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**From the Selected Works of Hon. Gerald Lebovits**

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2008

# Residential Landlord-Tenant Appeals in the Appellate Term—Part I

Gerald Lebovits



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This article is designed to move practitioners through the Appellate Term thicket, from deciding whether to appeal, to exhausting appellate remedies, to winning a residential landlord-tenant appeal. This article focuses on appeals from Housing Court, but similar and often identical rules apply to City and District Court procedures.

After the practitioner obtains a Housing Court order or final judgment under Real Property Actions and Proceedings Law (RPAPL) Article 7, the first appeal is to the appropriate Appellate Term of the Supreme Court. That appeal is as of right.<sup>1</sup> The term “as of right” distinguishes an appeal the Constitution or a statute authorizes from one that must be undertaken by permission, or by leave to appeal—certiorari in the federal system. Appeals then go from the Appellate Term by leave (even if there is a dissenting opinion in the Appellate Term) to the Appellate Division, and

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from there by leave (even if there are dissenting opinions in the Appellate Division) to the Court of Appeals and by certiorari to the United State Supreme Court. For appeals from the Appellate Term to the Appellate Division and, later, to the Court of Appeals and the United States Supreme Court, "[t]here generally are no restrictions on the types of orders and judgments (whether interlocutory, final, etc.) for which permission to appeal may be sought."<sup>2</sup>

Each department of the Appellate Division may create an Appellate Term.<sup>3</sup> Only the Appellate Division's First and Second Departments have done so. Outside the First and Second Departments—meaning the Third and Fourth Departments—residential appeals go from City and Justice Courts (where they are heard in first instance) to County Court (not Supreme Court)<sup>4</sup> and, from there, by right to the Appellate Division,<sup>5</sup> by leave to the Court of Appeals, and then by certiorari to the United States Supreme Court.

The Appellate Term for the First Department covers New York and Bronx Counties. Housing Court judgments and orders from Manhattan and the Bronx go to the Appellate Term, First Department, located at 60 Centre Street, 4th Floor, New York, New York 10007.<sup>6</sup> The clerk's office's telephone number is (646) 386-7763.

Two Appellate Terms are in the Second Department, one for the Second and Eleventh Judicial Districts, which cover Kings, Richmond (Second Judicial District), and Queens (Eleventh Judicial District) Counties, and the other for the Ninth and Tenth Judicial Districts, which cover Dutchess, Nassau, Putnam, Rockland, Suffolk (Tenth Judicial District), Orange, and Westchester (Ninth Judicial District) Counties. Housing Court judgments and orders from Brooklyn, Queens, and Staten Island are argued in the Appellate Term, Second Department, Second and Eleventh Judicial Districts, located

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at 141 Livingston Street, Brooklyn, New York 11201, and at 88-11 Sutphin Boulevard, Queens, New York 11435.<sup>7</sup> Once a year, the justices of the Appellate Term, Second Department, Second and Eleventh Judicial Districts, preside in Staten Island at the Richmond County Clerk's Office, Juror Assembly Center, 126 Stuyvesant Place, Staten Island, New York 10301.<sup>8</sup> The central clerk's office for both Appellate Terms in the Second Department is located at 141 Livingston Street, 15th Floor, in Brooklyn. The telephone number is (347) 401-9580.

Every Appellate Term justice is an elected Supreme Court justice chosen by the Chief Administrator of the Courts with the approval of the Presiding Justice of the respective Department of the Appellate Division.<sup>9</sup> Appellate Term justices are part-time appellate judges who also handle a Supreme Court caseload. A maximum of three justices serve on each panel. Two justices constitute a quorum to render a final order and opinion. Both must concur to render any final order and opinion.<sup>10</sup>

To appeal an Appellate Term order, an appellant must seek and obtain permission from the Appellate Term and, if the Appellate Term denies that application, from the Appellate Division.<sup>11</sup> The Appellate Division will hear only Appellate Term orders that decide an appeal. To appeal from an order granting a new trial or hearing, the appellant must stipulate that judgment absolute will be entered if the Appellate Division affirms the Appellate Term's judgment.<sup>12</sup>

Motions to reargue Appellate Term orders must be made within 30 days after the court made the order, except for good cause shown.<sup>13</sup> Motions to reargue are rarely granted. Leave to appeal to the Appellate Division must be sought within 30 days after service of the Appellate Term order with notice of entry.<sup>14</sup> Appeals to the Appellate Division are governed by C.P.L.R. Art 57.

Appeals to the Court of Appeals can be as of right or by permission. If the decision below involves only the constitutionality of a statutory provision under the New York or United States Constitutions, an appeal may be taken of right directly from the court that issued the decision.<sup>15</sup> A case that originates in the Supreme Court goes to the Court of Appeals of right if two Appellate Division Justices dissent on a matter of law.<sup>16</sup> Appeals that originate from Civil Court judgments go to the Court of Appeals by leave regardless whether or how many Appellate Division Justices dissent. Unless an appeal is of right, permission—in the form of a leave application—is required to appeal from the Appellate Division to the Court of Appeals.<sup>17</sup> Leave to the Court is granted in either of two ways. Two Judges of the Court of Appeals must grant leave before the Court may hear a civil proceeding.<sup>18</sup> Or two Appellate Division Justices may grant leave to the Court.<sup>19</sup> C.P.L.R. Art 56 governs appeals to the Court of Appeals.

### III. APPEALABLE JUDGMENTS, ORDERS, AND PAPER

When a Housing Court judge renders an adverse decision, the practitioner's first step, after consoling the client, is to decide whether the decision constitutes an appealable order or judgment.<sup>20</sup> If not, the practitioner must first exhaust Civil Court remedies by making the appropriate motion in the Housing Court. That way the practitioner will seek the relief the client needs and create an appealable order.

It is often necessary to file a notice of appeal concurrently with a Housing Court motion to preserve appellate remedies. On the other hand, if the order is appealable directly, a notice of appeal must first be filed if there is any possibility that the client will appeal or if, having failed to console the client, the client will no longer be using the practitioner's services.

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It is for the client, not the lawyer, to decide whether to appeal.<sup>21</sup> But spending the \$30 fee to file the notice of appeal will bring peace of mind to both practitioner and client. Advising a client in writing of appellate options is good practice.

(A) *C.P.L.R. 5501: The Court's Jurisdiction*

A final judgment is always appealable.<sup>22</sup> When a final judgment is appealed, any non-final judgment or order that affects the final judgment may be reviewed during the appeal.<sup>23</sup> The Appellate Term reviews both law and fact<sup>24</sup> and Housing Court's exercises of discretion.<sup>25</sup> The Appellate Division reviews Appellate Term decisions on the law and facts, while the Court of Appeals reviews only questions of law, unless the Appellate Division has found new facts.<sup>26</sup>

(B) *C.P.L.R. 5501: Interlocutory Appeals*

Before a final judgment is rendered, an appellant may appeal as of right non-final judgments or orders, called interlocutory orders.<sup>27</sup> Non-final orders that affect a final judgment include orders adverse to the prevailing party below, orders denying a new trial or hearing, rulings to which an appellant objected or had no opportunity to object, and a judge's remark to which the appellant objected.<sup>28</sup> Only an interlocutory order that "necessarily affects the final judgment" may be appealed.<sup>29</sup>

To determine whether an intermediate order or interlocutory judgment "necessarily affects the final judgment," the practitioner should ask whether, assuming the interlocutory judgment is erroneous, its reversal would overturn the final judgment. If it would, "it is a reviewable item; if it would not, and the judgment can stand despite it, it is not reviewable."<sup>30</sup>

Although interlocutory Housing Court orders may be appealed immediately, a direct appeal from an interlocutory order terminates when a final judgment is entered.<sup>31</sup>

After a final judgment is entered, an appeal must be taken from it, although a non-final order that affects the final judgment can be reviewed at that time.<sup>32</sup> The right to appeal a pretrial order ends if no appeal is taken within 30 days after a final judgment is entered.<sup>33</sup>

Because Housing Court handles summary proceedings with relative speed, it is unlikely that the Appellate Term will decide an interlocutory appeal before Housing Court renders a final judgment. As a result, many appeals from interlocutory orders are accompanied by a request to stay the summary proceeding pending the appeal.<sup>34</sup> But there is no right to a stay while an appeal is pending. Absent special circumstances, Housing Court and the Appellate Term are reluctant to grant a stay pending an appeal of an interlocutory, prejudgment order in a summary proceeding, even to avoid unnecessary trial time and expense. By the time the Appellate Term considers an interlocutory order, Housing Court will likely render a final judgment if the case is not stayed and if the order is not merged into the judgment. That alone makes it inefficacious to commence most interlocutory appeals from orders entered during summary proceedings.

