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Article 62

Motion to Dismiss for Failure to Diligently Prosecute an Appeal--Indications that Courts Are Becoming Stricter

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any priorities in the above situation the court should have permitted all of the judgment creditors to share pro rata (after the state and city claims were satisfied). There is something to be said for either disposition. CPLR 5234 might be reconsidered with an eye towards giving priority status to judgment creditors who serve subpoenas or restraining notices under article 52.

ARTICLE 55 — APPEALS GENERALLY

Motion to dismiss for failure to diligently prosecute an appeal — Indication that courts are becoming stricter.

In *Tonkonogy v. Jaffin,*[248] a motion was made to dismiss appeals taken from orders dismissing a complaint for insufficiency and a judgment entered thereon. The notices of appeal were served in December 1963. The motion to dismiss was made in May 1964 on the ground that the appellants had not taken any steps to perfect the appeals. The appellate division, first department, granted the motion, holding that an undue delay in the perfection of an appeal tends to frustrate the rights of the respondent and that the rules[249] pertaining to the time limitations for perfecting an appeal are not to be lightly regarded. The court pointed out that a motion to dismiss for failure to prosecute is addressed to the sound discretion of the court and stated the requirements that the appellant, in opposing such a motion, must show that the appeal has merit and that there is a satisfactory excuse for his failure to perfect the appeal.

An analogy may be drawn between the instant case and the case of *Sortino v. Fisher.*[250] *Sortino* involved a motion to dismiss for failure to prosecute the action (as opposed to an appeal). The appellate division, first department, reversed the order of the lower court which had denied the motion, holding that the delay was substantial and unreasonable.[251] It further pointed out that an excuse based on the plaintiff's attorney's press of business would be rejected. This argument was also advanced in *Tonkonogy,* and was rejected, along with the excuse that the appellants lacked funds with which to prosecute the appeal. The court disposed of the latter excuse by pointing out that a person who lacks

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[248] 21 App. Div. 2d 264, 249 N.Y.S.2d 934 (1st Dep't 1964).

[249] CPLR 5530. There are rules in each of the four departments. N.Y. APP. DIV. RR. V. XI, XII, XIII (2), pt. 1 (1st Dep't 1963) are specifically involved in this case.

[250] 20 App. Div. 2d 25, 245 N.Y.S.2d 186 (1st Dep't 1963).
A scholarly discussion of the *Sortino* case is available in 38 ST. JOHN'S L. REV. 448-52 (1964).

[251] The sting has been taken out of the *Sortino* case by the amendment of CPLR 3216 by the legislature in 1964. See 38 ST. JOHN'S L. REV. 406, 461-63 (1964).

funds may be able to take advantage of the liberal provisions of the CPLR regarding the papers on an appeal,[252] or, in a proper case, of the provisions regarding pauper status.[253]

In the earlier cases[254] the usual procedure had been for the court to grant a dismissal conditioned on the delinquent party's failure to perfect the appeal within a stated period of time thereafter. The holding in the *Tonkonogy* case is an indication that the courts will construe the time provisions more strictly than the earlier cases had, and it serves as a warning to the Bar that the time limitations for perfecting appeals must not be casually treated. A party opposing the motion to dismiss must show that the appeal has merit *and* that there is a valid excuse for failing to perfect the appeal. What an adequate excuse will be in a given case will depend on its own peculiar facts. The *Sortino* case should be consulted for guidelines.

CPLR 5530(a) and (b) set out the time requirements for the filing of records and briefs, and when they should be served. But subdivision (c) states that the

> appellate division in each department may by rule applicable in the department prescribe other limitations of time different from those prescribed in subdivisions (a) and (b) for filing and serving records on appeal. . . .

As a result of subdivision (c), subdivisions (a) and (b) have been virtually superseded by the rules of the appellate division in each of the four departments. The attorney should be mindful to consult the time requirements contained in the rules of the individual departments which, to the extent inconsistent with CPLR 5530(a) and (b), supersede the latter.

If a party has a legitimate reason for not being able to comply with the time requirements set out in CPLR 5530(a) and (b) or the applicable appellate division rules, he would be best advised to apply for additional time, perhaps by motion under CPLR 2004, or, if possible, by stipulation with the respondent.[255]

Proper use of the transcript and appendices; Settlement of the transcript — Rule 5525; Use of the appendix — Rule 5528(a)(5).

In *Perry v. Tauro*,[256] the plaintiffs appealed from an order of the supreme court which denied their application to eliminate

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[252] CPLR 5529.
[253] CPLR Art. 11.
[254] *E.g.*, U.S. Hat Co. v. Title Guar. Trust Co., 273 N.Y. 586, 7 N.E.2d 705 (1937); Maronet v. 1010 Rogers, Inc., 17 App. Div. 2d 793, 232 N.Y.S.2d 757 (1st Dep't 1962); Eagle Contractors of Utica, Inc. v. Black, 5 App. Div. 2d 954, 171 N.Y.S.2d 380 (4th Dep't 1958).
[255] *E.g.*, N.Y. App. Div. Rr. XI (6) & XII (5), pt. 1 (1st Dep't 1963).
[256] 21 App. Div. 2d 804, 250 N.Y.S.2d 898 (2d Dep't 1964).