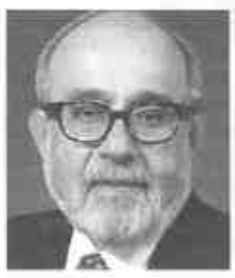
Appellate Courts Find Non-Appealing Parties To Be Unappealing

BY HARRY STEINBERG



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There is an obvious difference between a non-appealing party and an unappealing party, but as far as the appellate courts are concerned, there is no difference because a non-appealing party is unappealing, i.e., it is unlikely to get relief because it has not filed a notice of appeal.

The Notice of Appeal Is Critical

Filing a notice of appeal even when you have gotten most of the relief you have asked for is important given the firm rule stated by the Court of Appeals in *Hecht v. City of New York*,[1] that a party who has not filed a notice of appeal is not entitled to appellate relief. *Hecht* has become the leading case on whether and when appellate relief can be awarded to a non-appealing party.[2]

Hecht is quite possibly a lawyer's worst nightmare—an equally liable defendant has succeeded in obtaining summary judgment while your client stays in the case all because your client failed to file a notice of appeal.

In *Hecht*, plaintiff tripped and fell on a public sidewalk and commenced an action against both the City of New York and Square Depew Garage. A jury found each of the two parties to be 50 percent liable for plaintiff's injury.[3] The City appealed, but Square Depew did not.[4] On appeal, three judges of the Appellate Division, First Department, concluded that plaintiff could not state a claim because "there was no showing that an actionable defect existed" and that "[a]lthough only the City prosecuted an appeal, the whole judgment is before us (CPLR 5501) and our disposition necessarily effects a dismissal as to the garage defendant as well."[5]

One of the two dissenters concluded that plaintiff's claim should be dismissed only as to the City, since it was the sole appealing party, because "this reversal does not inure to the benefit of the non-appealing defendant."[6]

The Court of Appeals adopted the view of the lone dissenter as to whether relief could be granted to the nonappealing party, holding:

> The power of an appellate court to review a judgment is subject to an appeal being timely taken [citations omitted]. And an appellate court's scope of review with respect to an appellant, once an appeal has been timely taken, is generally limited to those parts of the judgment that have been appealed and that aggrieve the appealing party [citations omitted]. The corollary to this rule is that an appellate court's reversal or modification of a judgment as to an appealing party will not inure to the benefit of a nonappealing coparty [citations omitted] unless the judgment was rendered against parties having a united and inseverable interest in the judgment's subject matter, which itself permits no inconsistent application among the parties [citations omitted].
>
> It is, of course, axiomatic that, once an appeal is properly before it, a court may fashion complete relief to the appealing party. On rare occasions, the grant of full relief to the appealing party may necessarily entail granting relief to a nonappealing party.[7]

The Court of Appeals concluded that because the City could be awarded full relief without also granting relief to Square Depew, the Appellate Division erred in dismissing the complaint against Square Depew.[8] In doing so, the Court of Appeals rejected Square Depew's argument that the broad language of CPLR 5522 opened the door for relief to be granted to "any party" because judgments are no longer viewed as indivisible entities so that when there are multiple parties, "the appellate court can fashion relief to the various parties within the confines of the governing substantive law."[9]

This rule applies equally where the Court of Appeals grants leave to appeal—relief will be granted solely to the party who sought leave to appeal, not to any of the other parties[10]—and where the Appellate Division grants leave to appeal even on a broadly-worded certified question.[11]

The Summary Judgment Exception

One of the few exceptions to the rule stated in *Hecht* is based on the broad language of CPLR 3212(b), which has opened the door to cases holding that a "Court may search the record and grant summary judgment to a nonappealing, nonmoving party."[12]

However, even this window provides only a limited opening given the rule stated by the Court of Appeals in *Dunham v. Hilco Construction*,[13] that the broad language of CPLR 3212(b) limits the grant of relief to non-moving parties "only with respect to a cause of action or issue that is the subject of the motions before the court."[14] The Court of Appeals explained that this limitation is dictated by "considerations of simple fairness" and that allowing relief to be granted to any party on any claim "would be tantamount to shifting the well-accepted burden of proof on summary judgment motions."[15]

A further limitation on the broad authority to search the record on motions for summary judgment was stated in *JMD Holding v. Congress Financial*,[16] in which the Court of Appeals held that while "the Supreme Court and the Appellate Division may search the record and grant summary judgment to a nonmoving party ... we may not."

There is, however, a narrow exception to this rule for pure issues of law, as the Court of Appeals noted in *Bingham v. New York City Transit Authority*:[17]

> As we have many times repeated, this Court with rare exception does not review questions raised for the first time on appeal. Unlike the Appellate Division, we lack jurisdiction to review unpreserved issues in the interest of justice. A new issue—even a pure law issue—may be reached on appeal only if it could not have been avoided by factual showings or legal countersteps had it been raised below .... The sound policy reasons that underlie this principle are especially acute when the new issue seeks change in a long-established common-law rule.

