St. John's Law Review

Volume 42, January 1968, Number 3 Article 36

CPLR 5511: Defendant May Obtain Limited Review of a Final Determination When Based Only in Part on His Default

St. John's Law Review

an action for damages for the negligent violation of a restraining notice. The court analogized Section 773 of the Judiciary Law to CPLR 5222 and 5251, concluding that a contempt proceeding under the CPLR for violation of a restraining notice was a concurrent remedy which did not bar an action for damages. While CPLR 5251 called for "refusal or willful neglect" [152] for a contempt proceeding to be successful, the facts in *Mazzuka*, as noted, showed the disobedience of the restraining notice to be caused by a mistake and in no way willful.[153]

ARTICLE 55 — APPEALS GENERALLY

CPLR 5511: Defendant may obtain limited review of a final determination when based only in part on his default.

CPLR 5511 provides that " [a]n aggrieved party . . . may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party." This provision carries forward the provision found in CPA 557 and is based on the rationale that where a party defaults, he has acquiesced in the judgment against him, abandoning his legal position, and therefore there can be no error of the lower court which may be the subject of an appeal. However, in those cases where the defendant did contest all or some of the issues against him, he is afforded a limited right to appeal. Thus, if a defendant defaults only in part, he may seek review of those issues which were the subject of a contest in the lower court.[154]

James v. Powell,[155] is an illustration of this proposition. There, the appellants contested the trial court's judgment awarding

---

[152] Prior to 1965, CPLR 5251 required only "failure" to obey in order to punish for contempt. In 1965 "refusal and willful neglect" were substituted for "failure." N.Y. Sess. Laws 1965, ch. 773, § 14.

[153] Even without the change in statutory language of CPLR 5251, it would be impossible to definitively state that contempt requires or does not require the element of intent. *Compare* People v. McCloskey, 6 N.Y.2d 390, 160 N.E.2d 647, 188 N.Y.S.2d 904 (1959), *and* Ditomaso v. Loverno, 242 App. Div. 190, 273 N.Y.S.2d 76 (2d Dep't 1934) (two civil contempt cases where willfulness was assumed to be an element of civil contempt), *with* People *ex rel.* Negas v. Dwyer, 90 N.Y. 402 (1882), *and* Faulisi v. Board of Police Comm'rs, 7 Misc. 2d 704, 162 N.Y.S.2d 687 (Sup. Ct. Steuben County 1957) (two criminal contempt cases wherein it was stated that willfulness is not necessary for a civil contempt proceeding).

[154] *See* 7 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 5511.10, 5511.11 (1964). *See also* People v. Connelly, 217 N.Y. 570, 573, 112 N.E. 579, 580 (1916); Sirianni v. Sirianni, 14 App. Div. 2d 432, 22 N.Y.S.2d 693 (2d Dep't 1961); Sauerbrunn v. Hartford Life Ins. Co., 165 App. Div. 506, 150 N.Y.S. 1039 (1st Dep't 1914), *aff'd*, 220 N.Y. 363, 115 N.E. 1001 (1917).

[155] 19 N.Y.2d 249, 225 N.E.2d 741, 279 N.Y.S.2d 10 (1967). One of the appeals was from the affirmance of the order striking defendant's answers

damages, which were assessed at an inquest, ordered subsequent to plaintiff's default at an examination before trial. The Court faced the issue of whether the judgment was appealable, notwithstanding that it was based in part on the default of the defendants.[156] Since the judgment appealed from was based only in part upon defendant's default, the Court of Appeals found that the defendant was entitled to a review of the matters which defendant's counsel challenged when he appeared at the inquest. The Court found that the defendant's attorney contested (1) the sufficiency of the complaint, (2) the measure of compensatory damages, and (3) the availability of punitive damages. The Court, therefore, considered this appeal, but limited its review to the contested issues.

ARTICLE 62 — ATTACHMENT

CPLR 6212: Forum non conveniens dismissal allows recovery on attachment bond.

CPLR 6212(b) provides that when an order of attachment is made the plaintiff must furnish an undertaking of an amount fixed by the court in order to protect the defendant from damages due to the attachment in the event the defendant prevails or it is finally decided that the plaintiff was not entitled to attachment. If the cause of action is dismissed without an adjudication on the merits, the defendant will not be able to recover on the undertaking.[157]

In *Minskoff v. Fidelity and Casualty Co.*,[158] defendant's prior action had been dismissed on the ground of forum non conveniens. Plaintiffs' property had been attached in that action and they subsequently sued on the attachment bond to recover damages resulting from the attachment. The sole issue was whether a forum non conveniens dismissal was a final determination that defendant was not entitled to an attachment. The majority concluded that although it had not been decided in the prior action whether defendant had a meritorious claim against the plaintiffs, a forum non conveniens dismissal was a final determination that no right to an attachment in this state had existed.

---

and directing an inquest on matters of damages in an action for interference with the collection of a judgment. The Court dismissed this appeal since the order did not finally determine the action and was therefore non-appealable.

[156] James v. Powell, 19 N.Y.2d 249, 250, 225 N.E.2d 741, 742, 279 N.Y.S.2d 10, 12 (1967).

[157] *See* Apollinaris Co. v. Venable, 136 N.Y. 46, 32 N.E. 555 (1892).

[158] 28 App. Div. 2d 85, 281 N.Y.S.2d 410 (1st Dep't 1967).