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22 NYCRR 500.6(a): Dismissal of Appeal for Want of Prosecution Precludes Subsequent Appeal in a Civil Action

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service of either a summons and a complaint or a summons with notice.[66]

COURT OF APPEALS RULES OF PRACTICE

22 NYCRR 500.6(a): Dismissal of appeal for want of prosecution precludes subsequent appeal in a civil action.

Rule 500.6(a) of the New York Court of Appeals Rules of Practice requires that an appeal be argued or submitted within 9 months after leave to appeal is granted by the lower court.[67] Noncompliance with this provision results in a summary dismissal for want of prosecution.[68] Recently, in *Bray v. Cox*,[69] the Court of Appeals held that such a dismissal in a civil case is an adjudication on the merits which bars any subsequent appeal of the same issues.[70]

The *Bray* plaintiff was a passenger in a car driven by defendant's decedent while the two were returning from a trip to Buffalo, New York. The vehicle collided with a utility pole, killing the driver and injuring the plaintiff. Both parties were residents of Ontario, Canada, and the car was registered and insured there. The plaintiff brought a negligence action against the defendant's estate in the Supreme Court, Erie County, to recover for personal injuries. The court ruled that the Ontario guest statute, which precluded recovery,[71] was applicable and dismissed the complaint. The appellate division reversed, finding error on the conflict of laws issue.[72] The defendant obtained leave to appeal to the Court of Appeals, but his failure to file and serve the necessary papers for more than a year resulted in dismissal of the appeal pursuant to

[66] *See* 7B MCKINNEY'S CPLR 3012, commentary at 582 (1974).

[67] 22 NYCRR 500.6(a) provides:

> An appeal must be argued or submitted within nine months after the appeal is taken. If it is not so argued or submitted a summary order of dismissal shall be entered on the minutes by the clerk without regard to whether or not the record and briefs have been filed. Notice of entry thereof shall be given by mail to attorneys of record in the cause.

[68] A motion to dismiss for want of prosecution, however, will be denied upon a showing of an adequate reason for the delay. 10 CARMODY-WAIT 2d § 70:260, at 530 (1966); Peterfreund, *Civil Practice*, 1959 *Survey of New York Law*, 34 N.Y.U.L. REV. 1563, 1581 (1959).

[69] 38 N.Y.2d 350, 342 N.E.2d 575, 379 N.Y.S.2d 803 (1976) (per curiam).

[70] *Id.* at 353, 342 N.E.2d at 576, 379 N.Y.S.2d at 805.

[71] ONT. REV. STAT. c. 202, § 132(3) (1970) provides:

> [T]he owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from the motor vehicle, except where such loss or damage was caused or contributed to by the gross negligence of the driver of the motor vehicle.

[72] 39 App. Div. 2d 299, 333 N.Y.S.2d 783 (4th Dep't 1972).

rule 500.6(a) and denial of a later motion to vacate the dismissal.[73] The plaintiff secured a judgment in his favor on the subsequent trial of the negligence action, whereupon the defendant appealed directly to the Court of Appeals,[74] once again seeking review of the appellate division ruling on the applicability of the Ontario guest statute.

With three judges dissenting, the Court of Appeals refused to reach the merits of the case, ruling instead that the appeal was barred by the prior dismissal for want of prosecution.[75] In support of this holding, the majority relied upon "sound logic and reason"[76] together with a sampling of authority from other jurisdictions.[77] The Court expressed concern that to allow a subsequent

[73] 33 N.Y.2d 789, 305 N.E.2d 775, 350 N.Y.S.2d 653 (1973).

[74] 38 N.Y.2d 350, 342 N.E.2d 575, 379 N.Y.S.2d 803 (1976). The defendant was permitted to bring his appeal directly to the Court of Appeals under CPLR 5601(d) which states in pertinent part:

> An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance . . . where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment . . . .

[75] 38 N.Y.2d at 353, 342 N.E.2d at 576, 379 N.Y.S.2d at 805.

