of Derivative Action,* N.Y.L.J., Aug. 14, 1978, at 1, col. 3; *see, e.g.,* Pollitz v. Wabash R.R., 207 N.Y. 113, 124-26, 100 N.E. 721, 723-24 (1912); Chelrob, Inc. v. Barrett, 265 App. Div. 455, 457, 39 N.Y.S.2d 625, 627 (2d Dep't 1943) (per curiam), *modified on other grounds,* 293 N.Y. 442, 57 N.E.2d 825 (1944); Heimann v. American Express Co., 53 Misc. 2d 749, 763, 279 N.Y.S.2d 867, 881 (Sup. Ct. N.Y. County 1967). Such a conclusion appears sound, since it prevents corporate directors from foreclosing all derivative actions against them by appointing "disinterested" committees to attest to their good faith.

[82] 64 App. Div. 2d at 101, 408 N.Y.S.2d at 84. Standing to appeal a derivative action has been granted to a nonparty stockholder prior to *Auerbach. See* Posen v. Cowdin, 267 App. Div. 158, 44 N.Y.S.2d 842 (1st Dep't 1943) (per curiam). In *Posen,* the stockholder who brought the action agreed to a compromise with the respondents. Before approving the compromise, the court directed that the nonparty stockholders be given an opportunity to air any objections. *Id.* at 159, 44 N.Y.S.2d at 843. The appellant used the opportunity to object, but the court nevertheless approved the compromise. The objecting stockholder subsequently was permitted to appeal after the appellate division found that he had appellate standing under CPA 557, the predecessor of CPLR 5511. 267 App. Div. at 160, 44 N.Y.S.2d at 843-44. *Posen*

stein's motion to intervene was presaged by earlier decisions involving intervention.[83] Despite the historical bias against permitting an individual to become a party to an action begun by another,[84] the *Auerbach* decision is consistent with the modern judicial view that intervention should be liberally allowed.[85] Moreover, the case for allowing post-judgment intervention in derivative actions is particularly strong when the plaintiff who initiated the suit refuses to appeal an adverse outcome. In such cases, the policy against permitting interested individuals to wait while another bears the risk and expense of litigation is not offended,[86] since the need to intervene is not foreseeable prior to judgment.[87] A rule contrary to that suggested

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is distinguishable from *Auerbach*, however, since the appellant in the former case specifically qualified as a party by having interposed an objection before the trial court. *Id.*

A closer question was presented in *In re* Estate of Mistrett, 75 Misc. 2d 377, 347 N.Y.S.2d 805 (Sur. Ct. Erie County 1973). In *Mistrett*, the original plaintiff died during the pendency of an appeal from a judgment dismissing his $20,000 claim against his estranged wife. The couple's son, who was appointed administrator of the estate, declined to prosecute the appeal, seeking instead to have his father's accounts settled. *Id.* at 378, 347 N.Y.S.2d at 806. Without discussing the effect of CPLR 5511, the *Mistrett* court held that the testator's other creditors, who had an interest in seeing the money returned to the estate, had standing to prosecute the appeal. 75 Misc. 2d at 378, 347 N.Y.S.2d at 806.

[83] *See* Soto v. Lenscraft Optical Corp., 7 N.Y.2d 747, 162 N.E.2d 740, 193 N.Y.S.2d 655 (1959); Unitarian Universalist Church v. Shorten, 64 Misc. 2d 851, 315 N.Y.S.2d 506, *vacated on other grounds*, 64 Misc. 2d 1027, 316 N.Y.S.2d 837 (Sup. Ct. Nassau County 1970); note 82 *supra*.

[84] *See* Note, *Non-Parties' Right of Appeal in Civil Actions*, 48 COLUM. L. REV. 1233, 1234 (1948); 2 WK&M ¶ 1012.01.