The right to perfect an appeal from an interlocutory order is typically exercised at the end of the summary proceeding. This strategy is sound because an appeal from a final judgment brings up for review all prior orders and decisions.<sup>35</sup> If the practitioner appeals an interlocutory order and a final Housing Court judgment is rendered while the appeal is pending, the Appellate Term has the discretion under C.P.L.R. 5520(c) to treat the notice of appeal from the non-final order as a notice of appeal from

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the judgment.<sup>36</sup> The Appellate Term will dismiss the interlocutory order because the right of direct appeal terminates with the entry of the final judgment.<sup>37</sup>

### III. NONAPPEALABLE ORDERS AND PAPER

Only an aggrieved party may appeal from the court of original jurisdiction.<sup>38</sup> To be aggrieved, a party must have a direct interest in the controversy and be bound by the lower court's adjudication.<sup>39</sup> If the appellant's interest in the subject matter of controversy ceased *pendente lite*, the appeal will be dismissed because party is no longer aggrieved under CPLR 5511.<sup>40</sup> A partly successful party is "aggrieved" and may appeal to obtain all the relief to which the party is entitled.<sup>41</sup> Conversely, a judgment or order embodying a decision that "may contain language or reasoning which those parties deem adverse to their interests does not furnish them with a basis for standing to take an appeal"<sup>42</sup> if the prevailing party obtains the relief it sought in first instance.

Similarly, only an order or judgment is appealable.<sup>43</sup> No appeal lies from a conclusion of law, finding of fact, order denying a motion to resettle, pre-trial motion in limine on an evidentiary point (which is merely an advisory opinion if it does not affect a substantial right), recommendation, report, ruling (even if reduced to a written order), or verdict.<sup>44</sup> The appeal is taken from the order or judgment that contains a conclusion of law, finding of fact, order denying a motion to resettle, pre-trial motion in limine, recommendation, report, ruling, or verdict.

Many Housing Court outcomes are not appealable. Not merely the appellant and the respondent but also judge of first instance must know what is appealable. A respondent faced with an appeal over something not appealable can move to dismiss the appeal after the appellant files a notice of appeal or wait to raise the point in the respondent's brief.

The following list illustrates Housing Court outcomes that may not be appealed without further motion practice or which require a motion for leave to appeal.

**Stipulations.** Stipulations of settlement or consent judgments are not appealable.<sup>45</sup> Litigants often stipulate to judgments in Housing Court. Stipulations are strictly enforced.<sup>46</sup> A stipulation negotiated by represented litigants and so-ordered by a judge in open court is difficult to vacate unless a party committed fraud, illegality, or overreaching, or unless the stipulation is unconscionable or violates public policy.<sup>47</sup> Only the resulting order denying or granting the motion to vacate the stipulation of settlement is appealable.

**Orders on default.** An order or judgment entered on default is not appealable,<sup>48</sup> whether in a nonpayment, a holdover, a lockout, or a Housing Part (repair) proceeding. A respondent-tenant's failure to appear at a holdover trial will result in an inquest—which, if the inquest is sustained, will result in an unappealable judgment entered upon default.<sup>49</sup> An unappealable default judgment without an inquest will ensue in a nonpayment proceeding on the respondent-tenant's failure to answer the petition or, having answered the petition, to appear at trial. As to a petitioner who does not appear on a court date, the court will issue an unappealable order of dismissal. If an appellant fails to file opposition papers to a motion requesting final judgment, the appellant is deemed in default, even if the appellant argued orally against the motion.<sup>50</sup> In this case, the appellant is considered a non-aggrieved party.

The party against whom a default is entered must move in Housing Court under C.P.L.R. 5015 to set aside the default. If service was improper, the default will be vacated because the court would have lacked jurisdiction to enter the default. Otherwise, the movant must set forth a valid excuse for

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the default and a meritorious cause of action or defense to the proceeding.<sup>51</sup> The resulting order may be appealed.

For example, an order awarding attorney fees at an inquest on a failure to appear does not give the losing party a right to appeal.<sup>52</sup> The remedy is to move to vacate the default in Civil Court and, in case of a denial, to appeal the decision on that motion.<sup>53</sup>

Tenant-respondents typically use orders to show cause to set aside defaults. Doing so can afford them an interim stay, if the signing judge agrees, that prevents an eviction before the tenant's motion is heard and resolved. If obtaining a stay is not at issue, a practitioner for a landlord or a tenant who seeks to vacate a default may move by regular motion to vacate the default order or judgment.<sup>54</sup> The resulting order, from an order to show cause or a motion, is appealable directly or on appeal from a final judgment.<sup>55</sup>

**Conditional defaults.** If a litigant fails to answer timely or to respond to an order compelling disclosure, called discovery in the federal system, Housing Court may order the litigant defaulted but vacate the default on condition that the defaulting litigant pay costs. An attorney might be tempted to deposit the check immediately. Doing so waives the right to appeal the order granting a conditional default.<sup>56</sup>

**Reargument.** An order denying reargument is not appealable.<sup>57</sup> Litigants may, however, appeal orders that deny reargument but which expand on the court's original reasoning. In addition, litigants may appeal an order entered after a judge agrees to hear reargument but then denies the motion and adheres to its original determination. If the order determining reargument is appealed, or if the judge grants a motion to renew, C.P.L.R. 5517 triggers extended time limits to appeal.<sup>58</sup>

Before bringing a motion for reargument, the practitioner should file a notice to appeal the underlying judgment or order. If reargument is granted, that order is appealable, even if Housing Court adheres to its decision in the prior order and even if no appeal is taken from the prior order.<sup>59</sup>

**Renewal.** An appeal as of right lies from the grant or denial of a motion to renew.<sup>60</sup> An order denying a motion without prejudice to renew is also appealable as of right.<sup>61</sup> The reason an order resolving a renewal motion is appealable but an order denying reargument is not appealable is that a motion to renew puts new material before the court and a motion to reargue does not.

**Ex Parte Orders.** An ex parte order is not appealable.<sup>62</sup> Similarly, a denial of an ex parte order is not appealable directly, although it is reviewable under C.P.L.R. 5704(b).<sup>63</sup> Thus, no appealable issue arises if a judge denies an ex parte subpoena in a nonprimary-residence holdover proceeding. If the judge rules against a litigant at the end of the case, the final judgment may be appealed on the ground that an earlier ruling, such as the court's failure to sign a subpoena, affected the judgment.<sup>64</sup> Counsel should make a record about the court's decision not to sign a subpoena. Otherwise, the error will not be preserved.

**Orders to Show Cause.** The court's refusal to sign an order to show cause that contains a stay is not appealable.<sup>65</sup> If a Housing Court judge declines to sign an order to show cause, which is submitted ex parte (although the court may hear argument from both sides before it signs or declines it), the practitioner may seek a stay from Appellate Term under the ex parte procedures in C.P.L.R. 5704(b). If the court signs an order to show cause with a stay, the opposing party, ex parte, may in the First Department either seek to vacate the stay or use the ex parte procedures of C.P.L.R. 5704(b) to vacate the order. In the Second Department, a practitioner who seeks to vacate a stay must ask the signing judge to vacate the stay under C.P.L.R. 2221(a)(2) before requesting C.P.L.R. 5704(b) relief.

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Once the court determines the order to show cause, which typically contains a stay but need not contain a stay, the order the court issues is appealable.

**Sua Sponte Orders.** No appeal lies from a sua sponte order. The remedy is to move in Housing Court to vacate the order and then appeal if the motion is denied.<sup>66</sup>

**Hearings.** A motion may result in an order that a hearing be held to resolve a contested issue of fact. No right exists to appeal as of right from an order that directs a hearing.<sup>67</sup> A mere order that directs a hearing does not affect a substantial right. The party dissatisfied with the order directing a hearing might prevail at the hearing and therefore is not yet aggrieved.

**Moot Issues.** An appeal will be dismissed if the issue on which the appeal is based becomes academic.<sup>68</sup> Here are some examples of cases in which appeals are rendered moot: A subsequent order dismissing the case on Statute of Limitations grounds;<sup>69</sup> the execution of a warrant of eviction while the appeal is pending if the appeal concerns a motion regarding that warrant;<sup>70</sup> the appellant's consent in a subsequent order to the relief appealed from a previous order;<sup>71</sup> and the expiration of the stay of an eviction warrant's issuance while the appeal is pending if the appeal concerns whether the warrant could properly issue before its expiration date.<sup>72</sup> Additionally, an appealed order will be rendered academic if the parties enter into a stipulation in a subsequent holdover summary proceeding involving the same premises.<sup>73</sup>

The Court of Appeals has formulated a mootness-doctrine exception that arises if the appellant can show three things about the issue under potential appellate review: "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, *i. e.*, substantial and novel issues."<sup>74</sup>

**Death of a Party.** The death of a party divests an appellate court of jurisdiction. The court must stay the proceedings until a substitution is done under C.P.L.R. 1015(a).<sup>75</sup> The court may hold the appeal in abeyance pending the substitution.<sup>76</sup>

**Decisions.** A trial court's decision is not appealable unless it is reduced to an order or a judgment.<sup>77</sup> To be appealed, the order must also constitute a final determination of an issue.<sup>78</sup> An order that does not accurately incorporate a decision may not be appealed directly.<sup>79</sup> An order that does not reflect the decision should be resettled.

