2008

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

Gerald Lebovits

Dov Treiman's

Landlord-Tenant Monthly

Volume 6 Issue 4 & 5 | April/May 2008

Residential Landord-Tenant Appeals In The Appellate Term - Part II

By Gerald Lebovits *

(B) *Automatic Stays*

R.P.A.P.L. 751(1). Subsection 751(1) contains an automatic-stay provision. A tenant sued for not paying rent can obtain a stay by depositing with the Housing Court the amount of rent due after a judgment is issued but before the warrant of eviction issues. This provision is rarely invoked, though it is effective. R.P.A.P.L. 751(1) is a Housing Court remedy, not an appellate remedy, but all appellate practitioners should know about it. A tenant's counsel who wishes to take advantage of R.P.A.P.L. 751(1) should request that a warrant not issue forthwith on a judgment, but rather on final judgment that both the warrant and its execution be stayed for five days.

C.P.L.R. 5519(a)(1). Other than the automatic stay in R.P.A.P.L. 751(1), the C.P.L.R.'s automatic-stay provisions are not always useful. Three subdivisions of C.P.L.R. 5519 might apply when appealing a summary proceeding. The first is C.P.L.R. 5519(a)(1), which provides an automatic stay for a governmental authority. This stay will usually occur only if the City of New York or the New York City Housing Authority (NYCHA) loses below, most often when the City or NYCHA loses a Housing Part (HP) proceeding and is ordered to make repairs.

C.P.L.R. 5519(a)(2). The second automatic stay provision is found in C.P.L.R. 5519(a)(2), which requires a deposit of an undertaking with the court from which an appeal is taken.[140] C.P.L.R. 5519(a)(2) deals only with a judgment or order that "directs the payment of a sum of money," and landlord-tenant proceedings primarily concern possessory issues, which must exist for Housing Court to have jurisdiction. Assuming that C.P.L.R. 5519(a)(2) applies to Housing Court cases, and it might not, this subdivision enables a litigant to obtain an appeal bond from an insurance company or to deposit the judgment in court under C.P.L.R. Article 26.

C.P.L.R. 5519(a)(6). The last automatic-stay provision deals with "possession or control of real property which the judgment or order

(Continued on page 2)

*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.

CONTENTS

Residential Landlord-Tenant Appeals In The Appellate Term Part II 1

A Prophecy Realized: The Pullman Premonition and the Business Judgment Rule Validated by Lapidus - Part I 9

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

directs be conveyed or delivered."[141] The authorities disagree over whether this subdivision applies to Housing Court proceedings. One leading authority suggests that this subdivision refers to selling real property, not possessing real property.[142] In addition, many Civil Court and Housing Part judges believe that this subdivision does not apply to residential landlord-tenant cases, especially holdover proceedings.

Still, many decisions have held that the automatic stay applies to appeals from summary proceedings.[143] Moreover, at least one author has opined that C.P.L.R. 5519(a)(6) provides that "an appellant is entitled to a stay as of right."[144]

If an automatic stay is granted, the appellant will be required to deposit with the court from which the appeal is taken an undertaking to prevent or compensate for waste.[145] It is unclear whether that undertaking must be fixed by noticed motion, by ex parte order, or by neither. C.P.L.R. 5519(a) concerns stays without court order, unlike the discretionary stays in C.P.L.R. 5519(c), which necessarily invite opposition. But a court that grants an automatic stay will likely refrain from fixing an undertaking ex parte. Thus, it is recommended that a C.P.L.R. 5519(a)(6) application be made by order to show cause. Whether or not a C.P.L.R. 5519(a)(6) stay is automatic or discretionary, "the amount of the undertaking is, and the opposing party should be given the opportunity to challenge the amount."[146]

There are two significant advantages to making a C.P.L.R. 5519(a)(6) motion. The first is that if it succeeds, the tenant-appellant ordered evicted under R.P.A.P.L. 711(1), 713, or 715 is not automatically required to deposit the entire amount of the judgment as an undertaking. This could aid holdover tenant-appellants, who might pay only the rent specified in the lease and not the fair-market use and occupancy. However, the Appellate Term often remands for Housing Court to set the amount of use and occupancy to be paid pendente lite or issues orders without prejudice to remand, especially when landlords move to modify the conditions for use and occupancy because the lease rent is lower

(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)

than market rent. The second advantage is that if an automatic stay succeeds in a holdover proceeding, a tenant can remain in possession for a long time pending appeal even when the likelihood of prevailing on appeal is slim. The disadvantage is that there is no guarantee that this motion will succeed.

