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Drafting NY Civil-Litigation Documents: Part 37—Motions to Reargue & Renew Cont'd

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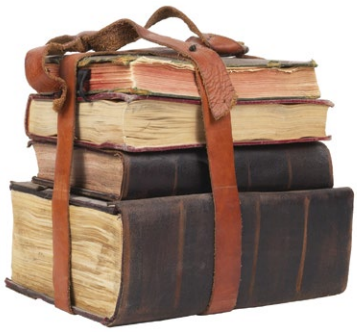
From Tractor Fenders to iPhones

Holographic Wills

By Jim D. Sarlis

Also in this Issue

BY GERALD LEBOVITS



Drafting New York Civil-Litigation Documents: Part XXXVII — Motions to Reargue and Renew Continued

In the last issue, the *Legal Writer* continued the series on civil-litigation documents with motions to reargue and renew. The *Legal Writer* gave an overview of motions to reargue and renew and discussed motions to reargue in-depth. In this issue, we discuss motions to renew in-depth. Consult the last issue for information relevant to motions to renew.

The *Legal Writer* uses "original decision" to refer to the decision that prompts you to move to renew. It's the decision in which the court ruled against you. You're asking the court to reconsider it.

Motions to Renew

Some practitioners refer to a motion to renew as a motion to rehear.[1] Most practitioners call it a motion to renew.

Consult CPLR 2221(e) before moving to renew.

Basis for the Motion. In your motion to renew, you're asking the court to consider "new or additional proof not used the first time around [on your prior motion]."[2] Or, you may demonstrate that the law has changed and the new law would change the court's original determination.[3]

You must also provide a "reasonable justification for [your] failure to present such facts on the prior motion."[4]

Before the New York legislature amended CPLR 2221 in 1999, "a party was not always required to establish reasonable justification."[5] The 1999 amendment to CPLR 2221 "overrules . . . prior case law . . . . [A] showing of reasonable justification is [now] mandatory."[6]

Courts are divided on whether the evidence must be "newly discovered."[7] Before the 1999 amendment, courts had the discretion to grant a renewal motion even if the facts weren't newly discovered — "if the facts were available to the moving party at the time of the original motion."[8] Since the 1999 amendment, courts might not have the discretion to grant a motion to renew if the moving party had the facts available at the time of the original motion.[9]

The First Department gives a court "greater flexibility than the Second Department" on this issue: The First Department has granted motions to renew in the interest of justice even when the evidence wasn't newly discovered.[10] Although the First Department has given courts flexibility in deciding motions to renew, it hasn't entirely relaxed its position.[11]

The Second Department requires that you show a "reasonable justification" for not having presented the new facts on the original motion.[12] If the proof you introduce in your renewal motion was available to you when you moved on the original motion and you fail to offer an excuse, a court will likely deny your motion to renew.[13]

The Third and Fourth Departments acknowledge that courts have the discretion in the interests of justice to grant a motion to renew, but they require the movant to show a "reasonable justification" for not having offered the new evidence in its original motion.[14]

Regardless whether you practice in the First, Second, Third, or Fourth Departments, you have a better chance at winning your motion to renew if you can show "why the additional proof [you're] offer[ing] now was not discovered and offered before [on the original motion]."[15]

The new proof you seek to introduce with your renewal motion might be "facts contained in a document submitted on the original motion . . . [and the document] was rejected [by the court] for not being in admissible form."[16] The court might, for example, have rejected a document that wasn't properly notarized. For procedural errors like this, the outcome of your renewal motion will depend on whether you're in the First, Second, Third, or Fourth Department. The "First Department allows the trial court the discretion to grant renewal in the absence of prejudice, even where the original failure was due to the movant's mistake."[17] The Second Department has a more "rigid position . . . . denying [renewal motions] regardless of the lack of prejudice if the defendant fails to provide a reasonable justification for the defects in the documents originally submitted."[18] The Third Department has the same rule as the First Depart-

> Asserting new legal arguments in your motion to renew isn't a basis for the court to grant renewal.

CONTINUED ON PAGE 58

ment.[19] The Fourth Department has not ruled on this issue.