Housing Court judges typically issue one-paper opinions that combine the decision and order and which merge the decision into the order as an appealable document. The decision and order will often call for the issuance of a judgment. The judgment becomes the appealable paper.

Sometimes a judge will decide a case orally from the bench and issue an order written as an abbreviation on the front page of the court file or somewhere else on some court papers. If so, the practitioner will need to transcribe the tape, the digital recording, or the court reporter's minutes to appeal the order successfully. Orders and oral rulings, even when transcribed, are not appealable unless the judge signs the transcript and the order is entered.<sup>80</sup> A clerk's extract of trial minutes may not serve as an appealable order.<sup>81</sup>

If a judge delivers an order from the bench but does not reduce it to writing, the practitioner must prepare an order for the judge's signature or ask the court to reduce an order to writing.<sup>82</sup> The Appellate Term accepts a file notation if the Housing Court judge signs and dates it.

Practitioners who wonder whether their order is appealable should attach the Housing judge's memorandum writing to their notice of appeal and then obtain a written order. This situation will occur

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only if the court dismisses the proceeding. Any other outcome will involve a judgment the clerk writes and the judge signs. That judgment is an appealable paper. Signing a judgment is a ministerial act that can, if necessary, be compelled by a C.P.L.R. Article 78 petition.<sup>83</sup>

**Inspections.** Housing Court judges often exercise their discretion to inspect the location at issue, to assign a resource assistant (a Civil Court clerk) to inspect the premises, or to ask an inspector from the New York City Department of Housing Preservation and Development or other City agency to inspect to determine whether there are violations of the Housing Maintenance Code or other City code affecting the premises or the health and safety of the occupants and guests. A decision and order concerning inspection of the subject premises is not appealable.<sup>84</sup>

**Supreme Court Orders and Judgments.** The Appellate Term is a part of the Supreme Court. It may not review or overrule another Supreme Court order or judgment.<sup>85</sup> A Supreme Court order or judgment must be appealed to the Appellate Division.

**Motion on Notice.** No right to appeal lies for an order that does not decide a motion made on notice, but the Appellate Term may exercise its discretion to treat the notice of appeal as an application for leave to appeal.<sup>86</sup>

**Accepting Benefits.** An appellant that accepts the benefits of the order it wishes to appeal waives its right to appeal the order.<sup>87</sup>

#### IV. STANDARDS OF APPELLATE REVIEW

##### (A) *Appealing Findings of Fact and Credibility Determinations*

An appeal may be predicated on Housing Court's findings of fact, including credibility determinations. But these appeals are rarely successful. Appellate courts are loath to substitute their own findings on a cold record. Deferring to the Housing Court's findings of fact strengthens the power of that court, which sees and hears witnesses, and limits appellate review.<sup>88</sup>

Courts of intermediate appellate jurisdiction, such as the Appellate Term and the Appellate Division, will not ordinarily vacate findings of fact unless the record clearly does not support them.<sup>89</sup> A trial court's credibility determinations are entitled to "the greatest respect"<sup>90</sup> and will not be disturbed if they are reached by "any fair interpretation of the evidence."<sup>91</sup>

The Appellate Term's review of facts is necessarily based on the Housing Court's making findings of fact. If Housing Court does not do so, and the "finding must be predicated on a determination of credibility, the matter [will be] remanded for a new trial"<sup>92</sup> or other proceedings because appellate courts do not decide credibility issues in first instance.

In the end, however, the scope of review of a court of intermediate appellate jurisdiction over a nonjury-trial determination is as broad as that of the trial judge's and allows the appellate court to substitute its judgment if the evidence fails to support the trial court's findings.<sup>93</sup>

##### (B) *Appealing Discretionary Determinations*

Courts of intermediate appellate jurisdiction, such as the Appellate Term or the Appellate Division, are vested with broad equity powers to "review a determination for abuse of discretion or substitute its own discretion."<sup>94</sup> The practitioner must always consider whether the ruling appealed from was initially subject to Housing Court's discretion. If it was, the Appellate Term may reverse by invoking its own

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discretion in the court's interest-of-justice prerogative or by finding that the Housing Court judge committed an abuse of discretion.<sup>95</sup>

The Appellate Term's authority is as broad as the trial court's.<sup>96</sup> In this sense, "the appellate court shall have full power to review any exercise of discretion by the court or judge below."<sup>97</sup> Some Housing Court issues, though, such as whether the court should have permitted an adjournment to allow a party to obtain counsel, lend themselves to reversal only if the Appellate Term finds not merely an abuse of discretion but a clear abuse of discretion.<sup>98</sup>

### **(C) *Appealing Unpreserved Issues***

Countless cases hold that an appellate court may not consider for the first time on appeal legal issues unpreserved below.<sup>99</sup> The justification is that defects and errors should be pointed out to the court below to give the court an opportunity to correct them. But courts of intermediate appellate jurisdiction like the Appellate Term may exercise their interest-of-justice prerogative to consider legal issues not raised below. To do so, the Appellate Term will require the advocate to advance a strong reason.

To allow the court reach a just and proper determination, moreover, an issue need not be preserved below "if the question presented is one of law which appeared on the face of the record and which could not have been avoided by the respondents if brought to their attention at the proper juncture."<sup>100</sup> In that sense, the Appellate Term may chart a course different from the litigants' course by deciding a case on grounds never raised below or even on appeal.<sup>101</sup>

## **V. NOTICE OF APPEAL**

### **(A) *The Notice of Appeal for Appeals "As of Right"***

Appellate courts can forgive, for good cause shown, any technical mistake in perfecting an appeal except a failure to serve or file a notice of appeal or a request for leave to appeal.<sup>102</sup>

If appellant incorrectly pursues an appeal as of right, the Appellate Term may deem the notice of appeal a motion for leave to appeal and grant leave in the interest of judicial economy.<sup>103</sup>

If a litigant appeals a judgment or order "as of right," the practitioner must file a notice of appeal within 30 days after the prevailing party serves the adversely decided order or judgment, with notice of entry under C.P.L.R. 2220(a).<sup>104</sup> If the order with notice of entry is served by mail, the appellant has an extra five days to serve and file the notice of appeal.<sup>105</sup> The same five-day extension for service by mail is granted if the side that lost below serves the notice of entry.<sup>106</sup>

The time requirement to serve a notice of appeal may not be waived, enlarged, or extended, even on consent by a so-ordered stipulation.<sup>107</sup> If the notice of entry is irregular, not served on all the parties, or served improperly, the time to appeal will not start to run with the defective entry or service.<sup>108</sup> Rather, if notice of entry is not effected or served, or effected or served irregularly, the time to appeal will extend indefinitely, barred only by laches.<sup>109</sup>

The 30-day time limit to serve and file a notice of appeal has a few limited exceptions: substitution of parties;<sup>110</sup> wrong method of appeal, such as serving a notice of appeal when a request for leave should have been made;<sup>111</sup> death, suspension, removal, or disability of the appellant's attorney;<sup>112</sup> either late service or late filing of the notice of appeal, but not both;<sup>113</sup> and an automatic stay under the

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Bankruptcy Code.<sup>114</sup> A practitioner faced with an oral decision can start the time running by serving a shortform cover sheet with notice of entry.<sup>115</sup> To start the time, the winning party need only copy the cover page, enter the judgment, and serve the notice of appeal. If the case was tried, the judgment, not the order, is the appealable paper. Beware a judge's handwritten changes, which, if they are absent from the order served, will prevent the time from beginning to run.<sup>116</sup> It is best to photocopy the order with the handwritten changes.

The Appellate Term has some powers granted to it whether or not a party files a notice of appeal. For example, the court may search the record and grant summary judgment to a non-appealing party—the party that does not file a notice of appeal from the denial of the motion.<sup>117</sup>

**(B) *Where and Whom to Serve the Notice of Appeal***

The notice of appeal must be served on the adverse party and filed personally or by mail with proof of service in the Housing Court Clerk's Office in which the order or judgment issued.<sup>118</sup> Attach to the notice of appeal a copy of the order or judgment appealed from. The \$30.00 filing fee, payable in the Civil Court Clerk's Office, is waived if permission to proceed as a poor person is granted under C.P.L.R. Article 11. Obtaining poor-person relief is helpful for pro bono practitioners in the First Department because doing so allows a simplified appeal on the original record, using hand-written briefs, rather than on the full record or by appendix. (All appeals in the Appellate Term, Second Department, are on the original record.<sup>119</sup>) If there are multiple parties, a notice of appeal must be served on all of them. A practitioner unsure whether the decision is adverse to a party should serve everyone and let them decide whether the appeal affects them.

