2008

Residential Landlord-Tenant Appeals in the Appellate Term—Part IV

Gerald Lebovits

Dov Treiman's

Landlord-Tenant Monthly

Volume 6 Issue 7 | July 2008

Residential Landord-Tenant Appeals In The Appellate Term - Part IV of IV

By Gerald Lebovits *

IX. NOTICING, DISMISSING, AND ABANDONING APPEALS

(A) *Notice of Argument*

After perfecting the appeal, the practitioner must notice the appeal for argument within the Appellate Term's time constraints; otherwise the appeal might be dismissed. In the Appellate Term, First Department, appellants or respondents may notice appeals, and thus schedule argument for a particular term of the court, by serving and then filing with the Appellate Term's clerk's office an original notice of argument, with proof of service. In the Second Department, only the appellant may notice the argument; the appellant does so by serving and filing a form called a note of issue.

The contents of the notice of argument or note of issue, which like most forms the Appellate Term's Clerk Office will provide, are in the Second Department's rules but not in the First Department's rules. The notice or note must contain the title of the appeal; the judgment or order appealed from, with dates and the county of the Housing Court; the name, address, and telephone number of the attorney and the name of the attorney who will orally argue; and the name of the party who is filing the notice or note.[228] In the Second Department, but not in the First, the appellant must file with the court blank, stamped post cards addressed to all the parties.[229] The court will use the post cards to notify the parties when and where oral argument will take place.

There are preargument conferences in the Appellate Division, First and Second Departments, to settle cases and to narrow appellate issues. There are no preargument conferences in the Appellate Term, although many practitioners would like the Appellate Term to assign a seasoned appellate court attorney to conduct them. Settling cases on appeal would save litigants time and money and reduce the court's backlog.

(B) *Dismissals*

The Appellate Term automatically dismisses appeals that have

(Continued on page 2)

CONTENTS

*Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at St. John's University School of Law, where he teaches appellate advocacy. This article, originally written with Deborah E. Fisher, a former principal law clerk to a justice of Appellate Term, First Department, was published in the April, May, and June 2000 and April 2001 issues of the Landlord-Tenant Practice Reporter. Judge Lebovits has updated, revised, and tripled the size of this article since then. He thanks Lourdes Marshall, his judicial intern, and Alexandra Standish, his court attorney, for their generous research help.

(Residential Landlord-Tenant appeals, continued from page 1)

not been brought for argument within the prescribed time limits.[230] In the First Department, the appellant has 60 days from the date the return is filed to notice an appeal for argument.[231] In other words, 60 days after the return is filed, the appeal is placed on an unpublished dismissal calendar, which is called, at least administratively, on the first argument day of each term. Because the First Department has only two argument days a term, an appeal not noticed for argument will be dismissed without warning on the first argument day of the third term following the filing of the return. A respondent noticing the appeal must file and serve the notice at least 68 days before the first day of the term.[232] In the Second Department, an appeal not noticed for argument will be dismissed if it has been on the general calendar for more than 90 days. The Second Department's dismissal calendar is published in the New York Law Journal five days before it is called.[233] Although the First Department's dismissal calendar is unpublished, the New York Law Journal publishes the list of filed clerk's returns 15 days before the first day of each term.[234] That list serves as a warning to practitioners.

(C) *Briefing Schedules*

The above deadlines are important because they set the date by which opening (main) briefs, answering briefs, and reply briefs, with proof of service, must be filed under 22 N.Y.C.R.R. 640.6(3). In the First Department, the appellant has 53 days before the first day of the term for which argument is noticed to file, with proof of service, the notice of argument and five copies (including one signed original) of the opening brief and the record or appendix. The respondent must then file, with proof of service, four copies and one original of the answering brief, and any exhibits the appellant did not file, at least 31 days before the beginning of the term. That gives the respondent at least 22 days to write, serve, and file an answering brief. The appellant who replies may then file four copies and one original of the reply brief, with proof of service, 24 days before the first day of the term. That gives the appellant at least a week to write, serve, and file the reply.