[76] *Id.*

[77] The Court cited a number of decisions from the highest benches of other states. Although most of these cases antedated *Bray* by as much as 100 years or more, the Court of Appeals found them applicable since they relied on the same "common law principles and precedent" that formed the basis for its holding. *Id.* at 353-54, 342 N.E.2d at 576, 379 N.Y.S.2d at 806. Among the cases cited by the majority was Carlberg v. Fields, 33 S.D. 410, 413, 146 N.W. 560, 561 (1914), wherein the Supreme Court of South Dakota held that a dismissal for want of prosecution bars a subsequent appeal on any issues that could have been raised previously. The Supreme Court of California, in Karth v. Light, 15 Cal. 324 (1860), ruled that a dismissal for want of prosecution constitutes an affirmance of the lower court's judgment and precludes a second appeal. The *Karth* court distinguished the situation in which the appeal is dismissed for a defect in the pleading or the notice of appeal. A technical defect of this kind, said the court, does not bar a later appeal, but a dismissal for want of prosecution is clearly res judicata. *Id.* at 326-27. *Accord*, Chamberlain v. Reid, 16 Cal. 208 (1860). The *Bray* Court also relied on Schmeer v. Schmeer, 16 Ore. 243, 17 P. 864 (1888) (per curiam), wherein the Supreme Court of Oregon stated: "When a party perfects an appeal, and then abandons it, his right of appeal is exhausted; the power over the subject is *functus officio*, and cannot be exercised the second time." *Id.* (citation omitted).

The most recent authority relied upon by the *Bray* Court was Anderson v. Richards, 173 Ohio St. 50, 179 N.E.2d 918 (1962). In that case, the unsuccessful plaintiff had his appeal dismissed for want of prosecution because he failed to file the necessary notice of appeal within the prescribed time limit. Upon the denial of his subsequent motion for a new trial, the plaintiff again appealed to the court of appeals, this time fully complying with all procedural requirements, and the appellate panel reversed the original judgment. The Ohio Supreme Court reversed this ruling, however, on the ground that the plaintiff's second appeal was precluded by the earlier dismissal for want of prosecution. The court declared that such a subsequent appeal would be permitted only if it were based on "newly discovered grounds for a new trial." *Id.* at 55, 179 N.E.2d at 922 (citation omitted).

Although not cited by the *Bray* Court, decisions of the highest courts in several other states also support its holding. In Stumpff v. Harper, 90 Okla. 195, 214 P. 709 (1923), the Supreme Court of Oklahoma found that an appeal is barred by a prior dismissal for want of prosecution. The court believed that such a ruling was necessary, or "there would be no end to litigation." *Id.* at 196, 214 P. at 710. In Friel v. Beadle, 320 Pa. 204, 182 A. 517 (1936) (per curiam), the Supreme Court of Pennsylvania reached the same conclusion, stating that an appellant should not have "two opportunities to obtain a reversal." *Id.* at 205, 182 A. at 518.

appeal following dismissal of an appeal for want of prosecution would encourage use of the interlocutory appeal as a stalling tactic. The unsuccessful litigant, by the taking of successive appeals, could seriously delay the enforcement of a judgment and thereby deprive the successful party of the benefit of a favorable ruling for quite some time.[78] Furthermore, the Court felt that to permit such appeals would dangerously jeopardize the interests of judicial economy.[79] Disturbed by the idea that an appellant might have two opportunities to appeal on identical issues, the majority stated that "a party should have his day in court, and that day should conclude the matter."[80] The Court also cited its recent opinion in *Crane v. New York*,[81] wherein the Court had refused to vacate a dismissal for want of prosecution of an appeal from a final judgment. Interpreting *Crane* as holding that the dismissal of an appeal for want of prosecution is with prejudice, the *Bray* majority declared that it would not vary the result in the instant case "simply because the order appealed from is nonfinal . . . ."[82]

Chief Judge Breitel, who authored the dissenting opinion,[83] insisted that a dismissal for want of prosecution could not preclude a subsequent appeal because such a dismissal is neither an affirmance nor an adjudication reaching the merits.[84] Indeed, in *Drummond v. Husson*,[85] the Court of Appeals had indicated that dismissal of an appeal for want of prosecution does not constitute affirmance of the judgment below.[86] Similarly, in *Palmer v. Foley*,[87] the Court held that a judgment could not be deemed to have been affirmed as a result of voluntary discontinuance of an appeal.[88] The apparent implication is that such terminations have no res

Similarly, the Court of Appeal of Louisiana, in Succession of Delesdernier, 184 So. 2d 37 (La. 1966), ruled that a dismissal for want of prosecution operates as res judicata on all issues raised on that appeal, even though one of the appellants had died while the appeal was still pending. *Id.* at 43. *Accord*, Aetna Cas. & Sur. Co. v. Bullington, 227 Ga. 485, 181 S.E.2d 495 (1971).