Service on a party not represented by counsel may be effected personally; otherwise, serve the attorney of record.<sup>120</sup> If served on an attorney, the notice may be served by ordinary mail, although some attorneys prefer to use registered, certified, overnight, or priority mail. The appeal is formally taken when the addressed and stamped envelope carrying the notice is dropped into a mailbox.<sup>121</sup>

In the Appellate Division, First Department, the appellant must serve and file a preargument statement with the notice of appeal.<sup>122</sup> In the Appellate Division, Second Department, the appellant must serve and file a Request for Appellate Division Intervention (RDAI).<sup>123</sup> Housing Court appeals to the Appellate Term have no such requirements.

**(C) *Drafting Tips for the Notice of Appeal***

A notice of appeal must contain a caption of the proceeding, the name of the appealing party, the judgment or order being appealed, and the court to which the appeal is taken.<sup>124</sup>

Be careful not to waive appellate issues. If only part of an order is appealed from, an appeal from the balance of the order is foreclosed once the 30-day period elapses.<sup>125</sup> Picking and choosing issues or framing the notice of appeal too narrowly can cause problems later.<sup>126</sup> The appeal should therefore be from "each and every part" of the order or judgment.<sup>127</sup>

A litigant may appeal the amount of a judgment, not merely the judgment or order itself. For example, if the appeal concerns an award of attorney fees, the practitioner should also appeal the amount of the award. The appellant's first argument is that fees should not have been awarded. The second argument, made in the alternative, is that even if fees were properly awarded, the amount awarded was too high. The issue will be waived if the amount awarded is not challenged timely.<sup>128</sup>

If a later order may affect the appeal, it is necessary to appeal all later orders. But C.P.L.R.

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5517(b) permits the Appellate Term to review any subsequent order not appealed from if the first order is appealable as of right.<sup>129</sup> A single record will serve for all the appeals taken. All that is required is that the practitioner serve and file an additional notice of appeal from each of the later orders, include the orders in the record with their underlying papers, and add further argument to the brief.

## **VI. STAYS PENDING APPEAL**

It is often necessary for practitioners to obtain a stay while a postjudgment appeal is pending. Stays are frequently sought when a judgment is entered against a tenant-respondent. Judgments against tenants may encompass eviction from their residence. For example, a tenant who loses a nonprimary-residence proceeding will be evicted unless a stay is obtained while the appeal is pending. Similarly, if a judgment is entered against a tenant-respondent in a nonpayment proceeding, the tenant's failure to tender the entire amount to the prevailing landlord before the warrant of eviction issues will result in immediate eviction unless a stay is obtained. The Appellate Term is often receptive to granting a stay in a residential proceeding to avoid an immediate eviction if the status quo can be maintained, "lest the one appeal 'as of right' be frustrated."<sup>130</sup> Losing landlord-petitioners also often seek stays. That may happen if a tenant is awarded a large abatement, treble damages, counterclaim, or legal fees, or if Housing Court directs the landlord to make repairs.

A stay may be sought at any point during an appeal after a notice of appeal is served and filed. Stays pending interlocutory appeals of pretrial motions are rarely granted. The Appellate Term will review Housing Court's decision on the motion after final judgment.

In a close case, an appellant who needs a stay should first speak to the respondent. If the respondent agrees not to enforce the order or judgment, no court order for a stay is necessary.

### **(A) Discretionary Stays**

There are two types of stays: automatic and discretionary. Litigants mostly seek discretionary stays, found by combining C.P.L.R. 2201 with Civil Court Act § 212 and in C.P.L.R. 5519(c), the latter of which applies if the automatic-stay provisions of C.P.L.R. 5519(a)(2)-(6) do not apply.<sup>131</sup> C.P.L.R. 5519(c) lets the Appellate Term modify or vacate a stay motion without the need to appeal a Housing Court stay. The party seeking the stay may move either in Housing Court under C.P.L.R. 5519(c) or in the Appellate Term by affidavit of the party, affirmation of the party's attorney, or both. Where to seek the stay is a matter of strategy. Because the appellant obtained an unfavorable decision from a Housing Court judge, the application for a stay is usually made to the Appellate Term.

The notice of appeal must be served and filed before a stay is sought in the Appellate Term or Civil Court. The motion should include a copy of the judgment or order being appealed, the notice of appeal, and any related orders or decisions. The practitioner should also attach any exhibit that demonstrates why the stay is needed. A brief procedural history and a statement of the merits of the appeal should appear in the affirmation or affidavit or, better, in an attached memorandum of law that is both succinct and concise. The motion should further state when the movant will perfect the appeal and why a stay of enforcement will not irreparably harm the respondent. Competent tenant's counsel in a holdover proceeding will offer to pay all back and current use and occupancy or explain why the tenant cannot or should not do so.

The Appellate Term often conditions granting a discretionary stay on the respondent's perfecting

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the appeal by the next term or, in the Second Department, by a specific date. The court will also set an undertaking, usually paying or posting the judgment and monthly sums for accruing rent or use and occupancy, to maintain the status quo. If a tenant-appellant fails to comply with the Appellate Term's conditions of the discretionary stay, then the landlord-respondent may move to vacate the stay and dismiss the appeal.<sup>132</sup> The Appellate Term's order granting the stay will set the conditions to how a stay may be vacated. A practitioner who represents tenant-appellants should advise them to abide by the terms of the discretionary stay. One consequence of failing to adhere to the Appellate Term's conditions is dismissal of the appeal before its merits are determined. Another is an eviction that follows quickly on the heels of the dismissal or the vacatur of the stay.

Practitioners should also carefully examine the term dates; a stay granted shortly before the end of a term may require perfecting an appeal more expeditiously than a stay granted shortly after the beginning of a term.<sup>133</sup>

As Metz and Gruber explain, "[t]he goal of virtually all pre-appeals motions . . . is to obtain an *interim* stay pending disposition of the motion."<sup>134</sup> It is possible to move at the Appellate Term, Second Department, for a stay by order to show cause if interim relief is sought. An interim stay is often called a temporary restraining order, or TRO.

In the Second Department, the practitioner should submit the order to the clerk's office at 141 Livingston Street in Brooklyn. The clerk will give a justice the order for possible signature. Motion papers on notice are required if interim relief is not requested.<sup>135</sup>

In the First Department, an interim stay is obtained from one justice *ex parte*, although the entire panel may hear a stay pending appeal.<sup>136</sup> Applications are processed within 36 hours, and usually the same day. Practitioners should not use an order to show cause. Rather, they should use a short-service notice of motion to obtain an interim stay or a short return date. The papers should include the notice of motion, a supporting affirmation or affidavit, exhibits, a notice of appeal with the filing-fee receipt, and the order or judgment appealed from. Include a blank sheet of paper between the notice of motion and the supporting papers. The Appellate Term will stamp on the blank sheet the return date, thus assigning the return date, and a short stay pending decision. If an interim stay is granted, the adversary must be served.<sup>137</sup>

The adversary may serve responsive (opposition) papers by ordinary mail up to the return date of the motion. There is no right to reply, although replies are considered if they are filed by the return date. As with all motions in the Appellate Term, there is no oral argument. All motions are submitted; no appearance on the return date is contemplated.<sup>138</sup> And as with all motions, lack of service is waived if the nonmovant responds on the merits, not merely on jurisdictional grounds.<sup>139</sup>

Practitioners who represent tenant-appellants should know that the entire money judgment amount awarded below will likely be the amount the Appellate Term will require to be deposited with the Civil Court as an undertaking, payable directly to the landlord or to the Department of Finance by bond, money order, or certified check.

**(To be continued next month)**

**(Endnotes)**

<sup>1</sup> N.Y.C. Civ. Ct. Act § 1702(a); C.P.L.R. 5515(1), 5703(a).

<sup>2</sup> Sanford F. Young, *Appeals from Intermediate Courts Require Careful Adherence to Applicable Statutes and Rules*, 71 N.Y. St. B.J. 8, 14 (Mar. 1999).

<sup>3</sup> N.Y. Const. art. VI, § 8; N.Y.C. Civ. Ct. Act § 1701.  
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<sup>4</sup> Uniform City Ct. Act § 1701 (appeals from City Ct.); Uniform Just. Ct. Act § 1701 (appeals from Justice Ct.). County Court appellate practice and procedure is provided for in C.P.L.R. Art. 55. The rules governing appealability to County Court are similar to those in the Appellate Division. See C.P.L.R. 5701.

<sup>5</sup> C.P.L.R. 5703(b).

<sup>6</sup> 22 N.Y.C.R.R. 640.1.

<sup>7</sup> *Id.* 730.1(a)(1), (f).

<sup>8</sup> Oral argument will be heard in 2008 at 126 Stuyvesant Place on November 12.

<sup>9</sup> N.Y. Const. art. VI, § 8(a); 22 N.Y.C.R.R. 1.1(f), 730.1(c)(2).

