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Article 30

CPLR 5601(a): Dismissal of Affirmative Defense Is a "Final Order" and Appealable as Such

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The ratio decidendi underlying the decision is clear. If the Court were to allow an appeal or reargument after the time for appeal had expired, every decision would be left uncertain. Moreover, there would never be a "final" decision from which the claimant could institute an appeal to the Court of Appeals. Rather than create such uncertainty, then, the Court, in *Huie*, follows its past policy of denying appeals when the statutory time limit has run.[132]

ARTICLE 56 — APPEALS TO THE COURT OF APPEALS

CPLR 5601(a): Dismissal of affirmative defense is a "final order" and appealable as such.

CPLR 5601(a) provides that an appeal may be taken as of right to the Court of Appeals "from an order of the appellate division which finally determines the action." In *Sirlin Plumbing Co. v. Maple Hill Homes, Inc.*,[133] the defendant interposed an affirmative defense and counterclaim. The appellate division, second department, granted plaintiff's motion to dismiss the affirmative defense and counterclaim and the defendant appealed to the Court of Appeals. Plaintiff sought dismissal of the appeal on the basis that the order of the appellate division was not final. The Court of Appeals reversed and denied the motion to dismiss, holding that the determination of the issue by the appellate division "impliedly severed it from the action," and to that extent it was final.[134]

Early cases have suggested that where the claim dismissed by the appellate division was closely related to the claim still pending the decision was not final.[135] In recent decisions though, the Court of Appeals has taken a different position and has considered as final, orders of the appellate division which have dismissed a claim or cause of action although claims arising out of the same transaction remain undecided.[136]

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[132] *E.g.*, Deeves v. Fabric Fire Hose Co., 14 N.Y.2d 633, 198 N.E.2d 595, 249 N.Y.S.2d 423 (1964). *Cf.* People *ex rel.* Bankers Trust Co. v. Graves, 270 N.Y. 316, 1 N.E.2d 114 (1936); Joannes Bros. Co. v. Lamborn, 237 N.Y. 207, 142 N.E. 587 (1923).

[133] 20 N.Y.2d 401, 232 N.E.2d 394, 283 N.Y.S.2d 489 (1967).

[134] It is clear that there need not be any express direction for severance in the appellate division's order as long as the claim was actually severed. *See In re* Gellatly, 283 N.Y. 125, 27 N.E.2d 809 (1940).

[135] *See, e.g.*, Davis v. Cohn, 286 N.Y. 622, 36 N.E.2d 458 (1941); Cage v. Rosenberg, 271 N.Y. 509, 2 N.E.2d 670 (1936).

[136] *E.g.*, Janos v. Peck, 15 N.Y.2d 509, 202 N.E.2d 560, 254 N.Y.S.2d 115 (1964); Denker v. Twentieth Century-Fox Film Corp., 10 N.Y.2d 339, 179 N.E.2d 336, 223 N.Y.S.2d 193 (1961); Ingraham v. Anderson, 2 N.Y.2d 820, 140 N.E.2d 747, 159 N.Y.S.2d 835 (1957).

Sirlin, while following this trend, is not entirely dispositive of the issue. Although the Court considered the defendant's claim of sufficient variance to allow a separate appeal, it remains apparent that claims which are very closely tied together, *i.e.*, "exceptional situations involving an extremely close interrelationship between the respective claims," [137] may warrant a different result in the future.

CPLR 5601(d): Dual review not permitted.

CPLR 5601(d) provides that an appeal may be taken to the Court of Appeals as of right from a non-final order of the appellate division "which necessarily affects the judgment. . . ." [138] This section is modeled after Sections 588(2) and 590 of the CPA. Under the CPA direct appeal was limited to cases in which the appellate division had made an interlocutory order or an order denying a new trial. Now, under CPLR 5601(d), a direct appeal may be taken on all non-final determinations of the appellate division that "necessarily affect" the final order or judgment, *i.e.*, all orders which if reversed would require a reversal of the final judgment.[139]

In *Knudsen v. New Dorp Coal Corp.*,[140] plaintiff appealed a judgment of the supreme court. The appellate division reversed and remanded. The supreme court, on remand, held for plaintiff. Defendant then appealed both to the Court of Appeals, under CPLR 5601(d), and to the appellate division from the subsequent final judgment of the supreme court. The Court, upon plaintiff's motion to dismiss in the Court of Appeals, held that CPLR 5601(d) did not permit dual review except in unusual circumstances where it was necessary to preserve equality of remedy to each of multiple appellants.[141] Since no such circumstances were present in the instant case, the appeal was improper. The Court stated, however, that if the defendant abandoned the appeal to the

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[137] 20 N.Y.2d 401, 402, 232 N.E.2d 394, 395, 283 N.Y.S.2d 489, 490 (1967). For an excellent discussion of finality as to one or several causes of action see H. COHN & A. KARGER, POWERS OF THE NEW YORK COURT OF APPEALS 84-93 (1952).

[138] In addition, the judgment or determination must satisfy the requirements of CPLR 5601(a) or (b)(1), except as to finality. CPLR 5601(a) provides that the appellate division order must contain a dissent, or the order must have directed a modification or reversal of the lower court judgment. CPLR 5601(b)(1) provides that the appellate division order must have directly involved the construction of either the state or federal constitution.

[139] 7 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶5601.24 (1964).

[140] 20 N.Y.2d 875, 232 N.E.2d 649, 285 N.Y.S.2d 618 (1967).

[141] *See* Defler Corp. v. Kleeman, 18 N.Y.2d 797, 221 N.E.2d 914, 275 N.Y.S.2d 384 (1966).