[78] 38 N.Y.2d at 353, 342 N.E.2d at 576, 379 N.Y.S.2d at 805.

[79] *Id.* at 355, 342 N.E.2d at 577, 379 N.Y.S.2d at 807.

[80] *Id.* at 353, 342 N.E.2d at 576, 379 N.Y.S.2d at 805.

[81] 35 N.Y.2d 945, 324 N.E.2d 550, 365 N.Y.S.2d 169 (1974) (per curiam).

[82] 38 N.Y.2d at 353, 342 N.E.2d at 576, 379 N.Y.S.2d at 805.

[83] Judges Jasen and Fuchsberg joined in the Chief Judge's dissent.

[84] 38 N.Y.2d at 356, 342 N.E.2d at 578, 379 N.Y.S.2d at 807 (Breitel, C.J., dissenting).

[85] 14 N.Y. 60 (1856).

[86] The *Drummond* plaintiff sued on a surety agreement whereby the defendants had guaranteed payment of an earlier judgment against another person if the appeal from the judgment was affirmed. Since the appeal had been dismissed for want of prosecution, the Court ruled that affirmance, the condition precedent to the defendants' obligation, had not occurred. "A dismissal of the appeal for want of prosecution, is clearly not *an affirmance* of the judgment." *Id.* at 61 (emphasis in original).

[87] 71 N.Y. 106 (1877).

[88] *Id.* at 112.

judicata effect and thus do not bar subsequent appeal. The *Bray* majority avoided such a conclusion, however, by finding these cases distinguishable because they did not specifically address the reviewability of issues which could have been raised on an earlier appeal.[89]

The rule announced by the *Bray* Court will have an immediate and significant impact on appellate practice in New York. Clearly intended to relieve some of the burden on the judicial process and accelerate its machinery,[90] the decision puts appellate counsel on notice that grants of leave to appeal must not be allowed to slip idly by. Providing for a point at which the neglect of a party will cause litigation to terminate is certainly desirable and has been endorsed by the Supreme Court.[91] Nevertheless, the decision in *Bray* is not beyond criticism. The majority opinion departed substantially from the previous rule in New York,[92] opting instead for an approach

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[89] 38 N.Y.2d at 354-55, 342 N.E.2d at 577, 379 N.Y.S.2d at 806-07.

[90] The majority was concerned that the Court "have the wherewithal to control its calendar." *Id.* at 355, 342 N.E.2d at 577, 379 N.Y.S.2d at 807. Court rules of practice, though they may lack the binding and mandatory nature of statutory requirements, should be carefully observed. As one authority has noted, "the rules directing the serving of briefs and filing of a record on appeal are intended to be obeyed, and are not to be lightly disregarded." 10 CARMODY-WAIT 2d § 70:260, at 530-31 (1966).

[91] In United States v. Munsingwear, Inc., 340 U.S. 36 (1950), the defendant manufacturer was sued by the federal government for having violated price controls. The government sought both injunctive relief and treble damages, but agreed to hold the damages claim in abeyance, pending a final determination of the merits. At trial, the district court found that there had been no violations and therefore refused to grant the injunction. During the pendency of the government's appeal the price controls were lifted, and the court of appeals dismissed the action for mootness. At this point, the government failed to move for an order vacating the original judgment of the trial court as it should have done in order to preserve its right to further litigate the case. Accordingly, when the plaintiff thereafter attempted to revive the damages issue, the Supreme Court denied relief. The Court ruled that the government's neglect had rendered the dismissal for mootness res judicata, concluding that

> [t]he case is therefore one where the United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself. The case illustrates not the hardship of res judicata but the need for it in providing terminal points for litigation.

Id. at 41.