<sup>10</sup> N.Y. Const. art. VI, § 8(c).

<sup>11</sup> C.P.L.R. 5703(a).

<sup>12</sup> *Id.*

<sup>13</sup> 22 N.Y.C.R.R. 640.9(a)(1) (First Department), 731.11(a), 732.11(a) (Second Department).

<sup>14</sup> C.P.L.R. 5513(b), 5703(a), 5516; 22 N.Y.C.R.R. 640.9(b) 731.11, 732.11.

<sup>15</sup> C.P.L.R. 5601(b).

<sup>16</sup> *Id.* 5601(a).

<sup>17</sup> *Id.* 5602(5)(b).

<sup>18</sup> *Id.* 5602(a).

<sup>19</sup> *Id.* 5601(a).

<sup>20</sup> For two brief and helpful articles on appellate jurisdiction, see Craig Peterson, *Appellate Jurisdiction and Scope of Review* 17 in New York Appellate Practice (unpublished article, N.Y. St. Bar Ass'n CLE 2007) [hereinafter "Appellate Jurisdiction"]; James E. Pelzer, *The Basics of Appellate Jurisdiction: The Concepts of Aggrievement, Appealability & Reviewability in New York Civil Appellate Practice* 29 in New York Appellate Practice (unpublished article, N.Y. St. Bar Ass'n CLE 2007).

<sup>21</sup> See, e.g., *In re Judicial Settlement of Account of Proceedings of McGinty*, 129 Misc. 2d 56, 59, 492 N.Y.S.2d 349, 352 (Surr. Ct. Queens County 1985).

<sup>22</sup> N.Y.C. Civ. Ct. Act § 1702(a)(1)-(3).

<sup>23</sup> C.P.L.R. 5501(a)(1).

<sup>24</sup> *Id.* 5501(d).

<sup>25</sup> N.Y.C. Civ. Ct. Act § 1702(d).

<sup>26</sup> C.P.L.R. 5501(c). New York and the federal courts both use the "judicial notice" doctrine. New York also uses the federal appellate de novo standard to review questions of law and, for intermediate courts of appellate jurisdiction like the Appellate Term and the Appellate Division, the federal "clearly erroneous" appellate standard to review questions of fact. New York and federal appellate courts review discretionary determinations under the same abuse-of-discretion standard, but New York does not follow the federal "plain error" doctrine as part of a "harmless error" review. For the differences between the New York and federal appellate standards, see Gerald Lebovits, The Legal Writer, *Technique: A Legal Method to the Madness—Part I*, 75 N.Y. St. B.J. 64 (June 2003); Gerald Lebovits, The Legal Writer, *Technique: A Legal Method to the Madness—Part II*, 75 N.Y. St. B.J. 64 (July/Aug. 2003).

<sup>27</sup> N.Y.C. Civ. Ct. Act § 1702(a)(1).

<sup>28</sup> C.P.L.R. 5501(a)(2-4).

<sup>29</sup> *Id.* 5501(a).

<sup>30</sup> David D. Siegel, New York Practice § 530, at 910 (4th ed. 2005).

<sup>31</sup> N.Y.C. Civ. Ct. Act § 1702; C.P.L.R. 550; *Nivens v. N.Y.C. Hous. Auth.*, 246 A.D.2d 520, 521, 667 N.Y.S.2d 415, 417 (2d Dep't 1998) (mem.), *lv. denied*, 92 N.Y.2d 805, 700 N.E.2d 319, 677 N.Y.S.2d 780 (1998); *Essex v. Newman*, 237 A.D.2d 486, 486, 655 N.Y.S.2d 595, 596 (2d Dep't 1997) (mem.).

<sup>32</sup> C.P.L.R. 5501(a)(1); *Wolf v. Rand*, 258 A.D.2d 401, 404, 685 N.Y.S.2d 708, 711 (1st Dep't 1999) (mem.); *Charchan v. Wilkins*, 231 A.D.2d 668, 669, 647 N.Y.S.2d 550, 551 (2d Dep't 1996) (mem.); *McGraw v. Wack*, 220 A.D.2d 291, 292, 632 N.Y.S.2d 135, 136 (1st Dep't 1995) (mem.).

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<sup>33</sup> *In re Aho*, 39 N.Y.2d 241, 248, 347 N.E.2d 647, 651, 383 N.Y.S.2d 285, 289 (1976).

<sup>34</sup> C.P.L.R. 5519.

<sup>35</sup> *Id.* 5501(a); *Smith v. Maya*, 27 H.C.R. 415B, 416-17, N.Y.L.J., July 23, 1999, at 30, col. 5 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

<sup>36</sup> *Eighty-First Assocs. v. Morell*, 27 H.C.R. 350A, N.Y.L.J., June 23, 1999, at 26, col. 1 (App. Term 1st Dep't) (per curiam).

<sup>37</sup> *Rochdale Vil., Inc. v. Goode*, 16 Misc. 3d 49, 50, 842 N.Y.S.2d 142, 143 (App. Term 2d Dep't 2d & 11th Jud. Dists. June 14, 2007) (mem.).

<sup>38</sup> C.P.L.R. 5511.

<sup>39</sup> *E.g., Advanced Distribution Sys., Inc., V. Frontier Warehousing, Inc.*, 27 A.D.3d 1151, 1152, 811 N.Y.S.2d 840, 841 (4th Dep't 2006) (mem.).

<sup>40</sup> *In re Luckenbach's Will*, 303 NY 491, 104 N.E.2d 870, 303 N.Y. 491 (1952).

<sup>41</sup> *Parochial Bus Sys., Inc. v. Bd. of Educ. of N.Y.C.*, 60 N.Y.2d 539, 544, 458 N.E.2d 1241, 1243, 470 N.Y.S.2d 564, 566 (1983).

<sup>42</sup> *Pennsylvania General Ins. Co. V. Austin Powder Co.*, 68 N.Y.2d 465, 472-73, 502 N.E.2d 982, 986, 510 N.Y.S.2d 67, 71 (1986).

<sup>43</sup> C.P.L.R. 5512(a).

<sup>44</sup> See Appellate Jurisdiction, *supra* note 20, at 22-24.

<sup>45</sup> *Johnson v. Hunte*, 8 Misc. 3d 133(A), 2005 N.Y. Slip Op. 51160(U), \*1, 2005 W.L. 1713319, at \*1 (App. Term 2d Dep't 2d & 11th Jud. Dists. July 21, 2005) (mem.); *Roberson v. Morris*, 22 H.C.R. 292C, N.Y.L.J., May 18, 1994, at 23, col. 3 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

<sup>46</sup> *E.g., 130 W. 57 Co. v. Farley*, 27 H.C.R. 82A, N.Y.L.J., Feb. 16, 1999, at 29, col. 1 (App. Term 1st Dep't) (per curiam).

<sup>47</sup> *E.g., Merwest Realty Corp. v. Prager*, 264 A.D.2d 313, 313-14, 694 N.Y.S.2d 38, 39 (1st Dep't 1999) (mem.); *Knickerbocker Village v. Doe*, N.Y.L.J., Jan. 5, 1994, at 21, col. 2 (App. Term 1st Dep't) (per curiam).

<sup>48</sup> C.P.L.R. 5511; *Abboud v. Abuhegazy*, 243 A.D.2d 519, 519, 663 N.Y.S.2d 96, 97 (2d Dep't 1997) (mem.); *In re Spedicato v. Div. Hous. Comm. Renewal*, 241 A.D.2d 343, 344, 660 N.Y.S.2d 970, 970 (1st Dep't 1997) (mem.); *Blackman v. Powell*, 19 H.C.R. 698B, N.Y.L.J., Dec. 3, 1991, at 30, col. 6 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

<sup>49</sup> *Everett D. Jennings Apts. L.P. v. Hinds*, 12 Misc. 3d 139(A), 2006 N.Y. Slip Op. 51335(U), \*1 2006 W.L. 1892280, at \*1 (App. Term 2d Dep't 2d & 11th Jud. Dists. May 18, 2006) (mem.).