Vacating the Stay. Only the court that hears the appeal may vacate an automatic stay granted under C.P.L.R. 5519(a).[147] To vacate an automatic stay, the respondent must show that the appeal is without merit or was brought in bad faith or solely to delay, that the stay will cause an undue burden or hardship, or that the appellant failed to comply with the court's order requiring an undertaking.[148]

If the Appellate Term affirms the judgment below or dismisses the appeal, the stay, whether discretionary or automatic, continues for five days after the notice of entry is served and filed in the Appellate Term.[149] Another five days are added if the notice of entry is served by regular mail under C.P.L.R. 2103(b). Pursuant to C.P.L.R. 5519(e), a stay will expire absent a motion for leave to appeal to the Appellate Division made five days after service of the notice of entry and filing. Practitioners who plan to seek leave to appeal from the Appellate Division if they lose in the Appellate Term should regularly call the Appellate Term Clerk's Office with the term when oral argument took place to determine whether the Appellate Term has rendered a decision. Doing so rather than waiting for a decision published in the New York Law Journal or online on the Law Reporting Bureau's Web site[150] or by receiving service from opposing counsel will add more time to prepare a leave application and possibly to continue the stay.[151] The stay expires once the Appellate Division renders a decision affirming or modifying. A debate has arisen over whether a notice of entry need be served or filed.[152]

(C) *Stays and Ex Parte Orders under C.P.L.R. 5704(b)*

The Appellate Term, which has the same power as the courts from which it hears appeals, may review ex parte the Housing Court's ex parte orders. The result can be twofold: either an ex parte order granted below will be vacated or modified or an ex parte order denied below will be granted. The ex parte order the Housing Court typically considers is an order to show cause. Pro se forms in the Landlord-Tenant Clerk's Office are routinely given to tenants who seek judgment relief. A tenant in a nonpayment proceeding may be paying out a judgment over time according to a stipulation that allows an eviction to occur on the tenant's failure to pay. If the tenant returns to Housing Court to request extra time to pay and shows that money is forthcoming, a judge might sign the order to show cause.

A landlord that believes that the tenant did not have a meritorious reason to obtain an order to show cause may file a C.P.L.R. 5704(b) motion with the Appellate Term to vacate the order, especially if several orders to show cause have been signed in one proceeding or if the landlord has reason to believe that the tenant has abused the procedure. The landlord may seek to strike and vacate a stay in an order to show cause, to strike the order from the Civil Court calendar, to direct that no additional Marshal's notice be required unless required by the Marshal's Handbook, and to direct that no further applications for a stay be sought.[153] In the Second Department, a landlord, before moving under C.P.L.R. 5704(b), must apply to the signing judge to vacate the order or any part of it, such as the stay provision.[154] If the signing judge in the Second Department declines to vacate the order, the landlord may then go to the Appellate Term under C.P.L.R. 5704(b). In the First Department, a landlord may go to the Appellate Term directly, bypassing the signing judge.

A tenant who brought an order to show cause that Housing Court declined to sign may go to the Appellate Term to request C.P.L.R. 5704(b) review.[155] In a nonpayment proceeding, the Appellate Term might grant the tenant C.P.L.R. 5704(b) relief, thus restoring the matter to the Housing Court's calendar, on condition that the tenant deposit money in court.

To file a C.P.L.R. 5704(b) motion, the movant prepares a proposed ex parte order with an

(Continued on page 4)

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

affidavit or affirmation and attached exhibits, including the underlying order. Modifying or vacating an underlying order favoring a tenant is drastic and will be granted only on a strong showing of abuse. If granted against a tenant, the Appellate Term justice who considered it will likely require that eviction be preceded by proof of service on the tenant filed with the Housing Court's Clerk's Office. Once the tenant is served, the tenant can go to the Appellate Term to read the C.P.L.R. 5704(b) application; it is an ex parte application, not a sealed document. By then, however, it may be too late to seek reargument before eviction. Reargument may be futile in any event. Another option for the evicted tenant is to move in Housing Court to be restored post-eviction.[156]

Although the Appellate Division will not review interim Appellate Term orders, the tenant may nevertheless try to seek review from the Appellate Division by way of a C.P.L.R. 5704(a) ex parte motion if the tenant can assert that the landlord itself committed an abuse in its C.P.L.R. 5704(b) motion to the Appellate Term. Under C.P.L.R. 5704(a), the Appellate Division has the jurisdiction to "vacate or modify an order granted without notice to the adverse party by any court or a judge thereof from which an appeal would lie to such appellate division." It is uncertain whether this procedure will work, however. No appeal to the Appellate Division lies from anything the Appellate Term does not decide on appeal. The Appellate Division might find that no appeal lies from the Appellate Term's decision on a C.P.L.R. 5704(b) motion.