[92] The Court referred to four cases from the appellate division which had reached conclusions contrary to its holding in *Bray*. In both Whyman & Whyman v. Philips, 36 App. Div. 2d 812, 320 N.Y.S.2d 316 (1st Dep't 1971) (per curiam) and Sacramona v. Scalia, 36 App. Div. 2d 942, 321 N.Y.S.2d 632 (1st Dep't 1971) (per curiam), the appellants were permitted to sustain appeals, despite the fact that their appeals on the same issues had previously been dismissed for want of prosecution. In French v. Row, 28 N.Y.S. 849 (4th Dep't 1894), the defendant's failure to prosecute an appeal taken from an interlocutory order of the trial court resulted in a dismissal by the appellate division. After judgment for the plaintiff, the defendant appealed again, raising the issue of the interlocutory order for a second time. The court permitted the appeal, relying on the *Drummond* holding that a dismissal for want of prosecution was not an affirmance. *Id.* at 854. A similar result was reached in Sperling v. Boll, 26 App. Div. 64, 50 N.Y.S. 209 (1st Dep't 1898), wherein the court ruled that a dismissal for want of prosecution is not binding on the merits, so that "if the appeal should subsequently come properly before the court there would be nothing to prevent an inquiry into the merits." *Id.* at 67, 50 N.Y.S. at 211. The *Bray* majority reasoned

previously adopted by a number of other states.[93] It should be noted, however, that there is an equally compelling amount of authority from other jurisdictions supporting the position of the dissent.[94]

Furthermore, the majority's reliance on *Crane v. New York*[95] may be misplaced. The case is cited for the proposition that a 500.6(a) dismissal of an appeal from a final judgment is with prejudice.[96] The *Crane* holding, however, is easily susceptible of a much narrower interpretation. The appellant therein had suffered a dismissal for want of prosecution after neglecting his appeal from a final judgment for more than 6 years. In the ruling cited by the *Bray* majority, the Court of Appeals merely denied the appellant's motion to vacate the previous dismissal.[97] Considering the inordinate delay involved, it is questionable whether the *Crane* holding requires a finding of prejudice in all cases wherein an appeal from a final judgment has been dismissed under rule 500.6(a). Surely,

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that these decisions had either misinterpreted *Drummond* and *Palmer* or relied on no authority at all, and therefore "should no longer be considered sound." 38 N.Y.2d at 355, 342 N.E.2d at 577, 379 N.Y.S.2d at 807.

Another New York case that has particular relevance here is Culliford v. Gadd, 135 N.Y. 632, 32 N.E. 136 (1892) (per curiam), wherein it was held that a dismissal for want of prosecution returns the case to the same position as if no appeal had been taken, thereby entitling the parties to appeal again. Although this appears to be the only precedent from the Court of Appeals that is directly in point, it was completely ignored by the *Bray* majority and received only an oblique reference in the dissenting opinion. *See* 38 N.Y.2d at 357, 342 N.E.2d at 578, 379 N.Y.S.2d at 808 (Breitel, C.J., dissenting). In Myers v. Myers, 169 Misc. 32, 6 N.Y.S.2d 907 (Family Ct. New York County), *rev'd per curiam on other grounds*, 255 App. Div. 599, 8 N.Y.S.2d 379 (1st Dep't 1938), it was stated: "It is axiomatic that upon the dismissal of a proceeding by an appellate court the rights of the parties to the litigation, if any there are, are re-established as if no judgment had been rendered or order made." 169 Misc. at 34, 6 N.Y.S.2d at 909. Unfortunately, the judge rendering the decision cited no authority in support of this "axiom."

Based on this prior case law, a frequently cited practitioner's guide stated the rule to be that a dismissal for want of prosecution does not ordinarily preclude a subsequent appeal, provided that the appellant repeats the proper procedure of obtaining leave to appeal from the court below. 10 CARMODY-WAIT 2d § 70:32, at 298-99 (1966).

[93] *See* note 77 and accompanying text *supra*.