<sup>50</sup> *Simon v. Whitfield*, 2008 N.Y. Slip Op. 50515(U), \*1 (App. Term 2d Dep't 2d & 11th Jud. Dists. Mar. 7, 2008) (mem.) ("Since landlord failed to submit opposition to said cross motion, the order granting the relief requested was entered on default, and no appeal lies therefrom by the defaulting party.") (citing C.P.L.R. 5511; *Coneys v. Johnson Controls, Inc.*, 11 A.D.3d 576, 577, 782 N.Y.S.2d 669, 670 (2d Dep't 2004)); *301 Oriental Blvd. LLC v. Rovner*, 5 Misc. 3d 134(A), 799 N.Y.S.2d 162, 2004 N.Y. Slip Op. 51480(U), \*1 (App. Term 2d Dep't 2d & 11th Jud. Dists. Nov. 30, 2004) (mem.). Under 22 N.Y.C.R.R. 208.11(b)(3), Housing Court may preclude oral argument from a landlord that does not submit papers opposing a tenant's motion. *4117 15th Ave. Realty Corp. v. Huredo*, 184 Misc. 2d 986, 987, 712 N.Y.S.2d 304, 305 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2000) (mem.). But oral opposition is insufficient in any event; oral argument is not part of the appellate record and is of no evidentiary value because it is unsworn. *Fox v. T.B.S.D. Inc.*, 278 A.D.2d 612, 613-14, 719 N.Y.S.2d 150, 151 (3d Dep't 2000), *lv. denied*, 96 N.Y.2d 716, 754 N.E.2d 1114, 730 N.Y.S.2d 31 (2001). Thus, it is irrelevant for appellate purposes that Housing Court heard oral argument; it is an unappealable default nonetheless. *Brown v. Chase*, 3 Misc. 3d 129(A), 787 N.Y.S.2d 676, 2004 N.Y. Slip Op. 50371(U), \*1, 2004 W.L. 1049221, at \*1 (App. Term 2d Dep't 2d & 11th Jud. Dists. Apr. 29, 2004) (mem.) ("Failure to interpose written opposition to a motion renders the resulting order or judgment equivalent to an order or judgment entered upon consent or at least acquiescence, by which the appellant is not aggrieved, and decisions have likened such an appeal to one taken from an order or judgment entered on default, from which no appeal lies. This is true even when, as in this matter, the appealing party appears on the motion return date and orally opposes the motion . . .") (citations omitted). For a discussion of this issue, see Jaya K. Madhavan, *Core Differences Between the First and Second Departments in Residential Landlord-Tenant Law 2* (unpublished article, N.Y. St. Jud. Inst. MCJE 2007).

<sup>51</sup> *Barasch v. Micucci*, 49 N.Y.2d 594, 599, 404 N.E.2d 1275, 1277, 427 N.Y.S.2d 732, 734 (1980); *Berlin v. New Hope Holiness Church of God, Inc.*, 93 A.D.2d 798, 798, 460 N.Y.S.2d 961, 962 (2d Dep't 1983) (mem.).

<sup>52</sup> *Bd. of Mgrs. of Greentree at Murray Hill v. Golub*, 17 Misc. 3d 128(A), 2007 N.Y. Slip Op. 51910(U), \*1, 2007 W.L. 2937118, at \*1 (App. Term 1st Dep't Oct. 5, 2007) (per curiam) (citing C.P.L.R. 5511).

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<sup>53</sup> *Id.* (citing *Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin, LLP v. Mazzella*, 262 A.D.2d 15, 690 N.Y.S.2d 561 (1st Dep't 1999) (mem.)).

<sup>54</sup> C.P.L.R. 5015.

<sup>55</sup> *Id.* 5501(a)(1).

<sup>56</sup> *Campion v. Alter Coach Lines, Inc.*, 137 A.D.2d 647, 647, 524 N.Y.S.2d 738, 738 (2d Dep't 1988) (mem.); *Manhattan Mansions v. Gonclaves*, 2003 N.Y. Slip Op. 51445(U), \*1, 2003 W.L. 22849767, at \*1 (Hous. Part Civ. Ct. N.Y. County May 7, 2003) (Gerald Lebovits, J.).

<sup>57</sup> *Deshler v. East West Renovators, Inc.*, 259 A.D.2d 351, 351, 687 N.Y.S.2d 65, 66 (1st Dep't 1999) (mem.); *Bossio v. Fiorillo*, 222 A.D.2d 476, 477, 635 N.Y.S.2d 59, 60 (2d Dep't 1995) (mem.); *N.Y.C. Prop. Mgmt. v. Santos*, 18 Misc. 3d 5, 6, — N.Y.S.2d — (App. Term 1st Dept 2007) (per curiam); *615 Co. v. Axelrod*, 24 H.C.R. 32A, N.Y.L.J., Jan. 17, 1996, at 29, col. 2 (App. Term 1st Dep't) (per curiam).

<sup>58</sup> David D. Siegel, *McKinney's Commentaries to C.P.L.R.* 5517.

<sup>59</sup> *Centennial Restorations Co. v. Wyatt*, 248 A.D.2d 193, 197-98, 669 N.Y.S.2d 585, 588 (1st Dep't 1998) (mem.); cf. C.P.L.R. 2221, 5701(a)(2)(viii) (Appellate Division).

<sup>60</sup> *Roberts v. Narcissus Boutique, Ltd.*, 72 A.D.2d 808, 808, 421 N.Y.S.2d 917, 918 (2d Dep't 1979) (mem.).

<sup>61</sup> *Venetucci v. Venetucci*, 151 A.D.2d 472, 472, 542 N.Y.S.2d 663, 663 (2d Dep't 1979) (mem.).

<sup>62</sup> *W. 141 St. HDFC v. Jones*, 18 Misc. 3d 135(A), 2008 N.Y. Slip Op. 50183(U), \*1, 2008 W.L. 269096, at \*1 (App. Term 1st Dep't Jan. 31, 2008) (per curiam).

<sup>63</sup> *Spedicato*, 241 A.D.2d at 344, 660 N.Y.S.2d at 970; *Violante v. Berkowitz*, 90 A.D.2d 837, 837, 456 N.Y.S.2d 78, 79 (2d Dep't 1982) (mem.).

<sup>64</sup> *McGraw*, 220 A.D.2d at 292, 632 N.Y.S.2d at 136.

<sup>65</sup> *Edwards v. Chavanes*, 15 Misc. 3d 139(A), 841 N.Y.S.2d 819, 2007 N.Y. Slip Op. 50993(U), \*2, 2007 W.L. 1438704, at \*2 (App. Term 2d Dep't 2d & 11th Jud. Dists. May 14, 2007) (mem.); *Paolini v. Thurston*, 25 H.C.R. 424A, N.Y.L.J., Aug. 7, 1997, at 25, col. 1 (App. Term 1st Dep't) (per curiam).

<sup>66</sup> *Kennedy Plaza, LLC v. Powell*, 11 Misc. 3d 132(A), 2006 N.Y. Slip Op. 50355(U), \*2, 2006 W.L. 623696, at \*3 (App. Term 2d Dep't 2d & 11th Jud. Dists. Mar. 9, 2006) (mem.).

<sup>67</sup> *E.g., Perez v. Perez*, 100 A.D.2d 962, 963, 474 N.Y.S.2d 989, 990 (2d Dep't 1984) (mem.).

<sup>68</sup> *Lefkowitz v. Weis*, 261 A.D.2d 448, 448, 687 N.Y.S.2d 296, 296 (2d Dep't 1999); *Eighty-First Assocs.*, 25 H.C.R. 179A, N.Y.L.J., Mar. 27, 1997, at 27, col. 4.

<sup>69</sup> *Fergusson v. Dumbacher*, 16 Misc. 3d 131(A), 2007 N.Y. Slip Op. 51430(U), \*1, 2007 W.L. 2141615, at \*1 (App. Term 1st Dep't July 26, 2007) (per curiam).

<sup>70</sup> *Lebron v. Hendrickson*, 10 Misc. 3d 133(A), 2005 N.Y. Slip Op. 52086(U), \*1, 2005 W.L. 3488278, at \*1 (App. Term 2d Dep't 9th & 10th Jud. Dists. Dec. 12, 2005) (mem.).

<sup>71</sup> *341 E. 19th St. Realty v. Sylvester*, 8 Misc. 3d 138A, 2005 N.Y. Slip Op. 51311(U), \*1, 2005 W.L. 1981546, at \*1 (App. Term 2d Dep't 2d & 11th Jud. Dists. Aug. 17, 2005) (mem.).

<sup>72</sup> *Pandya v. Korolev*, 9 Misc. 3d 127(A), 2005 N.Y. Slip Op. 51469(U), \*1, 2005 W.L. 2276670, at \*1 (App. Term 2d Dep't 2d & 11th Jud. Dists. Sept. 16, 2005) (mem.).

<sup>73</sup> *Tower W. Assocs. v. Presley*, 13 Misc. 3d 133(A), 2006 N.Y. Slip Op. 51894(U), \*1, 2006 W.L. 284422, at \*1 (App. Term 1st Dep't Oct. 5, 2006) (per curiam).

<sup>74</sup> *In re Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 715, 409 N.E.2d 876, 878, 431 N.Y.S.2d 400, 402 (1980).

<sup>75</sup> *15th Assocs. v. Pamblanco*, 15 Misc. 3d 127(A), 2007 N.Y. Slip Op. 50546(U), 2007 W.L. 852508, at \*1 (App. Term 1st Dep't Mar. 21, 2007) (per curiam).