The new proof you introduce in your renewal motion might also be an affidavit from a witness you could not locate when you made your original motion.[20]

The court might consider as part of your renewal motion new evidence you discover while investigating the case even though you've conducted your investigation after you lost the original motion.[21]

Retaining a new expert in your case isn't a basis for moving to renew.[22]

A court might deny your renewal motion if the only new evidence is an examination before trial (EBT) transcript that was available at the time of the original motion.[23]

If you allege in your renewal motion that you have new proof you want the court to consider, but you introduce the same proof you introduced in your original motion, the court will likely deny your motion to renew.[24] The court might denominate your motion to renew as a motion to reargue.[25]

The court might deny your motion to renew if you didn't exercise due diligence in obtaining the proof on your original motion.[26]

If the basis for your motion is that the law has changed, move to renew. Don't move to reargue. In your motion to renew, explain to the court how the court's original decision would be different under the new law.

Asserting new legal arguments in your motion to renew isn't a basis for the court to grant renewal.[27]

Time. CPLR 2221 doesn't specify any time limit for moving to renew.[28] Unlike a motion to reargue, a motion to renew doesn't have a 30-day time limitation.[29] The only limitation on a motion to renew is that you move "without unreasonable delay."[30] If you wait too long to move to renew, a court might deny your motion to renew by finding that you're the dilatory party.[31]

If you move after the court has entered judgment and after your time to appeal has expired, the court might deny your renewal motion as untimely if the basis for your motion is that the law has changed.[32]

Notice of Motion or Order to Show Cause. You may move to renew by notice of motion or by order to show cause. Most practitioners move by order to show cause because it's an expedient way to have the court hear their motion to renew.

If you move to renew by order to show cause and the court declines to sign your order to show cause, you may appeal the declination.[33]

Appeals. Regardless whether the court grants or denies your motion to renew, you may appeal the court's decision on your motion to renew.[34] The "grant or denial of a motion for leave to renew is appealable as of right."[35]

You may timely appeal the court's original order.

An appellate court will apply the law "as it exists at the time of appeal, not as it existed at the time of original determination."[36]

You may move to renew on the basis that you have new evidence even after an appellate court has affirmed the original order.[37]

A court will likely deny your renewal motion if the basis for your motion is that the law has changed and your motion concerns an order that disposed of your case and you didn't file a notice of appeal.[38]

You may move to renew even after your time to appeal has expired.[39] If the basis for your renewal motion is that you have new evidence, a court might grant your motion even if you didn't appeal the court's original order.[40]

Although an appellate court won't grant affirmative relief to a nonappealing party, move to renew if an appellate court "has made a determination . . . that affects previous motions that were[n't] appealed."[41] Consider the following scenario: The trial court denied your cross-motion to dismiss the complaint.[42] Your co-defendant appealed the trial court's decision denying its motion to dismiss the complaint.[43] The appellate court dismissed the complaint as to your co-defendant.[44] You may move to renew the trial court's decision on your cross-motion to dismiss the complaint.[45] Thus, on a motion to renew, you "may be allowed to exploit a co-defendant's appellate victory if the issues as disposed of in the appealed case would also benefit [you,] the nonappealer."[46]

After consulting with your client, consider whether to move to renew, appeal the original decision, or both. Consider the cost, time, and effort in moving to renew or to appeal.

Opposing a Motion to Renew

Oppose a motion to renew by submitting opposition papers.

If your adversary argues in its moving papers that it has new evidence that would change the court's decision, you must convince the court in your opposition papers that the new evidence wouldn't change the court's decision. Argue that your adversary hasn't provided a reasonable justification for failing to present the new evidence on the original motion. Depending on your department, you may also argue that the allegedly new evidence isn't newly discovered.

If your adversary argues in its motion to renew that the new law would change the court's decision, persuade the court that even under the new law the court's decision stands.

Regardless whether the court grants or denies your motion to renew, you may appeal the court's decision on your motion to renew.

If the new law doesn't apply to your case, explain why it's inapplicable.

If your adversary relies on the same law the court applied, articulate that to the court. Argue that it's how the court interpreted the law that's at issue. The court might denominate your adversary's motion as a motion to reargue instead of as a motion to renew.

Argue that the court can't consider your adversary's new legal arguments on a motion to renew.

In the next issue of the *Journal*, the *Legal Writer* will discuss motions to vacate defaults. ■

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1. David D. Siegel, New York Practice § 254, at 449 (5th ed. 2011).