[94] *See, e.g.*, Wilson v. Wilson, 53 Ala. App. 194, 298 So. 2d 616 (1973); Wagner v. Bieley, Wagner & Associates, Inc., 263 So. 2d 1 (Fla. 1972); Doonan v. Winterset, 224 Iowa 365, 275 N.W. 640 (1937); Helm v. Boone, 29 Ky. (6 J.J. Marshall) 351 (1831); Brillhart v. Beever, 198 S.W. 973 (Tex. Civ. App. 1917); Marshall v. Milwaukee & St. Paul R.R., 20 Wis. 676 (1866). Early decisions of the Supreme Court of the United States also provide some support for the position of the *Bray* dissent. *See* Evans v. State Bank, 134 U.S. 330 (1890); United States v. De Pacheco, 61 U.S. (20 How.) 261 (1858); Steamer Virginia v. West, 60 U.S. (19 How.) 182 (1857). Some of this authority is acknowledged by the *Bray* majority. 38 N.Y.2d at 354 n.1, 342 N.E.2d at 577 n.1, 379 N.Y.S.2d at 806 n.1.

[95] 35 N.Y.2d 945, 324 N.E.2d 550, 365 N.Y.S.2d 169 (1974) (per curiam).

[96] 38 N.Y.2d at 353, 342 N.E.2d at 576, 379 N.Y.S.2d at 805. *See* text accompanying notes 82-83 *supra*.

[97] 35 N.Y.2d 945, 946, 324 N.E.2d 550, 365 N.Y.S.2d 169, 170 (1974) (per curiam).

the ruling need not dictate such a result where, as in *Bray*, the judgment below is nonfinal and the delay in prosecution is little more than a year.

Finally, it is clear that in New York a dismissal for want of prosecution at the trial level does not normally bar a subsequent action on the same issues in that cause.[98] It is difficult to see why dismissal should have a more terminal effect in an appellate court than it does upon the original trial of the action. The Court of Appeals has stated that since such a dismissal by the trial court "was not rendered upon the merits, it does not prevent [a subsequent] action for the same cause of action."[99] Clearly, the same reasoning could be readily applied to a dismissal for failure to prosecute by an appellate court. Moreover, the demands of judicial economy and fairness to the parties would seem to be equally compelling at both levels.

Thus, while support can be found for the majority's ruling in both logic and precedent, the wisdom of its decision remains subject to question. Nevertheless, the impact of the holding is clear. As long as *Bray* continues to control in New York, the practitioner should be aware that grants of leave to appeal in a civil case must not be neglected, for the opportunity to appeal on the same issues will not arise again.

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[98] CPLR 3216(a) states:

> Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment . . . the court, on its own initiative or upon motion, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits.

The commentary to this rule observes that "[i]f the motion is made and granted and the order and/or judgment states only that it is for neglect to prosecute, a second action will not be met by the defense of res judicata . . . ." 7B McKINNEY's CPLR 3216, commentary at 922 (1970). *Accord,* Mintzer v. Carl M. Loeb, Rhoades & Co., 10 App. Div. 2d 27, 197 N.Y.S.2d 54 (1st Dep't 1960); Concrete Constr. Corp. v. Commercial Union Ins. Co., 174 N.Y.L.J. 79, Oct. 22, 1975, at 7, col. 2 (Sup. Ct. N.Y. County); De Marco v. Boghossian, 37 Misc. 2d 701, 236 N.Y.S.2d 585 (Westchester County Ct. 1962). The court can specify that a 3216 dismissal *is* on the merits, in which case it would have res judicata effect. This is most unusual, however, and is likely to occur only where the record strongly suggests that the case is defective on the merits. 7B McKINNEY's CPLR 3216, commentary at 922-23 (1970). Interestingly, the Court of Appeals has ruled that even where a dismissal is on the merits, it is still not res judicata where title to realty is involved. Headley v. Noto, 22 N.Y.2d 1, 237 N.E.2d 871, 290 N.Y.S.2d 726 (1968), *discussed in* 7B McKINNEY's CPLR 3216, commentary at 923 (1970). For a discussion of CPLR 3216 and its battle-scarred history, see *The Quarterly Survey,* 41 ST. JOHN's L. REV. 279, 312 (1966). *See also The Survey,* 49 ST. JOHN's L. REV. 792, 819 (1975), wherein CPLR 3216 is distinguished from CPLR 3404 which effects an automatic dismissal upon the abandonment of an action for more than one year. A dismissal under CPLR 3404 does not preclude another action. *Id.* at 820.

[99] Gundersheim v. Bradley-Mahony Coal Corp., 295 N.Y. 539, 541, 68 N.E.2d 599 (1946) (per curiam) (citation omitted).