Although a single Appellate Term justice, in chambers or at home, may modify or vacate an ex parte stay, the full panel, according to one author, considers whether to grant relief to a party who failed to obtain it below.[157]

A C.P.L.R. 5704(b) motion must be made to the Appellate Term before the return date in Housing Court on an order to show cause. If Housing Court hears both sides on a stay issue, the application is no longer ex parte, and 5704 jurisdiction is lost.

In the Second and Eleventh Judicial Districts, litigants with orders to show cause go to the court's central clerk's office at 141 Livingston Street. In the Ninth and Tenth Judicial Districts, a local clerk will telephone the central clerk's office at 141 Livingston Street. A clerk in the 141 Livingston office will direct the litigant to a court where a Ninth and Tenth justice sits in chambers. The litigant will then go to the justice's chambers with the papers and await a decision.

(D) *Stays of Reletting and Restoration*

In a 2003 opinion overruling its precedent, the Appellate Term, Second Department, has decided that it has the jurisdiction to stay reletting and restore a tenant to possession pending appeal.[158] This power stems from the appellate right to issue a prohibatory injunction under C.P.L.R. 6301 to preserve the status quo pending appeal. To obtain this relief, the tenant-movant must show a likelihood of success on the merits, the prospect of irreparable harm (counted as the eviction itself), and a balance of equities in the tenant-movant's favor.[159]

VII. CROSS APPEALS

The respondent on appeal may also appeal; the procedure is called a cross-appeal. A respondent may not request any modifications to the Housing Court's order or final judgment unless a cross-appeal is taken.[160] To cross-appeal, the respondent must be an "aggrieved party."[161] The exception to that rule is when the judgment or order does not grant the respondent complete relief or when an error occurs below that, if corrected, would support a judgment in the respondent's favor.[162] For example, an award might be less than the respondent sought below, or the judgment might deny an affirmative claim.[163]

The respondent must serve its cross-appeal during either of the following two time periods,

(Continued on page 5)

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

whichever is later: 10 days after the appellant serves its notice of appeal or within the original 30-day period following service of the order with notice of entry.[164] A cross-appeal not served within these time limits will be dismissed.[165] In addition, a cross-appeal perfected improperly will be dismissed.[166]

The Appellate Term, on application, may order both sides to share the costs of ordering the transcript in a cross-appeal.

VIII. PERFECTING THE APPEAL

The appellant's time to perfect an appeal—that is, to file the brief and the record—begins to run from the day the notice of appeal is filed in the clerk's office in the county from which the practitioner is appealing. Failure to perfect an Appellate Division appeal will result in dismissal with prejudice.[167] But the Appellate Term has no requirement that an appeal be perfected within a specified term. A respondent must move to dismiss a dilatory Appellate Term appeal. The Appellate Term usually denies these motions unless the appellant defaults in answering or causes an extremely lengthy and unreasonable delay. If the appellant even nominally opposes the motion, the court will typically condition the denial on the appellant's perfecting the appeal by a particular term or date. The respondent should renew the motion to dismiss the appeal if the appellant does not comply with the conditional order. Once an appeal has been perfected, it is rare that an appeal will be dismissed as untimely.

Conversely, the appellant may move to extend, or enlarge, the time to perfect an appeal. One extension is routinely granted on motion for good cause shown. The appellant should explain why the extension is needed. Valid excuses are myriad; they include delays prompted by settlement discussions, awaiting a decision on a motion to reargue, or a burdensome caseload. A smart practitioner will also briefly argue that the appeal is meritorious, that the delay will not prejudice the respondent, that the appellant is close to perfecting the appeal, and what the estimated date of submission is. The motion for an extension should be served before the expiration date, although the return date may be after the expiration date. The application is brought by motion, not by order to show cause. The motion should include the notice of appeal and the order or judgment that is the subject of the appeal. The court must be advised of the respondent's position regarding the request for an extension. Any stipulation in which the respondent consents to an extension should be annexed as an exhibit.

A respondent's attorney who wishes to object to a request for an extension is well-advised to set out good reasons for objecting, especially in response to an appellant's first motion for an extension.

The respondent may also move to accelerate the final due date.

The Appellate Term may expedite perfection on its own motion. In *McDonald v. Wilson*,[168] for example, the court deemed the papers submitted on a motion for a stay pending appeal to be briefs and set the matter down for oral argument on the next calendar date.

The Appellate Term's broad powers also include the power of summary reversal without the need to perfect an appeal. In *Cruz v. Chan*,[169] the court, on its own motion, treated a notice of appeal as an application for leave to appeal, and on granting leave reversed summarily. In *Cruz*, an HP court struck the landlord's answer for lack of verification even though the landlord offered to verify the answer nunc pro tunc before the time to answer had expired. According to the court, the urgent nature of HP proceedings required summary reversal.