(Continued on page 3)

The Landlord-Tenant Monthly is published twelve times per year. Subscriptions are available from the publisher at the annual rate of $150.00. Individual issues are available for purchase at $25.00 each. For additional information, contact Treiman Publications Corp., 12724 State Route 38 Berkshire, NY 13736. (800) 338-5262; Fax (607) 657-8505; e-mail: TreimanPub@aol.com. It should be cited as LTM.

Executive Editor
Dov Treiman, Esq.
(607) 657-8473
Dov Treiman@aol.com

Managing Editor:
Thomas Antonovich
(607) 657-8473
TomAntonovich@aol.com

"Good scholarship doesn't have to be boring."

Contributing Authors:

Adam Leitman Bailey, Esq., Hon. Lucy Billings, J.C.C., Mr. Andrew Blaine, Mr. Joseph Capasso, Daniel J. Curtin, Jr., Esq., William J. Geller, Esq., Barry Gottlieb, Esq., Hon. James R. Grayshaw, J.H.C., Mr. Jeremy L. Havens, Ms. Darya Kapulina, Ms. Callie M. Kramer, Ms. Carrie Krieg, Ms. Angelina Laide, Hon. Gerald Lebovits, J.H.C., Mendy Mirocznik, Amanda Nelson, Esq., Hon. Michelle D. Schreiber, J.C.C, Douglas J. Seidman, Esq., Mr. David Smoren, Hon. Philip Straniere, J.C.C., Ms. Kiriaki Tourikis, Mr. Michael E. Plank, Esq., James P. Tracy Esq., Mr. Michael K. Treiman, Hon. Pierre B. Turner, Ricardo Vera, Esq., J.H.C., Mr. Phil Wartell

111 Off Centre: Story and Text: Andrew Wagner, Esq.; Resident Artist: Ms. Andrea Tsurumi

Contributors:

Ms. Dana M. Agabiti, Mr. Shai Dayan, Ms. Deborah E. Fisher, Ms. Shani R. Friedman, Paul N. Gruber, Esq., Mr. Paul M. Horwitz, Jarred I. Kassenoff, Esq., Ms. Sarah N. Kelly, Mr. Jesse Langel, Mr. Matthias Li, Mr. Nicholas J. Loiacono, Ms. Melissa Manning, Ms. Erin Olshever, Ms. Karina Primak, Mr. Steve M. Sacks, Mr. Timothy Schmidt, Mr. Matthew Shapiro, Ms. Rosalie Valentino, Ms. Marti Weithman

(Residential Landlord-Tenant appeals, continued from page 2)

A respondent who notices the argument in the First Department must file and serve the notice of argument at least 68 days before the first day of the term.[235] The briefing schedule is the same when the appellant notices the argument for appeal. A respondent who prods an appeal can therefore force an appellant to perfect in 15 days,[236] because the appellant must file the briefs and record or appendix at least 53 days before the first day of the term.

If the appeal is placed or is about to be placed on the dismissal calendar, the practitioner may apply to the court for more time.[237] In the alternative, the appellant and the respondent may stipulate to obtain additional time. An appeal not briefed is deemed abandoned.[238]

In the Second Department, the appellant may file a note of issue, with a signed original with proof of service and three copies of the brief, on or before the last Friday of any month.[239] The respondent's brief is due exactly 14 days after service on the respondent.[240] A reply brief must be served and filed within seven days after the appellant receives the respondent's answering brief.[241]

Practitioners who are bad at math can get an appellate printing company's briefing schedule from the appellate clerks' offices, which will also have for distribution free copies of briefs, records, and forms that novices may use as models. For those who can afford them, appellate printing companies can also greatly assist the novice or busy practitioner to prepare the record quickly and to assure technical compliance with appellate rules. Nevertheless, no competent appellate attorney should rely on anything but the appellate rules themselves. For example, the courts' briefing schedules consider nothing out of the ordinary, such as the briefing schedule for cross-appeals, which is found at C.P.L.R. 5530(b), or the schedule if the respondent notices the argument.