2. *Id.*

3. CPLR 2221(e)(2).

4. CPLR 2221(e)(3); David L. Ferstendig, New York Civil Litigation, § 7.17[3], at 7-122 (2014).

5. Ferstendig, *supra* note 4, § 7.17[3], at 7-122.

6. *Id.* (citing *Cippitelli v. County of Schenectady*, 307 A.D.2d 658, 658, 762 N.Y.S.2d 841, 842 (3d Dep't 2003); *Giardina v. Parkview Court Homeowners' Ass'n, Inc.*, 284 A.D.2d 953, 953, 730 N.Y.S.2d 585, 586 (4th Dep't 2001); *Greene v. N.Y. City Hous. Auth.*, 283 A.D.2d 458, 459, 724 N.Y.S.2d 631, 632 (2d Dep't 2001); *Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle, Inc.*, 271 A.D.2d 636, 638, 706 N.Y.S.2d 724, 726 (2d Dep't 2000); *Ulster Sav. Bank v. Goldman*, 183 Misc. 2d 893, 896, 705 N.Y.S.2d 880, 882 (Sup. Ct. Rensselaer County 2000); contra *Mejia v. Nanni*, 307 A.D.2d 870, 871, 763 N.Y.S.2d 611, 612 (1st Dep't 2003) ("Although renewal motions generally should be based on newly discovered facts that could not be offered on the prior motion, courts have discretion to relax this requirement and to grant such a motion in the interest of justice.")).

7. Siegel, *supra* note 1, § 254, at 450 n.5 (citing *Ulster Sav. Bank*, 183 Misc. 2d at 896, 705 N.Y.S.2d at 882 ("In this instance, plaintiff has not advanced any argument to support a claim of reasonable justification for the failure to present the facts on the prior motion. Under the circumstances, in view of the mandatory language of CPLR 2221 (e)(3), the court is constrained to deny the motion to renew."); *Poag v. Atkins*, 3 Misc. 3d 1109(A), at *4 (Sup. Ct. N.Y. County 2004) ("[T]he court has continued to apply the pre-amendment exception thereto permitting the exercise of discretion to grant a motion for leave to renew, based upon facts inexplicably omitted on the prior motion. Under the circumstances in this case, and in the interest of justice, this court will exercise that discretion, and grant the plaintiff's motion for leave to renew.")).

8. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 16:330, at 16-38 (2006; Dec. 2009 Supp.).

9. *Id.*

10. *Id.* (citing *Tishman Constr. Corp. of New York v. City of N.Y.*, 280 A.D.2d 374, 376–77, 720 N.Y.S.2d 487, 490 (1st Dep't 2001) ("[T]he court, in its discretion, may also grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made. Indeed, we have held that even if the vigorous requirements for renewal are not met, such relief may be properly granted so as not to 'defeat substantive fairness.'")); Ferstendig, *supra* note 4, § 7.17[3], at 7-126 (citing *Mattis v. Keen*, 54 A.D.3d 610, 611, 864 N.Y.S.2d 6, 8 (1st Dep't 2008) ("Although motions to renew should be based on newly discovered facts that could not have been offered on the prior motion, courts have discretion to relax this requirement and grant the motion in the interest of justice.")).

11. Barr et al., *supra* note 8, § 16:330, at 16-38 (citing *Henry v. Peguero*, 72 A.D.3d 600, 602–03, 900 N.Y.S.2d 49, 51 (1st Dep't 2010) ("Supreme Court's grant of renewal in this matter contravenes this Court's policy of confining motion practice to the limits imposed by the CPLR. Neither of the statutory requirements for renewal was satisfied by plaintiff. Dr. Mian's addendum was not the result of any additional examination or medical testing; rather, the doctor's conclusion was based on the medical information previously available to him and could have been included in his original affidavit. While, in appropriate circumstances, renewal may be predicated on previously known facts, it is settled that '[t]he movant must offer a reasonable excuse for failure to submit the additional evidence on the original motion.'"); *Cuccia v. City of N.Y.*, 306 A.D.2d 2, 2–3, 761 N.Y.S.2d 31, 32–33 (1st Dep't 2003)); Ferstendig, *supra* note 4, § 7.17[3], at 7-128 (citing *Am. Audio Serv. Bureau v. AT & T*, 33 A.D.3d 473, 477, 823 N.Y.S.2d 25, 28 (1st Dep't 2006) ("Plaintiff's explanation that the documents were overlooked because the files are voluminous is simply not a reasonable justification.")).

