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Back to Basics: A Primer on the Appealability of Interlocutory Orders
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For any attorney who practices in New York Supreme Court, interlocutory appeals — that is, appeals to the Appellate Division from non-final orders — are a standard fixture. New York's approach to such appeals is so liberal that it is common to assume that just about any order of the Supreme Court will be appealable "as of right" (that is, without the need to seek permission either from that court or from the Appellant Division). But this is only almost true: Some types of orders are not appealable absent permission; others require additional procedural steps before an appeal can be taken. This article explores those nuances.

Substantive Categories: Broad But Not Limitless

On its face, CPLR 5701 (titled "Appeals to appellate division from supreme and county courts") seems to make virtually any order of the Supreme Court appealable as of right. CPLR 5701(a)(2), which lists the types of orders to which this right attaches, is extremely broad in scope—authorizing appeals as of right from (among other things) orders that "involve[] some part of the merits" (CPLR 5701(a)(2)(iv)) or "affect[] a substantial right" (CPLR 5701(a)(2)(v)).

As the official commentary says of these two provisions, "Between them both they cover most orders." Reilly, Practice Commentary, McKinney's Cons. Laws of NY, Book 7B, CPLR 5701, C5701:4. And so it would appear: It seems almost self-evident that any order a party would want to spend the time and money to appeal must (at a minimum) "affect[] a substantial right." See*, e.g., Solomons v. Douglas Elliman*, 95 A.D.3d 696 (1st Dept. 2012) (order denying motion to compel certain discovery impacted a party's "ability to pursue a theory of the case" and was therefore appealable as affecting a substantial right); *Wall Street Assocs. v. Brodsky*, 295 A.D.2d 262, 262-63 (1st Dept. 2002) (ruling that certain testimony was not barred by the Dead Man's Statute affected a substantial right and was therefore appealable as of right; the testimony "may be central to the resolution of the action").

Nevertheless, the Appellate Division Departments have held that some kinds of orders do not affect substantial rights and therefore are not appealable as of right. For example, a pretrial ruling addressing the admissibility of evidence is not appealable as of right unless it also impacts the scope of the issues to be tried. *See Frankel v. Vernon & Ginsburg*, 118 A.D.3d 479 (1st Dept. 2014). An order that directs a hearing in connection with the determination of a motion is not appealable as of right (*see Kornblum v. Kornblum*, 34 A.D.3d 749, 751 (2d Dept. 2006)), nor is an order directing in camera inspection as a precursor to the resolution of a discovery dispute (*see Solomon v. Meyer*, 103 A.D.3d 1025, 1026 (3d Dept. 2013)), or a ruling made in the course of a deposition (*see Turner v. Owens Funeral Home*, 189 A.D.3d 911, 913 (2d Dept. 2020)). The only route to an appeal from such orders is an application for permission under CPLR 5701(c). *See, e.g., Marrero v. Modern Food Center*, 209 A.D.3d 533 (1st Dept.

2022) (treating notices of appeal from orders limiting scope of deposition—which were not appealable as of right—as applications for leave to appeal, and granting such leave).

Moreover, CPLR 5701 itself cautions that some orders are not appealable as of right even if they affect a substantial right. One example of this is an order that denies a motion for leave to reargue. See CPLR 5701(a)(2)(viii). But CPLR 5701(a)(2) also states that the types of orders it lists as appealable as of right are subject to that right only if they are "not specified in subdivision (b)." CPLR 5701(b), in turn, specifies that certain interlocutory orders are never appealable as of right: those made in the course of a proceeding against a body or officer pursuant to CPLR Article 78, those that determine a motion to require a more definite statement in a pleading, and those that determine a motion to strike scandalous or prejudicial matter from a pleading. Again, the only route to an appeal from such an order is an application for permission under CPLR 5701(c). *See Pisula v. Roman Catholic Archdiocese of New York*, 201 A.D.3d 88, 98 (2d Dept. 2021).