The "pure issues of law" exception also applies to questions of statutory interpretation[18] and issues of legislative intent[19] since these issues typically cannot be resolved or challenged by factual or legal showings or arguments.

The Exception Is Narrowly Granted

Notwithstanding the cases cited above which make it clear that both the Supreme Court and the Appellate Division have the authority to grant relief to nonmoving and nonappealing parties, the casebooks are littered with losing parties whose requests for relief as nonappealing parties were rejected, including in summary judgment cases, in terms that suggest that such relief is beyond the power of the Appellate Division to grant. For example, in *Banushi v. Law Office of Scott W. Epstein*,[20] the Appellate Division stated:

> While defendants, in their appellate brief, request a modification to require court approval even if plaintiff is represented by counsel, and indeed requested such relief from the Supreme Court, we are precluded from granting affirmative relief to a nonappealing party.

Nothing in any of these cases, or many more like them, suggest that there is any barrier to the Appellate Division not invoking the power granted it by CPLR 3212(b). However, it appears that the courts, in the exercise of their discretion, generally decline to grant relief to a party who has failed to take the simple step of filing a notice of appeal. Such cases are probably the tip of the iceberg because there are many cases in which a nonappealing party seeks relief and the courts dispose of the appeal with no mention of the nonappealing parties' requests for relief.

One court, even while refusing to grant relief to a nonappealing party has suggested a solution to a nonappealing party left out in the cold—a motion in the Supreme Court for the same relief granted to the appealing party.[21]

The 'Full Relief' Exception

The window available for courts to grant relief to nonappealing parties—i.e., to grant full relief to the appellant, relief must also be granted to the nonappealing party—is also a narrow one. In *Cover v. Cohen*,[22] the sole remaining claims against an automobile manufacturer and a seller were strict liability claims. The Court of Appeals explained that it would dismiss the claims against both the appealing manufacturer and the nonappealing seller because the manufacturer would be required to indemnify the seller if plaintiff prevailed on his claims against the seller. Thus, to grant complete relief to the manufacturer it was necessary to also grant relief to the nonappealing seller.[23]

Similarly, in *Citnalta Construction Corp. v. Caristo Associates Electrical Contractors*,[24] the Appellate Division granted relief to a nonappealing party explaining that "we find the issue appealed, the failure to factor the payments to the original subcontractor into the damages award, to be so inextricably intertwined with the failure to factor the cost of the change orders into that award, that correction of the former error requires correction of the latter."

Likewise, the Appellate Division granted relief to a nonappealing municipal employee because the court dismissed similar claims against his employer, who did appeal, and dismissal of the claims against the nonappealing employee was necessary to grant complete relief to the appealing employer.[25] Under the rubric of granting complete relief, the Appellate Division also granted relief to a nonappealing general contractor "as a means of effectuating complete relief" to the appealing subcontractor.[26] The Appellate Division also dismissed a zoning challenge as time-barred even as to those parties who did not appeal because "this case presents one of those rare occasions in which the grant of full relief to the appealing parties necessarily entails granting relief to nonappealing parties."[27] Similarly, the Appellate Division set aside a foreclosure order against the nonappealing mortgagees, where the appealing mortgagee established that she had not been properly served because "in order to grant full relief to the appellant we must grant relief to non-appealing parties by setting aside the foreclosure sale of the subject property."[28]

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Conclusion

The lesson to be learned is that when confronted by an appeal, the safest course for any party with an even colorable basis for an appeal of its own is to promptly file a notice of cross-appeal instead of, as the appellate process travels its course, belatedly discovering that it, too, needs appellate relief. A request for appellate relief in the absence of a notice of appeal is likely to be met by a deaf ear because, as the Court of Appeals held, a non-appealing party can obtain appellate relief only on "rare occasions."[29]