12. Ferstendig, *supra* note 4, § 7.17[3], at 7-126 (citing *Spectrum Painting Contrs., Inc. v. Kreisler Borg Florman Gen. Constr. Co., Inc.*, 54 A.D.3d 748, 749, 864 N.Y.S.2d 61, 63 (2d Dep't 2008) ("The Supreme Court providently exercised its discretion in denying . . . [the renewal motion] on the ground that it failed to offer a reasonable excuse as to why it did not present the alleged new facts on the prior motion. In any event, the additional facts would not have supported a change in the court's original determination.")); *Delvecchio*, 271 A.D.2d at 638, 706 N.Y.S.2d at 726.

13. *Id.* (citing *Henley v. Foreclosure Sales, Inc.*, 57 A.D.3d 483, 484, 869 N.Y.S.2d 171, 172 (2d Dep't 2008) ("Since the information presented in support of the defendant's motion was either information previously submitted on the original motion, information available at the time the original motion was made, or equivocal new information, the motion was properly denied.")).

14. Barr et al., *supra* note 8, § 16:330, at 16-38 (citing *Davidson v. Ambrozewicz*, 23 A.D.3d 903, 903–04, 803 N.Y.S.2d 810, 810 (3d Dep't 2005); *Robinson v. Consol. Rail Corp.*, 8 A.D.3d 1080, 1080, 778 N.Y.S.2d 387, 388 (4th Dep't 2004)).

15. Siegel, *supra* note 1, § 254, at 450.

> Unlike a motion to reargue, a motion to renew doesn't have a 30-day time limitation.

16. Ferstendig, *supra* note 4, § 7.17[3], at 7-123, 7-124 (citing *Hachney v. Monge*, 103 A.D.3d 844, 845, 960 N.Y.S.2d 176, 178 (2d Dep't 2013) ("CPLR 2221(e) has not been construed so narrowly as to disqualify, as new facts not offered on the prior motion, facts contained in a document originally rejected for consideration because the document was not in admissible form.")).

17. Siegel, *supra* note 1, § 254 at 79 (July 2014 Pocket Part) (quoting *Kalir v. Ottinger*, 2011 WL 6968334 (Sup. Ct. N.Y. County 2011) ("Moreover, because the error was procedural, renewal is proper to correct the motion."); *B.B.Y. Diamonds Corp. v. Five Star Designs, Inc.*, 6 A.D.3d 263, 264, 775 N.Y.S.2d 34, 35 (1st Dep't 2004) ("Renewal may be granted where the failure to submit an affidavit in admissible form was inadvertent and there is no showing by the opposing party of any prejudice attributable to the delay caused by the failure. Defendants' failure was demonstrably inadvertent and plaintiff has failed to show any prejudice.")).

18. *Id.* (citing *Singh v. Mohamed*, 54 A.D.3d 933, 935, 864 N.Y.S.2d 498, 500 (2d Dep't 2008) ("Neither the plaintiff nor Dr. Guy provided a reasonable justification as to why the doctor's reports containing contemporaneous range-of-motion findings in the plaintiff's lumbar and cervical regions of the spine, were not in proper form when submitted in opposition to the initial motion.")).

19. *Id.* (citing *Wilcox v. Winter*, 282 A.D.2d 862, 863–64, 722 N.Y.S.2d 836, 837 (3d Dep't 2001) ("Clearly, the failure on the part of plaintiff's counsel to provide Supreme Court with the unredacted version of the affidavit in the first instance was a simple procedural error and leave to renew was an entirely appropriate remedy to excuse it.")).

20. Ferstendig, *supra* note 4, § 7.17[3], at 7-124 (citing *Gonzalez v. Vigo Constr. Corp.*, 69 A.D.3d 565, 566, 892 N.Y.S.2d 194, 195 (2d Dep't 2010) ("The plaintiff offered a reasonable excuse for not including an affidavit from a nonparty witness in opposition to the original motion. The misidentification of an eyewitness to the subject accident, by not stating his correct surname in the police report, resulted in a reasonable delay in locating the eyewitness and obtaining his affidavit.")).

21. *Id.* (citing *Smith v. Cassidy*, 93 A.D.3d 1306, 1307, 941 N.Y.S.2d 413, 415 (4th Dep't 2012)).

22. *Id.*§ 7.17[3], at 7-125 (citing *Burgos v. Rateb*, 64 A.D.3d 530, 531, 883 N.Y.S.2d 115, 117 (2d Dep't 2009) ("The retention of a new expert is not a legitimate basis for renewal; renewal 'is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation.'")).