(D) *Abandonment*

Sometimes appellants leave appeals to die on the vine. The case may settle or the appellant may decide not to pursue the appeal, but abandonment is a poor way to leave things. The Court of Appeals, strongly advising practitioners not to abandon an appeal, has ruled that the Appellate Division may dismiss a second appeal that presents the same issue as an earlier abandoned appeal.[242] Although the Appellate Division has the discretion to entertain an appeal after an earlier appeal is dismissed for failure to prosecute, *Rubeo* holds that the Appellate Division need not exercise this discretion. Writing for the Court, Chief Judge Kaye advised the practitioner to avoid this situation by moving for an extension of time under 22 N.Y.C.R.R. 670.8(d)-(h) or by withdrawing the appeal. That way, the Chief Judge explained, the practitioner will be "sparing the Appellate Division the burden of carrying, monitoring and ultimately dismissing [the appeal]."[243]

Thus, instead of abandoning an appeal, withdraw it. That way, a practitioner who decides to appeal again in the future may still address issues raised in the first appeal.[244]

X. ORAL ARGUMENT

The Appellate Term, First Department, conducts 10 sessions a year—none in July or August. Oral argument is scheduled for the first and second Monday of each month. The Appellate Term, Second Department, also conducts 10 sessions a year—none in July or August. For the Second and Eleventh Judicial District, oral argument is usually heard twice a month on Wednesdays. The court will send a postcard to the litigants two weeks in advance stating where, at 141 Livingston Street in Brooklyn, 88-11 Sutphin Boulevard in Queens, or 126 Stuyvesant Place in Staten Island, oral argument will take place. For the Ninth and Tenth Judicial Districts, oral argument is usually heard twice a month on Tuesdays in Central Islip, Goshen, Mineola, and White Plains. The clerk's office tries to group arguments at these locations and will notify the litigants by postcard. The calendar is called at 9:30 a.m.

In the Appellate Term, Second Department, a practitioner must request oral argument. Oral argument is requested by asking for it, and stating who will argue and for how long, at the upper right-

(Continued on page 4)

(Residential Landlord-Tenant appeals, continued from page 3)

hand corner of the brief's cover page.[245] According to some counsel, the Second Department will allow oral argument whether or not a request for argument is noted on the brief. The First Department's rules about requesting oral argument are contradictory. Practitioners in the First Department are therefore urged to follow the Second Department's rules about requesting oral argument on the brief's cover page, lest they risk submitting the appeal without oral argument.[246] If the appellant does not request oral argument, the respondent should also submit, lest defeat be snatched from the jaws of victory. Whether or not oral argument is assumed in the First Department, orals can be waived by stipulation, by writing "submitted" on the brief's cover page, or by not appearing on oral-argument day. If one side does not appear for a scheduled oral argument, the side that appears may argue anyway.

The calendar for oral argument in the First Department is printed in the New York Law Journal six days before the first day before each term.[247] The Second Department notifies litigants through publication in the New York Law Journal 12 days before the term begins and by post card to be received at least five days before the term begins.[248]

A practitioner who cannot argue on a particular day may obtain a stipulation from opposing counsel or move for an adjournment. If the Appellate Term is given a reason, it "is usually liberal with the first adjournment."[249]

The Appellate Term is a hot bench. The justices are prepared for oral argument because they read the litigants' briefs in advance and receive bench briefs from their law clerks or the court-attorney pool. Practitioners should get to the point and be prepared for focused questions that will side-track a rehearsed presentation. Practitioners who worry that they made a more effective argument after they left the courthouse than while in the courthouse should not worry unduly. Unless the justices tell you, "We disagree, but we'll think about it"—a crushing prediction one hears from time to time in the Appellate Term—it often happens that the final opinion bears little resemblance to the oral argument. Nevertheless, no practitioner should miss the opportunity to argue. Briefs count for more than oral argument in most appeals, but close cases are won or lost at oral argument in the Appellate Term.

Cases are called according to the calendar, but it is wise to arrive at the beginning of the oral argument. That will enable the advocate to assess the court and, even more important, to avoid arriving late. The appellant is seated to the left of the podium, or to the right of the justices; the respondent is seated to the right of the podium, or to the left of the justices.

