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CPLR 5601(d): Dual Review Not Permitted

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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).

appellate division within ten days, his appeal to the Court of Appeals would not be dismissed.

While the express language of 5601(d) does not limit dual appeals, cases interpreting CPA 590 did find such a limitation.[142] Since no change of this nature was intended by the recodification, dual review should not be permitted under the CPLR. Moreover, the Legislative Studies and Reports indicate that if review of the subsequent lower court proceedings is desired, the appeal must first be made to the appellate division and then, after their decision, to the Court of Appeals.[143] If dual appeals were allowed, they would be time consuming, result in a duplication of effort, and offend against the requirement of finality. Therefore, in the absence of any unusual circumstances, it appears justified to limit the use of this procedural device.

ARTICLE 57 — APPEALS TO THE APPELLATE DIVISION

CPLR 5701: Issue of liability appealable prior to assessment of damages.

In *Fortgang v. Chase Manhattan Bank*,[144] a negligence action, the issues of liability were tried separately before a jury and a verdict was found for the plaintiffs. Subsequently, an interlocutory judgment was entered and the case was set down for an assessment of damages. On motion to stay trial on the issue of damages pending an appeal from the interlocutory judgment, the appellate division, second department, relying on CPLR 5701, granted the stay, and held the decision appealable.[145]

Prior to *Fortgang*, the second department, in *Bliss v. Londner*,[146] had held that subsequent to a non-jury trial exclusively on the issue of liability, the defendant must await the determination of damages before an appeal may be instituted.

Two years after the *Bliss* decision, the appellate division, first department, in *Hacker v. City of New York*,[147] was confronted with a similar question. In *Hacker*, the court held that an appeal *would* lie after trial on the issues of liability irrespective of the fact that the case would be later scheduled for a determination of

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142 7 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶5601.26 (1964).

143 18 N.Y.2d 797, 221 N.E.2d 914, 275 N.Y.S.2d 384 (1966).

144 29 App. Div. 2d 41, 285 N.Y.S.2d 110 (2d Dep't 1967).

145 CPLR 5701 provides in part that: "An appeal may be taken to the appellate division as of right in an action, originating in the supreme court or county court:

1. from any final or interlocutory judgment. . . ."

146 20 App. Div. 2d 640, 246 N.Y.S.2d 296 (2d Dep't 1964).

147 25 App. Div. 2d 35, 266 N.Y.S.2d 194 (1st Dep't 1966).