23. Barr et al., *supra* note 8, § 59:05, at 745 (citing *Glasburgh v. Port Auth. of N.Y. & N.J.*, 193 A.D.2d 441, 441, 597 N.Y.S.2d 327, 328 (1st Dep't 1993) ("Appellant's motion to renew was properly

denied, the only "new evidence" offered in support thereof being a deposition transcript that was available at the time of the original motion.")).

24. Ferstendig, *supra* note 4, § 7.17[3], at 7-125 (citing *Chernysheva v. Pinchuck*, 57 A.D.3d 936, 937, 871 N.Y.S.2d 621, 623 (2d Dep't 2008) ("In support of her motion for leave to renew, the plaintiff relied upon evidence that, while generated after the summary judgment motions were fully submitted, contained no 'new facts' that would change the prior determination awarding summary judgment to the defendants.")).

25. *Id.* (citing *Staten Is. N.Y. CVS, Inc. v. Gordon Retail Dev.*, LLC, 57 A.D.3d 764, 765, 869 N.Y.S.2d 583, 584 (2d Dep't 2008) ("Here, the plaintiffs' alleged new evidence had not only been submitted to the Supreme Court in opposition to the original motions, cross motion, and separate cross motion but had also been considered by the court in determining them. Accordingly, that branch of the plaintiffs motion, denominated as one for leave to renew, was, in fact, a motion for leave to reargue.")).

26. *Id.*§ 7.17[3], at 7-124, 7-125 (citing *Jones v. 170 East 92nd St. Owners Corp.*, 69 A.D.3d 483, 483-84, 893 N.Y.S.2d 534, 535 (1st Dep't 2010) ("Putting aside that this affidavit was inadvertently omitted from plaintiffs' moving papers and first submitted only in their reply, plaintiffs' attorney's bald statement that the doctor's affidavit was not included in their opposition to the prior motion because 'it was not made available to [p]laintiffs until this time' does not satisfy plaintiffs' burden 'to show due diligence in attempting to obtain the statement before the submission of the prior motion.'")).

27. 1 Byer's Civil Motions § 59:05 at 744 (Howard G. Leventhal 2d rev. ed. 2006; 2013 Supp.) (citing *In re State Farm Mut. Auto. Ins. Co. v. Wernick*, 90 A.D.2d 519, 519, 455 N.Y.S.2d 30, 31 (2d Dep't 1982); *see Brian Wallach Agency v. Bank of N.Y.*, 75 A.D.2d 878, 880, 428 N.Y.S.2d 280, 282 (2d Dep't 1980) ("Although the waiver issue could have been raised on the original motion for a joint trial, the circumstances indicate that the bank's failure to do so may fairly be said to have resulted from excusable mistake or inadvertence.")).

28. Barr et al., *supra* note 8, § 16:332, at 16-38.

29. *Id.* (citing *Di Russo v. Kravitz*, 21 N.Y.2d 1008, 1010, 290 N.Y.S.2d 928, 929, 238 N.E.2d 329, 330 (1968) ("Defendant's motion for renewal of the motion to dismiss was promptly made upon the discovery of the fraud during trial and before the case was concluded and a final determination rendered.")).

30. Byer's Civil Motions, *supra* note 27, § 59:05, at 46–47 (2013 Cumulative Supplement) (citing CPLR 2221(e); *Ramos v. City of N.Y.*, 61 A.D.3d 51, 55, 872 N.Y.S.2d 128, 131 (1st Dep't 2009) ("Although the better practice would have been to move for renewal prior to commencing these new actions, the new actions show that plaintiff had not fallen asleep at the wheel. Upon receiving guidance by Justice York, plaintiff immediately moved for renewal. Under these circumstances it cannot be said that plaintiff unreasonably delayed seeking relief after learning of the new evidence.")).

31. Siegel, *supra* note 1, § 254, at 78 (2013 Cumulative Supplement) (citing *Garcia v. City of N.Y.*, 72 A.D.3d 505, 507, 900 N.Y.S.2d 17, 19 (1st Dep't) ("Even if we were to assume that plaintiff only learned of the 1999 denial shortly before he made his motion to renew in 2007, that is not sufficient. Clearly, plaintiff had a duty to inquire into the status of the 1999 motion. Instead, he sat on his hands for eight years, and offers no explanation as to why he waited so long."), *appeal dismissed*, 15 N.Y.3d 918, 913 N.Y.S.2d 644, 939 N.E.2d 810 (2010)).