1. 60 N.Y.2d 57, 467 N.Y.S.2d 187 (1983).
2. As of the end of July 2015, *Hecht* had been cited by other cases 249 times.
3. *Hecht*, 60 N.Y.2d at 60-61, 467 N.Y.S.2d at 529.
4. Id. at 61, 467 N.Y.S.2d at 529.
5. *Hecht v. City of New York*, 89 A.D.2d 524, 524-25, 452 N.Y.S.2d 443, 444 (1st Dep't 1982).
6. Id. at 525, 452 N.Y.S.2d at 444.
7. *Hecht*, 60 N.Y.S2d at 61-62, 467 N.Y.S.2d at 189-90.
8. Id. at 62-63, 467 N.Y.S.2d at 190-91.
9. Id. at 64, 467 N.Y.S.2d at 191.
10. *Oden v. Chemung County Industrial Development Agency*, 87 N.Y.2d 81, 89, 637 N.Y.S.2d 670, 674 (1995); *Board of Education of Bloomfield Central School District v. Christa Construction*, 80 N.Y.2d 1033, 1033, 593 N.Y.S.2d 179, 179 (1993).
11. *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151 n.3, 764 N.Y.S.2d 131, 135 n.3 (2002).
12. *Hastings v. Sauve*, 94 A.D.3d 1171, 1172-73 n.3, 941 N.Y.S.2d 774, 776 n.3 (3d Dep't 2012). See also *Piedra v. Matos*, 40 A.D.3d 610, 612, 835 N.Y.S.2d 407, 408-09 (2d Dep't 2007); *Eighty Eight Bleecker Co. v. 88 Bleecker Street Owners*, 34 A.D.3d 244, 246, 824 N.Y.S.2d 237, 239 (1st Dep't 2006).
13. 89 N.Y.2d 425, 654 N.Y.S.2d 335 (1996).
14. Id. at 430, 654 N.Y.S.2d at 337. See also *LaSalle Bank National Association v. Nomura Asset Capital*, 14 A.D.3d 366, 367, 788 N.Y.S.2d 83, 84 (1st Dep't 2005) ("the authority given to the Appellate Division to search the record and grant summary judgment pertains only to relief for the nonmoving party on a matter addressed in the motion"); *American Ref-Fuel Co. of Hempstead v. Resource Recycling*, 248 A.D.2d 420, 424, 671 N.Y.S.2d 93, 97 (2d Dep't 1998) (rejecting request to search record and grant summary judgment on cross-claim since neither of the defendants "made any motion with respect to the cross claims before the Supreme Court. Although an appellate court may search the record and grant summary judgment in favor of a nonmoving party, it may only do so with respect to a cause of action or issue that was the subject of the motions before the court").
15. *Dunham*, 89 N.Y.2d at 430, 654 N.Y.S.2d at 337.
16. 4 N.Y.3d 373, 385, 795 N.Y.S.2d 502, 511 (2005), citing *Merritt Hill Vineyards v. Windy Heights Vineyard*, 61 N.Y.2d 106, 110-11, 472 N.Y.S.2d 592, 595 (1984) ("Unlike this Court, which has no original jurisdiction over motions and limited authority to review facts, the Appellate Division is a Division of the Supreme Court ... and shares that court's power to search the record and award summary judgment even where, as here, the nonmovant did not appeal"). See also *Graubard Mollen Dannet & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 118 n.2, 629 N.Y.S.2d 1009, 1012 n.2 (1995).
17. 99 N.Y.2d 355, 359, 756 N.Y.S2.d 129, 131 (2003), citing *Telaro v. Telaro*, 25 N.Y.2d 433, 439, 306 N.Y.S.2d 920, 924 (1969). See also *Post v. 120 East End Avenue*, 62 N.Y.2d 19, 29, 475 N.Y.S.2d 821, 825 (1984).
18. *Richardson v. Fielder Roofing*, 67 N.Y.2d 246, 250, 502 N.Y.S.2d 125, 127 (1986).
19. *American Sugar Refining Co. of N.Y. v. Waterfront Commission of New York Harbor*, 55 N.Y.2d 11, 25, 447 N.Y.S.2d 685, 690-91 (1982).
20. 110 A.D.3d 558, 559, 973 N.Y.S.2d 198, 200 (1st Dep't 2013). See also *Antinello v. Young Women's Christian Association*, 42 A.D.3d 851, 852, 841 N.Y.S.2d 150, 151 (3d Dep't 2007) ("Having failed to file a cross-appeal, Bast has waived the right to appellate review of these issues"); *Piquette v. City of New York*, 4 A.D.3d 402, 404, 771 N.Y.S.2d 365, 366 (2d Dep't 2004); *Koller v. Leone*, 299 A.D.2d 396, 397, 751 N.Y.S.2d 266, 267 (2d Dep't 2002); *Buchta v. Union-Endicott Central School District*, 296 A.D.2d 688, 689, 745 N.Y.S.2d 143, 145 (3d Dep't 2002).
21. *Frank L. Ciminelli Construction Co. v. City of Buffalo*, 110 A.D.2d 1075, 1076, 488 N.Y.S.2d 932, 934 (4th Dep't 1985) ("Clarence may, however, move at Special Term to vacate the dismissal pursuant to CPLR 5015(a)(5); because the foundation for dismissal of the third-party complaint has been destroyed by our reinstatement of the complaint herein, such motion should be granted in the interest of justice.").
22. 61 N.Y.2d 261, 473 N.Y.S.2d 378 (1984).
23. Id. at 277-78, 473 N.Y.S.2d at 386-87.
24. 244 A.D.2d 252, 254, 664 N.Y.S.2d 438, 439 (1st Dep't 1997).
25. *Delanoy v. City of White Plains*, 83 A.D.3d 773, 775, 923 N.Y.S.2d 116, 118 (2d Dep't 2011).
26. *Lakewood Construction Co. v. Brody*, 1 A.D.3d 1007, 1009, 769 N.Y.S.2d 664, 666-67 (4th Dep't 2003).
27. *Schiavoni v. Village of Sag Harbor*, 285 A.D.2d 638, 639, 728 N.Y.S.2d 399, 400 (2d Dep't 2001).
28. *Bank One N.A. v. Osorio*, 26 A.D.3d 452, 453, 811 N.Y.S.2d 416, 417 (2d Dep't 2006).
29. *Hecht*, 60 N.Y.2d at 64, 467 N.Y.S.2d at 191.