If you want the court to consider a case not in your brief—a New York Law Journal case decided after the briefs were filed, for example—give your adversary notice and make enough copies for each justice. Before the calendar is called, ask the clerk to distribute the case to the justices.

Oral argument is limited to 15 minutes,[250] although the Presiding Justice may (and often will) cut it short or allow more time. Rebuttals are rare; sur-rebuttals are almost unheard of.

A few pointers will aid the oral advocate.

(1) After you introduce yourself quickly, give a quick roadmap of all the major points you plan to argue: "This case should be reversed for three reasons. First, . . ." That will assure your organization and the justices' comprehension. It will also focus the court to ask what it is concerned about and to allow a side-tracked speaker to mention something important at least once—at the beginning, when it counts most.

(2) Discuss only important things in your few moments before the court. Do not raise in oral argument anything overly controversial, lest your argument excite opposition. Your brief speaks for itself on the details and on the less critical issues. Do not argue issues not in your brief or your adversary's brief.

(3) Have a conversation with the court. Do not be stiff. Do not read. Especially do not read your brief or recite long quotations.

(Continued on page 5)

(Residential Landlord-Tenant appeals, continued from page 4)

(4) Answer all the questions when you get them, and try to begin your answer with a yes or no.

(5) If you have a theme of your case, you will never get stuck. Develop a theme in advance. Then dwell on emotional themes without getting emotional.

(6) Do not interrupt a justice who is speaking.

(7) Do not interrupt your adversary or make faces or gestures while your adversary or a justice is speaking.

(8) Turn your cell phone off when you enter the courtroom.

(9) Appellate advocacy is different from trial advocacy. Be respectful. Do not try to clobber your adversary, the court below, or the justices. Be firm, not obsequious.

Once oral argument ends, the practitioner must wait from one to twelve months for a decision. A three-to-six month wait for a decision is the norm. Currently, the Appellate Term, Second Department, schedules oral argument later than the First Department will, but the First Department will take longer than the Second Department to decide the appeal. The net effect in both departments is that it sometimes takes longer than a year after the summary proceeding is decided for the court to decide the appeal of the summary proceeding.

The Appellate Term will not read postargument briefs.

XI. FRIVOLOUS APPEALS, ATTORNEYS FEES, AND COSTS

(A) *Frivolous Appeals*

Litigants sometimes abuse their appellate remedies by filing frivolous appeals. An appeal is frivolous if it is "completely without law or merit," if "it is undertaken primarily to delay or prolong the resolution of the litigation or to harass or maliciously injure another," or if "it asserts material factual statements that are false."[251] A party may move the Appellate Term under C.P.L.R. 2214 or 2215 to request that the court award costs sanctions for frivolous litigation.[252] The Appellate Term may also impose costs or sanctions on its own.[253]

(B) *Pleading Attorney Fees*

Practitioners should request attorney fees in the petition, or as a counterclaim in the respondent's answer, if Housing Court has any basis to award attorney fees in a landlord-tenant proceeding. But at least in consolidated cases in which one petition requests attorney fees, a postjudgment request for attorney fees is permitted unless the moving party intentionally relinquishes its claim.[254]

In *A.D. 1619*, a prevailing landlord moved after the proceedings ended to amend two petitions to include attorney fees. The first petition included a claim for attorney fees; in the second case, "[a] claim for attorney fees was interposed for the first time in landlord's postjudgment and postappeal motion approximately nine months after our order."[255] After the court denied the motion to amend, the Appellate Term held that a party should give notice of a claim for attorney fees near the start of a case to avoid surprise and prejudice.[256] Thus, the Appellate Term affirmed the trial court's denial of the motion to amend the petition to include a late claim for attorney fees.[257]

On appeal, the Appellate Division answered that the tenant could not claim surprise "sinc respondent was aware of Article 19 of the lease providing for the landlord's recovery of attorneys' fees if the landlord prevailed in litigation over nonpayment of rent, and indeed, since the landlord's petition in the second of the two consolidated nonpayment proceedings expressly demanded such fees."[258]