32. Ferstendig, *supra* note 4, § 7.17[3], at 7-128 (citing *Glicksman*, 278 A.D.2d at 366, 717 N.Y.S.2d at 374–75 ("The statute imposes no time limit for making such a motion [renewal] . . . [but] because the plaintiff's motion was made after judgment was entered and the time to appeal had expired, it should have been denied as untimely.")).

33. CPLR 5704.

34. Siegel, *supra* note 1, § 254, at 450.

35. Ferstendig, *supra* note 4, § 7.17[3], at 7-123 (citing CPLR 5701(a) (2) (viii)).

36. Byer's Civil Motions, *supra* note 27, § 59:04 at 743 (citing *In re Alscot Inv. Corp. v. Incorp. Vill. of Rockville Ctr.*, 64 N.Y.2d 921, 922, 488 N.Y.S.2d 629, 629 (1985) ("[T]he law as it exists at the time a decision is rendered on appeal is controlling.")).

37. *Id.* § 59:05, at 744 (citing *Levitt v. County of Suffolk*, 166 A.D.2d 421, 422, 560 N.Y.S.2d 487, 488 (2d Dep't 1990) ("Although we are in agreement with the Supreme Court that a court of original jurisdiction may entertain a motion to renew or to vacate a prior order or judgment on the ground of newly discovered evidence even after an appellate court has affirmed the original order or judgment, we do not find that the plaintiff exercised due diligence in producing the 'new evidence.' Assuming, as the plaintiff contends, that he was not sufficiently recovered prior to July 1988 for his deposition to be taken, he has failed to proffer a sufficient explanation for the six-month postdeposition delay in seeking to vacate the prior judgment."); *Sciss v. Metal Polishers Union Local 8a*, 149 A.D.2d 318, 321, 539 N.Y.S.2d 899, 902 (1st Dep't 1989)).

38. Barr et al., *supra* note 8, § 16:330, at 16-38 (citing *Glicksman v. Bd. of Educ./Cent. Sch. Bd. of Comsewogue Union Free Sch. Dist.*, 278 A.D.2d 364, 366, 717 N.Y.S.2d 373, 374–75 (2d Dep't 2000) ("The statute imposes no time limit for making such a [renewal] motion. However, there is no indication in the legislative history of an intention to change the rule regarding the finality of judgments. None of the circumstances set forth in CPLR 5015 [newly discovered evidence], nor circumstances which would warrant the exercise of the court's inherent power to provide relief from a judgment are present here. Consequently, because the plaintiffs' motion was made after judgment was entered and the time to appeal had expired, it should have been denied as untimely.")).

39. Byer's Civil Motions, *supra* note 27, § 59:05, at 745 (citing *Prude v. County of Erie*, 47 A.D.2d 111, 114, 364 N.Y.S.2d 643, 647 (4th Dep't 1975) ("[A]n appeal may be taken from a denial of a motion for leave to renew . . . . and a concurrent appeal from the original order upon a subsequent motion to renew may be dismissed as 'academic.' We conclude, therefore, that a motion to renew is not limited to the time within which an appeal may be taken."), *abrogated by McCarthy v. Volkswagen of America, Inc.*, 55 N.Y.2d 543, 450 N.Y.S.2d 457, 435 N.E.2d 1072 (1982)).

40. *Cf. Glicksman*, 278 A.D.2d at 366, 717 N.Y.S.2d at 374–75.

41. Barr et al., *supra* note 8, § 16:330, at 16-38 (citing *Koscinski v. St. Joseph's Med. Ctr.*, 47 A.D.3d 685, 686, 850 N.Y.S.2d 162, 163 (2d Dep't 2008) ("Although, as a general rule, an appellate court will not grant any affirmative relief to a non-appealing party, this principle does not bar a non-appealing defendant from seeking renewal of a cross motion to dismiss the complaint insofar as asserted against it based upon an appellate court's decision to grant dismissal of the complaint as to a codefendant.")).

42. Ferstendig, *supra* note 4, § 7.17[3] at 7-128 (citing *Koscinski*, 47 A.D.3d at 686, 850 N.Y.S.2d at 163).

43. *Id.*

44. *Id.*

45. *Id.*

46. Siegel, *supra* note 1, § 254, at 451 (citing *Koscinski*, 47 A.D.3d at 686, 850 N.Y.S.2d at 163).

INDEX TO ADVERTISERS