<sup>76</sup> *Park City LLC v. Benami*, 5 Misc. 3d 129(A), 2004 N.Y. Slip Op. 51266(U), \*2, 2004 W.L. 2399139, at \*2 (App. Term 2d Dep't 2d & 11th Jud. Dists. Oct. 25, 2004) (mem.).

<sup>77</sup> C.P.L.R. 5512(a); *Oppenheim & Co., P.C. v. Bernstein*, 198 A.D.2d 163, 164, 604 N.Y.S.2d 62, 63 (1st Dep't 1993) (mem.); *Schicchi v. J.A. Green Constr. Corp.*, 100 A.D.2d 509, 510, 472 N.Y.S.2d 718, 719 (2d Dep't 1984) (mem.); *Jessamy v. Waltonstead*, 13 Misc. 3d 128 (A), 2006 N.Y. Slip Op. 51742 (U), \*1 (App. Term 2d Dep't 9th & 10th Jud. Dists. Sept. 14, 2006) (mem.).

<sup>78</sup> *In re Shulz v. Galgano*, 88 N.Y.2d 1015, 1015, 671 N.E.2d 1272, 1272, 648 N.Y.S.2d 875, 875 (1996) (mem.).

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- <sup>79</sup> *Peron Restaurant, Inc. v. Young & Rubicam, Inc.*, 179 A.D.2d 469, 470, 578 N.Y.S.2d 194, 195 (1st Dep't 1992) (mem.).
- <sup>80</sup> C.P.L.R. 2219(b), 5512(a); *In re Commitment of Juan Alejandro R. II*, 221 A.D.2d 183, 83, 633 N.Y.S.2d 159, 159 (1st Dep't 1995) (mem.); *Blaine v. Meyer*, 126 A.D.2d 508, 508, 510 N.Y.S.2d 628, 628 (2d Dep't 1987) (mem.).
- <sup>81</sup> *Wilson v. Schindler Haughton Elevator Corp.*, 118 A.D.2d 777, 777, 500 N.Y.S.2d 310, 310 (2d Dep't 1986) (mem.).
- <sup>82</sup> C.P.L.R. 5512; *225 Holding Co. v. Beal*, 12 Misc. 3d 136(A), 2006 N.Y. Slip Op. 51269(U), \*3, 2006 W.L. 1843973, at \*3 (App. Term 2d Dep't 9th & 10th Jud. Dists. June 28, 2006) (mem.).
- <sup>83</sup> *Martinez v. Jacobson*, 253 A.D.2d 521, 522, 677 N.Y.S.2d 161, 162 (2d Dep't 1998) (mem.) (noting that stipulations need not be "so ordered"), *lv. denied*, 93 N.Y.2d 818, 719 N.E.2d 927, 697 N.Y.S.2d 566 (1999).
- <sup>84</sup> *Zaccaro v. Freidenbergs*, 10 Misc. 3d 143(A), 2006 N.Y. Slip Op. 50096(U), \*2, 2006 W.L. 211717, at \*2 (App. Term 1st Dep't Jan. 27, 2006) (per curiam).
- <sup>85</sup> *Negron v. Goldman*, 4 Misc. 3d 140(A), 2004 N.Y. Slip Op. 50958(U), \*2, 2004 W.L. 1944983, at \*2 (App. Term 1st Dep't Aug. 20, 2004) (per curiam).
- <sup>86</sup> *1223 Bushwick, LLC v. Williams*, 2008 N.Y. Slip Op. 50512(U), \*1, 2008 W.L. 711713 (App. Term 2d Dep't 2d & 11th Jud. Dists. Mar. 5, 2008) ("No appeal as of right lies from an order which decides a motion that was not made on notice . . . [a]lthough under appropriate circumstances leave to appeal may be granted.") (citing N.Y.C. Civ. Ct. Act § 1702(a)(2); C.P.L.R. 2211; N.Y.C. Civ. Ct. Act § 1702(c)); *Benben v. DiMartini*, 4 Misc. 3d 135(A), 2004 N.Y. Slip Op. 50778(U), \*1, 2004 W.L. 1620872, at \*1 (App. Term 2d Dep't 9th & 10th Jud. Dists. July 7, 2004) (mem.).
- <sup>87</sup> *HPS Holdings Co. v. AL & Assocs.*, 10 Misc. 3d 135(A), 2005 N.Y. Slip Op. 52103(U), \*1, 2005 W.L. 3488430, at \*1 (App. Term 2d Dep't 2d & 11th Jud. Dists. Dec. 5, 2005) (mem.).
- <sup>88</sup> See, e.g., *Jacobs v. Rosenberg*, 20 H.C.R. 754A, N.Y.L.J., Dec. 21, 1992, at 23, col. 2 (App. Term 1st Dep't) (per curiam).
- <sup>89</sup> See, e.g., *Charles J. Hecht, P.C. v. Clowes*, 224 A.D.2d 312, 312, 638 N.Y.S.2d 42, 43 (1st Dep't 1996) (mem.); *D'Amico v. Allstate Ins. Co.*, 194 A.D.2d 761, 761, 599 N.Y.S.2d 296, 296 (2d Dep't 1993) (mem.). For the state appellate standard reviewing facts, see *Thorsen v. Penthouse Int'l*, 80 N.Y.2d 490, 495, 606 N.E.2d 1369, 1370, 591 N.Y.S.2d 976, 979 (1992).
- <sup>90</sup> *Eschbach v. Eschbach*, 56 N.Y.2d 167, 173, 436 N.E.2d 1260, 1264, 451 N.Y.S.2d 658, 662 (1982) (internal quotations omitted).
- <sup>91</sup> *Claridge Gardens, Inc. v. Menotti*, 160 A.D.2d 544, 545, 554 N.Y.S.2d 193, 194 (1st Dep't 1990) (mem.); accord *Minick v. Park*, 27 H.C.R. 103A, N.Y.L.J., Feb. 25, 1999, at 29, col. 2 (App. Term 1st Dep't) (per curiam).
- <sup>92</sup> *A Real Good Plumber, Inc. v. Kelleher*, 191 Misc. 2d 94, 96, 740 N.Y.S.2d 745, 747 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2002) (mem.); accord *Nederpelt v. Ben Hur Moving & Stor.*, 18 Misc. 3d 138(A), 2008 N.Y. Slip Op. 50314(U), \*1, 2008 W.L. 480036, at \*1 (App. Term 1st Dep't Feb. 22, 2008) (per curiam).
- <sup>93</sup> *Northern Westchester Prof. Park Assocs. v. Town of Bedford*, 60 N.Y.2d 492, 499, 458 N.E.2d 809, 812, 470 N.Y.S.2d 350, 354 (1983).
- <sup>94</sup> *Alliance Prop. Mgmt. & Develop., Inc. v. Andrews Ave. Equities, Inc.*, 70 N.Y.2d 831, 833, 517 N.E.2d 1327, 1328, 523 N.Y.S.2d 441, 442 (1987) (mem.) (reviewing C.P.L.R. 5015 motion to vacate default).
- <sup>95</sup> *Bouton v. De Almo*, 12 Misc. 3d 132 (A), 2006 N.Y. Slip Op. 51166 (U), \*1, 2006 W.L. 1747493, at \*1 (App. Term 1st Dep't June 26, 2006) (per curiam).
- <sup>96</sup> *360 W. 55th St. L.T.v. Anvar*, 13 Misc. 3d 7, 9, 822 N.Y.S. 2d 353, 354 (App. Term 1st Dep't Aug. 3, 2006) (per curiam).
- <sup>97</sup> N.Y.C. Civ. Ct. Act § 1702(d).
- <sup>98</sup> See, e.g., *Blunt v. Northern Oneida County Landfill*, 145 A.D.2d 913, 913-14, 536 N.Y.S.2d 295, 296 (4th Dep't 1988) (mem.).
- <sup>99</sup> E.g., *Rentways, Inc. v. O'Neill Milk & Cream Co., Inc.*, 308 N.Y. 342, 349, 126 N.E.2d 271, 274 (1955); *Nelson v. Times Square Stores Corp.*, 110 A.D.2d 691, 691, 487 N.Y.S.2d 814, 815 (2d Dep't 1985) (mem.).
- <sup>100</sup> *Libeson v. Copy Realty Corp.*, 167 A.D.2d 376, 377, 561 N.Y.S.2d 604, 605 (2d Dep't 1990) (mem.); accord *Infante v. Bisnauthsing*, 16 Misc. 3d 127(A), 2007 N.Y. Slip Op. 51231(U), \*1, 2007 W.L. 1774917, at \*1 (App. Term 1st Dep't June 20, 2007) (per curiam).
- <sup>101</sup> See, e.g., *Notre Dame Leasing, L.L.C. v. Rosario*, — H.C.R. —, N.Y.L.J., July 18, 2001, at 21, col. 2 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) (quoting *Morris Plan Co. of New York v. Globe Indemnity Co.*, 253 N.Y. 496, 497, 171 N.E. 756, 756 (1930) (per curiam) ("Our duty does not require us to reject a contention sound in its ultimate conclusion because the path that we follow is different from the one marked out for us in the argument of counsel."), reconsidering 188 Misc. 2d 291, 727 N.Y.S.2d 271 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2001) (mem.)), *aff'd*, 308 A.D.2d 164, 761 N.Y.S.2d 292 (2d Dep't 2003), *aff'd*, 2 N.Y.3d 459, 812 N.E.2d 291, 779 N.Y.S.2d 801 (2004).