[85] *See, e.g.*, Teleprompter Manhattan CATV Corp. v. State Bd. of Equalization & Assessment, 34 App. Div. 2d 1033, 311 N.Y.S.2d 46 (3d Dep't 1970); *In re* Eberlin, 18 App. Div. 2d 1068, 239 N.Y.S.2d 569 (1st Dep't 1963) (per curiam); Raymond v. Honeywell, 58 Misc. 2d 903, 297 N.Y.S.2d 66 (Sup. Ct. Duchess County 1968). One court has noted that New York's provision for intervention as of right was modeled after FED. R. CIV. P. 24, "in an attempt to further broaden [the] scope and liberalize [the] application" of intervention as of right. Mann v. Compania Petrolera Trans-Cuba S.A., 17 App. Div. 2d 193, 197, 234 N.Y.S.2d 1001, 1005 (1st Dep't 1962) (citing TWELFTH ANN. REP. N.Y. JUD. COUNCIL 218-32 (1946)).

[86] While the intervenor in *Auerbach* had initiated an independent suit prior to the entry of judgment in the main action, it is submitted that the *Auerbach* court's reasoning need not be limited to such a factual situation. There appears to be no reason not to allow any stockholder to intervene in a derivative action, because the amount of recovery by the corporation on whose behalf the action is brought will remain constant no matter how many plaintiffs there are.

[87] It is interesting to note that, while the court recognized that earlier intervention would have helped Wallenstein avoid later controversy, it expressly refused to impose any duty of earlier intervention upon him:

> Doubtless, a consolidation or joint trial of all the stockholders' actions in the State (or elsewhere, if the procedural machinery were available) predicated on the alleged wrongful payments would prevent either an unseemly race among competing stockholders or the abrupt and unreviewable ending of all the actions by an

in *Auerbach* would invite collusion between corporate directors and stockholders, as it would enable directors to squelch litigation by exerting influence over the party prosecuting it.[88]

John H. Beers

ARTICLE 31—DISCLOSURE

CPLR 3101: Pre-trial disclosure on the issue of child custody in a matrimonial action denied

CPLR 3101, New York's disclosure statute, provides that a party has a right to "all evidence material and necessary in the prosecution or defense of an action."[89] Notwithstanding this broad

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unappealed decision in one action at nisi prius. But neither the stockholder plaintiffs, the corporation, nor the defendants have found that remedy appropriate for one reason or another. In the circumstances, the intervention by Wallenstein should be permitted and his timely filing of an appeal effectuated by the hearing of the argument on the merits.

64 App. Div. 2d at 105-06, 408 N.Y.S.2d at 87.

[88] The potential for collusion between corporate directors and stockholders was described by the second department over 40 years ago:

> It would be very easy for offending officers and directors to obtain a friendly stockholder to begin an action and to suppress all information on the subject. The defendants and not stockholders would then be in control of the litigation. If the doctrine here advocated by the defendants prevails, all other stockholders are prevented from bringing actions in good faith — unless to their already great difficulties, . . . they must have added the duty of establishing by proof that the first action is in fact collusive. If other stockholders without intervention rely on the first action to furnish a remedy to all, then it may be permitted to drag along until the Statute of Limitations has run and be discontinued on a private settlement or otherwise; and other stockholders will be left remediless.

Dresdner v. Goldman Sachs Trading Corp., 240 App. Div. 242, 247-48, 269 N.Y.S. 360, 367 (2d Dep't 1934). *See generally* McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit*, 46 YALE L.J. 421 (1936). The problem discussed by the *Dresdner* court has been alleviated to some extent by N.Y. BUS. CORP. LAW § 626(d) (McKinney 1963), which prohibits pre-judgment termination of derivative actions without approval of the trial court. The dilemma persists, however, in cases such as *Auerbach*, where the initial plaintiff prosecutes the action at the trial level but refuses to pursue a meritorious argument to the appellate level. It is submitted that the *Auerbach* holding represents a practical solution in these situations.

[89] CPLR 3101(a) provides in pertinent part that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . . ." Under the statute, only privileged matter, attorneys' work product and materials prepared solely for litigation are specifically exempted from the general rule of full disclosure. CPLR 3101(b)-(d) (1970). *See also* note 97 *infra*.

CPLR 3101(a) was originally enacted as a temporary replacement for its predecessor, § 288 of the Civil Practice Act, ch. 926, [1920] N.Y. Laws 521. Although further study was contemplated, the original language has never been changed and the legislative intent underlying the statute remains unclear. 3A WK&M ¶ 3101.01. The courts, however, consistently