(Continued on page 6)

(Residential Landlord-Tenant appeals, continued from page 5)

Despite *A.D. 1619*, the practitioner is still advised to claim attorney fees early, even though Housing Court will not address attorney fees until a case is over.[259]

A.D. 1619 raises another interesting question: May a party who has not claimed attorney fees before the trial court amend its petition after winning an appeal? Perhaps. Depending on how much time has passed, laches may apply and a plenary action may be required. But notions of fair play may make it possible for an indigent litigant to claim attorney fees after an appeal if an attorney did not represent the indigent at trial, and thus did not claim attorney fees below, if the indigent won the appeal while represented by counsel.[260]

(C) *Appealing Amounts of Legal Fees and Prevailing-Party Status*

Appellate issues arise over whether Housing Court should have awarded attorney fees and over the amount awarded. If the Appellate Term finds that Housing Court wrongly awarded an amount or that a different party prevailed, the Appellate Term will remand the case to Housing Court to determine the amount of legal fees.[261]

(D) *Determining Fees*

The Appellate Term may award a fee-on-a fee for pursuing an appeal over legal fees.[262] A fee-on-a-fee is justified for time an attorney spends to recover a legal fee. But Housing Court retains jurisdiction over attorney fees arising out of a proceeding held before it.[263] As a result, Housing Court may, following an appeal, award attorney fees and disbursements incurred to handle a motion to vacate a judgment, to appeal, and to prosecute or defend appellate and postappellate motions.[264]

(E) *Appellate Costs*

A prevailing party in the Appellate Term is entitled to costs on appeal,[265] although costs are modest and appellate courts have the discretion to award costs to the losing side.[266] As explained above, costs may also be awarded for frivolous litigation under 22 N.Y.C.R.R. 130.1-1(d).

XII. CONCLUSION

Appeals to the Appellate Term, at least in the First Department, where appeals on the fully reproduced record are the norm, are tedious and complex. On the first go around, the practitioner might spend as much time complying with the rules as preparing the legal issues on appeal. But that thicket of complexity is more illusory than real. Although the rules are stultifying and time-consuming to follow, they are easy to learn with a little practice. A practitioner who completes but one appeal will know most of the rules by heart. Then the practitioner can get down to the serious business of winning residential landlord-tenant appeals.

(Endnotes)

[228] 22 N.Y.C.R.R. 731.4(b), 732.4(b).
[229] *Id.*
[230] *Id.* 640.6(a)(3)(iii), 731.8(a) 732.8(a).
[231] *Id.* 640.6(a)(3)(1).
[232] *Id.* 640.6(a)(3)(ii).
[233] *Id.* 731.8(c), 732.8(c).
[234] *Id.* 640.6(2).
[235] *Id.* 640(a)(3)(ii).
[236] *Id.* 640.6(a)(3)(ii).
[237] *Id.* 640.6(a)(3)(iii), 731.8(a), 732.8(a).

(Continued on page 7)

(Residential Landlord-Tenant appeals, continued from page 6)

