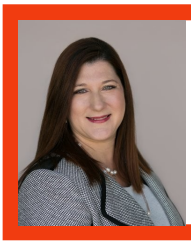

FRANKEL-Y APPEALING

By Tracy L. Frankel, Esq.

Often, when clients think of appeals, they think of three sets of documents: The Notice of Appeal, the Record on Appeal, and the briefs. They will send me a Notice of Appeal with the expectation that the predictable process will follow-that I will prepare the Record and briefs, argue the appeal, and obtain a Decision.

However, the appellate process is not always neat and pretty. There are times when appellate motions become necessary or advisable. For example, I was recently retained to handle an appeal from an Order that was also being appealed by two other parties. Litigation counsel asked that I obtain an extension of time to perfect the appeal. However, in reviewing the documents, it became clear that only one of the three parties had sought and achieved an extension of time to perfect their appeal before the deadlines expired. Two of the parties, including my client, had not applied for a timely extension, assuming, incorrectly, that the granting of one party's application applied to extend all parties' time to perfect appeals from the same Order. I explained to my client that, unfortunately, since the perfect date had expired, a letter application for an extension was not going to be sufficient. Instead, I explained that I would need to make a motion to the Appellate Division, seeking leave to perfect the appeal and to vacate the automatic dismissal of the appeal, pursuant to 22 NYCRR 1250.9, 1250.10, and/or in the interest of justice.

In fact, there are many circumstances that warrant motion practice in the Appellate Courts and it is important to review every document pertaining to an appeal with a discerning eye, to determine potential issues that may give rise to an appellate motion.

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When counsel receives a Notice of Appeal, it is important to evaluate whether an adversary is even appealing from an "appealable paper". Under CPLR 5701, parties do not have an appeal as of right from every Order or directive. For example, there is no appeal as of right from an Order which denied a movant's application to the Court to sign an Order to Show Cause (Bank of NY Mellon v. Joy Taylor, Motion No. M274596 (2d Dept. December 18, 2020), citing Astoria Gas Turbine Power LLC v Tax Comm'n, 14 A.D.3d 553 (2d Dept. 2005). Under CPLR 5701, parties do not have an appeal as of right from an Order made in a proceeding against a body or officer pursuant to Article 78; an Order which requires or refuses to require a more definite statement in a pleading; or Orders or refusals to Order that scandalous or prejudicial matters be stricken from a pleading. Furthermore, the denial of a motion to reargue is not appealable, unless the Court, "in effect" grants the motion by addressing its merits (JW 70th Street LLC v. Simon., 179 A.D.3d 408 [1st Dept. 2020]).

CPLR 5701 (c) states that you can appeal from any order that is not appealable by right in an action originating in the supreme court or a county court by: 1) first getting permission from the Judge who issued the order you would like to appeal; or 2) by permission of a justice of the Appellate Division, upon refusal by the judge who made the initial order; or 3) by direct application to the Appellate Division. However, a Referee's report is not appealable as of right or by permission (Kopelowitz v. Moskowitz, Motion No.: M274597 [2d Dept. December 16, 2020]). Suffice it to say that when an appeal is received, experienced appellate counsel will review the appeal not just for the purposes of briefing the arguments or for timeliness, but to determine whether an immediate motion to dismiss the appeal is viable.

A recent Decision by the Second Department, Charalabidis v. Elnagar, 186 A.D.3d 1313 (2d Dept. 2020), is a fascinating read that highlights the pitfalls of a party's selection of the process to follow to obtain an appealable paper. In Charalabidis, 186 A.D.3d 1313, defense counsel made a motion to the trial judge, on the eve of trial, to disqualify plaintiff's counsel from trying the case, due to a purported conflict of interest. The trial judge orally granted the motion on the record, stating, "this is the Decision and Order of the Court". Plaintiff wanted to appeal from this determination and understood that although the

court reporter certified the transcript of the trial court's determination, a verbal Order is not an appealable paper, unless signed by the Judge. Plaintiff sent the trial judge a certified copy of the transcript for signature, however, the trial judge refused to sign the transcript, thereby preventing plaintiff from obtaining an appealable paper.

According to the Decision in Charalabidis, 186 A.D.3d 1313, plaintiff's counsel complained to the Administrative Judge, but did not receive guidance. Plaintiff's counsel then filed a motion to compel the Court to sign the transcript or issue a signed, appealable order, pursuant to CPLR 2219, which sets forth the requirements of an Order. Once again, the trial judge denied plaintiff's request and plaintiff appealed from the Order which denied the motion to compel.

The end of this tale focuses on process, process, process. While the Appellate Division criticized the trial judge for refusing to furnish plaintiff with an appealable paper to which plaintiff was entitled, the Appellate Division effectively stated that it had no choice but to affirm the denial of the motion to compel. In so holding, the Court stated that the *only remedy* that plaintiff had at his disposal to compel the trial judge to take an action to which plaintiff was entitled, was to have commenced an Article 78 action against the trial judge. Unfortunately, the statute of limitations for an Article 78 proceeding had run during the period in which plaintiff chose to proceed with the appeal from the denial of the motion to compel. All was not lost for this plaintiff, however. As the Appellate Division noted, since the trial judge never memorialized the disqualification determination in an executed Order, the plaintiff did not have to comply with the trial judge's determination.

In addition to evaluating whether the appellant is appealing from an appealable paper, appellate counsel should also evaluate whether the appellant truly has an interest in, and will be directly affected by, the outcome of the appeal. Generally, an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and that the interest of the parties is an immediate consequence of the Judgment (Matter of Cassini, 180 A.D.3d 773 [2d Dept. 2020], citing, Matter of Gonzalez

v. Annucci, 32 N.Y.3d 461 [2018]; *see also,* Castro v. 31st Ave Associates LLC. Motion No.: M274530 [2d Dept. December 14, 2020] [motion to dismiss appeal pursuant to CPLR 5511 on the ground that the appellant is not aggrieved]).

Furthermore, appeals from Orders and Judgments that include directives to act, require their own consideration by appellate counsel, including whether to make a motion to stay the enforcement of the Order or Judgment pending the hearing and determination of the appeal (Colon v. Crespo, Motion No.: M274617 [2d Dept. December 18, 2020]).

Once the Record on Appeal and appellant's brief are filed, there still may be occasion to engage in motion practice. For example, if the Record and/or brief contains documents or refers to matters which are dehors the Record reviewed by the lower court, counsel should consider moving to strike the Record and brief, or portions thereof (IPA Asset Management, LLC v. Schuman, Motion No.: M274489 [2d Dept. December 11, 2020]; Green 333 Corp. v. RNL Life Science, Inc., Motion No.: 3521 [1st Dept. December 10, 2020]). A party can make a motion to enlarge the record or for the court to take judicial notice of the material in the omitted exhibit (Breakaway Courrier v. Berkshire Hathaway, Motion No.: M3546 [1st Dept. December 10, 2020]).

The motions discussed in this blog are only examples of circumstances that may give rise to appellate submissions beyond the Record on Appeal and briefs. What these examples tell us, is that the appellate process can be complicated. Experienced counsel will look for the viability of an appeal beyond the subject of the underlying motion or trial issues and these considerations must take place as soon as appellate counsel is retained. Waiting to perform this review too close to the deadline to file a brief may result in the expiration of time to obtain certain relief, and/or the court's consideration of delay as a factor in their determinations.

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