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<sup>102</sup> C.P.L.R. 5520, 5514.

<sup>103</sup> *Green v. Crosby*, 11 Misc. 3d 132(A), 2006 N.Y. Slip Op. 50353(U), \*1, 2006 W.L. 623678, at \*1 (App. Term 2d Dep't 2d & 11th Jud. Dists. Mar. 9, 2006) (mem.).

<sup>104</sup> CPLR 5513(a).

<sup>105</sup> *Id.* 2103(b)(2); *Messner v. Messner*, 42 A.D.2d 889, 890, 347 N.Y.S.2d 589, 589 (1st Dep't 1973) (per curiam).

<sup>106</sup> C.P.L.R. 5513(d).

<sup>107</sup> *Id.* 5513, 5514, 5520; *Haverstraw Park, Inc. v. Runcible Properties Corp.*, 33 N.Y.2d 637, 637, 301 N.E.2d 553, 553, 347 N.Y.S.2d 585, 585 (1973) (mem.); *Reinfeld v. 325 W End Corp.*, 43 A.D.2d 671, 671, 350 N.Y.S.2d 140, 141 (1st Dep't 1973) (per curiam) (waiver).

<sup>108</sup> *Cohen v. Grossman*, 185 A.D.2d 719, 720, N.Y.S.2d 893, 893 (4th Dep't 1992) (mem.); *Maddox v. New York*, 104 A.D.2d 430, 431, 478 N.Y.S.2d 923, 924 (2d Dep't 1984) (mem.); *Nagin v. Long Island Sav. Bank*, 94 A.D.2d 710, 710, 462 N.Y.S.2d 69, 70 (2d Dep't 1983) (mem.).

<sup>109</sup> *Dobess Realty Corp. v. City of N.Y.*, 79 A.D.2d 348, 350, 436 N.Y.S.2d 296, 299 (1st Dep't) (per curiam), *appeal dismissed*, 53 N.Y.2d 1054, 425 N.E.2d 888, 442 N.Y.S.2d 500 (1981).

<sup>110</sup> C.P.L.R. 1022.

<sup>111</sup> *Id.* 5514(a).

<sup>112</sup> *Id.* 5514(b).

<sup>113</sup> *Id.* 5520(a).

<sup>114</sup> 11 U.S.C. § 362.

<sup>115</sup> C.P.L.R. 2219(a); *Corteguera v. City of N.Y.*, 179 A.D.2d 362, 363, 577 N.Y.S.2d 837, 838 (1st Dep't 1992) (mem.).

<sup>116</sup> *Masters, Inc. v. White House Discounts, Inc.*, 119 A.D.2d 639, 640, 500 N.Y.S.2d 790, 791 (2d Dep't 1986) (mem.).

<sup>117</sup> *WSC 72nd St. Owners L.L.C. v. Bondy*, 9 Misc. 3d 126(A), 806 N.Y.S.2d 449, 2005 N.Y. Slip Op. 51432(U), \*2, 2005 W.L. 2216948, at \*2 (App. Term 1st Dep't Sept. 9, 2005) (per curiam).

<sup>118</sup> C.P.L.R. 5515(1).

<sup>119</sup> 22 N.Y.C.R.R. 731.1(a), 732.1(a).

<sup>120</sup> C.P.L.R. 2103.

<sup>121</sup> *Id.* 2103(b)(2).

<sup>122</sup> 22 N.Y.C.R.R. 600.17(a).

<sup>123</sup> *Id.* 670.3(a).

<sup>124</sup> C.P.L.R. 5515(1).

<sup>125</sup> *See, e.g., Dingle v. Pergament Home Centers, Inc.*, 141 A.D.2d 798, 798, 530 N.Y.S.2d 25, 25 (2d Dep't 1988) (mem.).

<sup>126</sup> *See City of Mt. Vernon v. Mt. Vernon Hous. Auth.*, 235 A.D.2d 516, 517, 652 N.Y.S.2d 771, 772 (2d Dep't 1997) (mem.) (prohibiting appellant from amending notice because appellant appealed from order that denied motion to amend complaint but not from order that granted dismissal against appellant).

<sup>127</sup> C.P.L.R. 5515.

<sup>128</sup> *See, e.g., Stanley v. Hawkins*, 180 Misc. 2d 302, 302, 688 N.Y.S.2d 379, 379 (App. Term 1st Dep't 1999) (per curiam).

<sup>129</sup> *Brooklyn Props., LLC v. Shade*, N.Y.L.J., Feb. 11, 2003, at 23, col. 6 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

<sup>130</sup> Robert W. Kanter, (Former) Chief Clerk, App. Term, 1st Dept, Lecture before N.Y. County Law. Ass'n Civ. Ct. Prac. Sect., Feb. 13, 2003, minutes at 1.

<sup>131</sup> Jeffrey R. Metz & Paul N. Gruber, Motion Practice in the Appellate Term 41 (unpublished article, N.Y. St. B. Ass'n CLE 1994) [hereinafter "Motion Practice"].

<sup>132</sup> *Sherman Nagle Realty Corp. v. Cruz*, 5 Misc. 3d 140(A), 799 N.Y.S.2d 164, 2004 N.Y. Slip Op. 51664(U), \*1, 2004 W.L. 2963998, at \*1 (App. Term 1st Dep't Dec. 20, 2004) (per curiam).

<sup>133</sup> James Briscoe West, Landlord-Tenant Appeals 17 n.7 (unpublished article, N.Y. County Law. Ass'n CLE 1999) [hereinafter "Landlord-Tenant Appeals"].

<sup>134</sup> *Motion Practice*, *supra* note 131, at 47 (emphasis in original).

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<sup>135</sup> *Id.* at 48.

<sup>136</sup> *Id.* at 47.

<sup>137</sup> *Id.* at 48.

<sup>138</sup> 22 N.Y.C.R.R. 640.8(c), 731.7, 732.7; see generally C.P.L.R. Art. 22 (motions).

<sup>139</sup> *Brooklyn Props.*, N.Y.L.J., Feb. 11, 2003, at 23, col. 6 (noting that landlord's counsel received tenant's papers only from marshal but answered on merits and thus waived jurisdictional defect).



## **The Law of Single Room Occupancy in New York City**

*By Marti Weithman & Gerald Lebovits\**

For over half a century, single room occupancy (SRO) units have been a staple of New York's housing supply for low-income residents. These residents, among them society's most marginalized, include the elderly, the disabled, the working poor, and people who would otherwise be homeless. SROs began as housing to serve the temporary needs of individuals with instability in their lives. Decades ago they became a necessary part of New York City's permanent affordable housing stock. SROs are housing of last resort for many in a City that has long been experiencing an affordable-housing crisis of critical proportions.

This article covers some aspects of New York City's rent-regulation system applying to SROs in contrast to apartment units.

### **What is an SRO?**

New York City's SRO housing stock consists of several different types of buildings, each with its own legal classification in New York State or City law. This varied housing stock includes hotels, rooming houses, middle-sized or larger single room occupancy buildings, and lodging houses. Generally, but not always, SRO tenants share a bathroom or kitchen, or both, living only in a single room that might vary in size depending on the type of unit and building.

The Multiple Dwelling Law (MDL) defines a single room occupancy as "the occupancy by one or two persons of a single room, or of two or more rooms which are joined together, separated from all other rooms within an apartment in a multiple dwelling."<sup>1</sup>

SRO buildings are classified as class A, "permanent residence," or class B, "transient housing." The MDL defines class A buildings as "a multiple dwelling which is occupied, as a rule, for permanent residence purposes. This class shall include . . . apartment hotels, bachelor apartments, . . . and all other multiple dwellings except class B multiple dwellings."<sup>2</sup> MDL § 248(1) deems a dwelling occupied for single room occupancy use a class A multiple dwelling.

The MDL defines a class B multiple dwelling as one "occupied, as a rule transiently, as the more or less temporary abode of individuals or families who are lodged with or without meals. This class shall include hotels, lodging houses, rooming houses, [and] boarding houses . . . ."<sup>3</sup>

Both class A and class B dwelling units in SRO buildings, including hotels, single room occupancy buildings, rooming houses, and lodging houses, are rent-stabilized if erected on or before July 1, 1969; contain six or more units; charged no more than \$88 a week or \$350 a month as of May 31, 1968; and are occupied by a permanent tenant.<sup>4</sup>

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