Procedural Characteristics: The Additional Requirement of a Motion on Notice

After satisfying itself that an order falls within one of the categories listed in CPLR 5701(a)(2), a party might be tempted to conclude that it has a green light to appeal that order. But although what it has is necessary, it is in fact not sufficient. CPLR 5701(a)(2) also requires that, to be appealable as of right, an order must decide a motion "made upon notice."

Some orders—such as those that result from a motion made by notice of motion or by order to show cause—quite obviously meet this criterion. Others—such as those issued by a court sua sponte—equally obviously do not. But for some orders it is harder to tell.
For example, an order that results from a process initiated by the court is considered sua sponte (and therefore not appealable as of right) even if the court requested and received submissions from the parties before issuing the order. *See Sholes v. Meagher*, 100 N.Y.2d 333, 335-36 (2003). The same is true of an order that disposes of a motion by granting relief that was not requested ("even informally") in the motion (*see Ramirez v. Selective Advisors Group*, 202 A.D.3d 608 (1st Dept.), app. dism'd, 39 N.Y.3d 931 (2022)), an order that resolves an application made by letter to the court rather than through a formal notice of motion (*see Reyes v. Sequiera*, 64 A.D.3d 500, 508 (1st Dept. 2009)), or a determination contained in a status conference order (*see MJC Electric v. Hudson Meridian Constr.*, 194 A.D.3d 574, 574-75 (1st Dept. 2021)). And an order that grants some relief that was sought by motion on notice and other relief that was not requested in the motion may be appealable as of right only in part. *See Duberry v. CNM Analytics*, 180 A.D.3d 648, 651 (2d Dept. 2020).

What options are available to a party who is aggrieved by an order that is not the product of a motion on notice? One is to seek permission to appeal, pursuant to CPLR 5701(c). But the courts do not always grant such permission. *See, e.g., U.S. Bank Trust, N.A. v. Hussain*, 207 A.D.3d 778, 779 (2d Dept. 2022).

CPLR 5701(a)(3) lays out what may be a safer path: It provides for an appeal as of right "from an order, where the motion it decided was made upon notice, refusing to vacate or modify a prior order, if the prior order would have been appealable as of right under paragraph two had it decided a motion made upon notice." In other words, the party aggrieved by an order that is not the product of a motion on notice (but otherwise falls within one of the categories listed in CPLR 5701(a)(2)) may move on notice to vacate or modify that order, and then—assuming the motion to vacate or modify is denied—appeal from the order denying that motion.

Importantly, the motion contemplated by CPLR 5701(a)(3) is not a motion for leave to reargue under CPLR 2221(d): CPLR 5701(a)(3) envisages a motion whose denial will yield an appealable order, whereas an order denying a motion for leave to reargue is not appealable. *See* CPLR 5701(a)(2)(viii); accord *Board of Educ. of City Sch. Dist. of City of N.Y. v. Grullon*, 117 A.D.3d 572, 573 (1st Dept. 2014) (order determining motion that "clearly seeks reargument" rather than vacatur was not appealable). Rather, to yield an appealable order under CPLR 5701(a)(3) an aggrieved party should move—either by notice of motion or by order to show cause—to "vacate or modify" the prior order under CPLR 2221(a), which specifies the requirements for any "motion … to stay, vacate or modify" an order. Assuming that "the prior order would have been appealable as of right under [CPLR 5701(a)(2)] had it decided a motion made upon notice," a denial of the motion to vacate or modify will be appealable as of right. CPLR 5701(a)(3); *see 215 West 84th St. Owner v. Ozsu*, 209 A.D.3d 401 (1st Dept. 2022); accord Grullon, 117 A.D.3d at 573; *Nedell v. Sprigman*, 227 A.D.2d 163 (1st Dept. 1996).

Conclusion

In New York Supreme Court, the availability of an interlocutory appeal as of right remains the rule rather than the exception. Nevertheless, the exceptions to that rule are sufficiently common that a party wishing to take such an appeal should stop to analyze them—and to determine whether further motion practice is necessary to generate an order whose appealability is more clearly assured.

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