[238] *2246 Holding Corp. v. Nolasco*, 15 Misc. 3d 142(A), 841 N.Y.S.2d 824, 2007 N.Y. Slip Op. 51099(U), *1, 2007 W.L. 1558619, at *1 (App. Term 1st Dep't May 30, 2007) (per curiam).
[239] 22 N.Y.C.R.R. 731.4(c), 732.4(c).
[240] *Id.*
[241] *Id.*
[242] *See Rubeo v. Nat'l Grange Mutual Ins. Co.*, 93 N.Y.2d 750, 720 N.E.2d 86, 697 N.Y.S.2d 866 (1999).
[243] *Id.* at 755, 720 N.E.2d at 88, 697 N.Y.S.2d at 868.
[244] *Cf. N.Y.C. Hous. Auth. v. Quinones*, 23 H.C.R. 58B, N.Y.L.J., Jan. 31, 1995, at 25, col. 4 (App. Term 1st Dep't) (per curiam) (declining to consider in second appeal issues dismissed in first appeal for failure to prosecute).
[245] 22 N.Y.C.R.R. 731.2(a)(2), 732.2(a)(2).
[246] *Compare id.* 640.5(a) *with id.* 640.7(c).
[247] *Id.* 640.7(b).
[248] *Id.* 731.4(d), 732.4(d).
[249] Kanter, *supra* note 130, at minutes at 3.
[250] 22 N.Y.C.R.R. 640.8(d), 731.6(a), 732.6(a).
[251] *Id.* 130-1.1(c)(1-3).
[252] *Id.* 130-1.1(d).
[253] *Id.*
[254] *A.D. 1619 Co. v. VB Mgmt., Inc.*, 259 A.D.2d 382, 382, 687 N.Y.S.2d 127, 128 (1st Dep't 1999) (mem.), *appeal dismissed*, 93 N.Y.2d 1030, 719 N.E.2d 912, 697 N.Y.S.2d 552 (1999).
[255] *A.D. 1619 Co. v. VB Mgmt., Inc.*, 175 Misc. 2d 1021, 1022, 672 N.Y.S.2d 985, 986 (App. Term 1st Dep't 1998) (per curiam).
[256] *Id.*, 672 N.Y.S.2d at 986.
[257] *Id.*, 672 N.Y.S.2d at 986.
[258] 259 A.D.2d at 382, 687 N.Y.S.2d at 128.
[259] *See Solow v. Wellner*, 86 N.Y.2d 582, 589, 658 N.E.2d 1005, 1008, 635 N.Y.S.2d 132, 135 (1995).
[260] *See* Laurie L. Lau, *A Further Consideration of Attorneys' Fees in the Housing Court From One Judge's Perspective* 15 (2007) (unpublished article, N.Y. St. Bar Ass'n Cttee. on Landlord-Tenant Proceedings CLE) ("[A] tenant may request attorney's fees at any time . . . .") (citing *Frank v. Park Summit Realty Corp.*, N.Y.L.J., Oct. 4, 1989, at 22, col. 2 (Sup. Ct. NY County), *aff'd & modified on other grounds*, 175 A.D.2d 33, 573 N.Y.S.2d 655 (1st Dep't 1991) (mem.), *aff'd & modified*, 79 N.Y.2d 789, 587 N.E.2d 287, 579 N.Y.S.2d 649 (1991) (mem.).
[261] *See, e.g., In re Duell v. Condon*, 200 A.D.2d 549, 549-50, 606 N.Y.S.2d 690, 691 (1st Dep't 1994) (mem.), *aff'd*, 84 N.Y.2d 773, 647 N.E.2d 96, 622 N.Y.S.2d 891 (1995); *390 W. End Assocs. v. Steppacher*, 23 H.C.R. 191A, N.Y.L.J., Apr. 12, 1995, at 25, col. 3 (App. Term 1st Dep't) (per curiam).
[262] *E.g., Kumble v. Windsor Plaza Co.*, 161 A.D.2d 259, 260, 555 N.Y.S.2d 290, 291 (1st Dep't) (mem.), *appeal dismissed*, 76 N.Y.2d 843, 559 N.E.2d 1285, 560 N.Y.S.2d 126 (1990); *Perkins v. Town of Huntington*, 117 A.D.2d 726, 726-27, 498 N.Y.S.2d 451, 453 (2d Dep't 1986) (mem.).
[263] *Masbel Realty Corp. v. Birnbaum*, 26 H.C.R. 360A, N.Y.L.J., June 16, 1998 (App. Term 1st Dep't) (per curiam).
[264] *See Duell*, 84 N.Y.2d at 784 n.2, 647 N.E.2d at 101 n.2, 622 N.Y.S.2d at 896 n.2.
[265] C.P.L.R. 8107, 8203 (in fine).
[266] *See Camarella v. E. Irondequoit Cent. Sch. Bd.*, 34 N.Y.2d 139, 141-42, 313 N.E.2d 29, 29, 356 N.Y.S.2d 553, 554 (1974) (mem.).