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# CPLR 5701: Order Denying Motion to Dismiss After Jury Fails to Return a Verdict Held Not Appealable

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given to his employer, was fulfilled by the civil court's enforcing officer, so that the supreme court's enforcing officer was not required to repeat the process.

### ARTICLE 57 — APPEALS TO THE APPELLATE DIVISION

*CPLR 5701: Order denying motion to dismiss after jury fails to return a verdict held not appealable.*

In *Covell v. H.R.H. Constr. Corp.*,[220] after the jury failed to return a verdict, the defendant's motion to dismiss the complaint was denied by the trial court. The defendant then appealed from the order denying the motion, but the appellate division refused to entertain the appeal. In refusing to allow the appeal of a denial of a motion to dismiss upon failure of the jury to return a verdict, the court noted that it recognized an alleged change in the CPLR deleting the specific authority for such appeal. Normally, there would be no adverse effect from such a holding, since the movant could appeal from a final judgment. However, there will be no final judgment in a case where the jury fails to return a verdict, and thus, any appeal of a possibly erroneous order becomes effectively blocked. The disposition of this case turns upon the CPLR's failure to incorporate into CPLR 5701(a) the last sentence of CPA § 457-a, despite advice to do so by the Advisory Committee on Practice and Procedure.[221] CPA § 457-a provided that "in the event a verdict was not returned an appeal may be taken from the order denying a motion for judgment. . . ."[222] The omission has been said to be a mere inadvertence with no intention to change prior law.[223]

Furthermore, CPLR 5701(a)(2) grants appeals as of right where the order involves some part of the merits or affects a substantial right.[224] It is contended that the denial of a motion to dismiss after the jury has failed to return a verdict does affect a substantial right since the parties must now go through a new trial necessitated by the failure of a jury verdict.

This appeal for the purpose of protecting defendant's substantial right of appeal of a question of law should have been allowed by a liberal interpretation of CPLR 5701(a). Furthermore, if the omission of CPA § 457-a in the CPLR was a mere inadvertence, the court should have "read in" such a right to appeal, especially

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[220] 24 App. Div. 2d 566, 262 N.Y.S.2d 370 (2d Dep't 1965).
[221] SECOND REP. 118-20. See CPLR 5701(a)(2); CPA § 457-a.
[222] CPA § 457-a.
[223] 7 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5701.19 (1965); See also 7B McKINNEY's CPLR 5701, commentary 553 (1963).
[224] CPLR 5701(a)(2).

in light of the discretion given the courts in determining the issue of substantial right. There is no indication that a change in the law was intended here, and, on the contrary, authorities agree that no change was to be wrought from this omission.[225]

## ARTICLE 78 — PROCEEDINGS AGAINST BODY OR OFFICER

### *CPLR 7801: Assessment of civil penalty.*

In *City of Rochester v. Diksu Corp.*,[226] plaintiff city sought to enjoin defendant corporation from renting certain premises until defendant obtained a certificate of occupancy. Plaintiff moved for: (1) a preliminary injunction; (2) summary judgment; and (3) assessment of a civil penalty. Prior to this action the plaintiff's officer inspected the dwelling, and, finding it uninhabitable, served defendant with notice of the defects and ordered it to repair or vacate the premises. At the time of this action defendant was advised of its right to a hearing on the inspector's findings.

The defendant persistently contended that the premises were in good repair, but refused to request the hearing. The defendant further maintained that it would be futile to require it to apply for a certificate of occupancy since the building official had previously stated (with regard to other property) that his department would never issue a certificate of occupancy to the defendant.

The court, in its discretion, denied plaintiff's request for summary judgment and injunctive relief because of the apparent friction between plaintiff and defendant and the questions of fact arising therefrom. The court, however, did allow the assessment of a civil penalty against the defendant until such time as it should obtain a certificate of occupancy. In so doing, the court pointed out that the defendant should have exhausted its administrative remedies and then proceeded under Article 78 for review of the acts of plaintiff's officials. Instead, defendant chose to ignore the code provisions and, by inaction, gain time and rents.

The decision in the instant case, in effect, forces the defendant to pursue its administrative remedies and then proceed under Article 78 if it desires relief against the plaintiff city.

The practitioner should glean from the foregoing an awareness that the avoidance of Article 78 and its prerequisites, in such situations, will obtain nothing save a delay, for which the courts will assess a penalty.[227]

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[225] 7 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5701.19 (1965); see also 7B McKINNEY'S CPLR 5701, commentary 553 (1963).

[226] 47 Misc. 2d 407, 262 N.Y.S.2d 690 (Sup. Ct. Monroe County 1965).

[227] See generally 8 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 7801.01 (1965).