In another unusual case, a tenant filed a post-eviction order to show cause in the Appellate Term, Second Department, seeking to be restored. The court signed it and later amended it sua sponte to provide for a hearing on the issues raised in the order to show cause.[170] After the hearing, the court summarily reversed because of what it found to be clear error and exigent circumstances.[171]

Either side may move by motion or order to show cause for the Appellate Term in its discretion

(Continued on page 6)

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

to grant a preference to hear and decide the appeal.[172] The rules of the Second Department, with its current six-month lag time in hearing appeals, specifically contemplate preferences.[173] Additionally, the parties may stipulate to extensions of time that are "so ordered" by the court to allow late perfection. Either way, perfecting the appeal in the First Department begins with compiling the record and ends with the clerk's return. In the Second Department the process begins and ends with the clerk's return.

(A) The Clerk's Return

The Appellate Term, First Department, requires a clerk's return in addition to one original (signed by the attorney) and four copies of the briefs and the full record or one signed original and four copies of the brief and appendices reproduced as authorized by C.P.L.R. 5529.[174] The only exception is if the parties consent to appeal on a statement under C.P.L.R. 5527, as explained below.[175] In the Second Department, a landlord-tenant appeal can be brought on the clerk's return and one signed original and three copies of the brief.[176] In the Second Department, the appellant may but need not print copies of the record.[177]

The Civil Court appeals clerk prepares a form titled the clerk's return on appeal, a coversheet that enumerates the contents of the clerk's return, and addresses it to the Appellate Term to attest that the record is complete. That form is affixed to the index (see below), the notice of petition and petition, evidence, the judgment, all necessary papers from the Housing Court's file, any opinion of the court, transcripts, and the notice of appeal.[178] The form, together with the file to which to the form is affixed, is called the clerk's return.

The appeals clerk is required to give the clerk's return to the Appellate Term, often through counsel if there is one, after the notice of appeal is filed.[179] The brief may not be filed unless the clerk's return is filed first. In the First Department, the appellant must procure the clerk's return within 30 days after the notice of appeal is filed.[180] That requirement, which does not exist in the Second Department, where appeals have no fixed deadlines and thus can wither without being prosecuted, is largely ignored in the First Department because it is often difficult and time-consuming to obtain a full record, especially when the record includes transcripts.

On the other hand, the practitioner should know that although the Appellate Term, First Department, largely ignores the 30-day rule in 22 N.Y.C.R.R. 640.6(a)(1), the court could take a hard line, in its discretion, on a case-by-case basis. So, too, can the Appellate Term, Second Department, in its discretion, dismiss an untimely appeal despite the absence of fixed dates in the Second Department within which an appellant must perfect an appeal.

In the Appellate Division, First Department, Rule 600.11(a)(3) fixes an outside limit for perfecting an appeal "within one year of the date of entry of the judgment or order appealed from," unless the court extends the time for good cause. Undue delay is presumed if perfecting the appeal exceeds a year.[181] Delays in prosecuting appeals frustrate the rights of respondents.[182] As one court has explained, "[b]y analogy to appeals to the Appellate Division, appeals to the Appellate Term, First Department, not perfected within a year . . . are best 'supported by a substantial excuse and a showing of merit to the appeal.'"[183] The appellant is wise in an important case, therefore, to take the initiative to move to extend the time to perfect when it appears likely that additional time is needed to perfect—and in most cases it will be likely because 30 days come and go quickly. Conversely, the respondent would be wise to move to dismiss an unperfected appeal. Otherwise, as in *Cetnar v. Kinowski*,[184] the court might find that the respondent "acquiesced in [appellant's] delay until well after the appeal was taken" and thus excuse late perfection.

In the Second Department, the appellate process is relatively simple because appeals are

(Continued on page 7)

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

made on the original record.[185] In the First Department, the practitioner who appeals on a fully reproduced record must first assemble the entire record, as described below, and serve it on the respondent. The appellant then gives the record, with proof of service, to the Civil Court appeals clerk for review. The clerk affixes the return to the record for appellant's counsel's filing with the Appellate Term, which will not accept the record or any briefs without the clerk's return.

(B) *The Record*

If the parties do not agree to a stipulated set of facts, called a C.P.L.R. 5527 statement—and they rarely do—the appellant must give the Appellate Term a record of what happened below. The record consists of an original record, a fully reproduced record, or an appendix. An original record is just that: the entire original court file, with transcripts. All appeals to the Appellate Term, Second Department, may be made on the original record, as may all poor-person appeals in the Appellate Term, First Department. To obtain an original record, the appellant need only ask. An appellant may subpoena the file from the Housing Court Clerk's Office, but doing so might upset the clerks.

The record is important. The Appellate Term will not review a final judgment if the Housing judge failed to comply with C.P.L.R. 4213(b) specificity requirements. Housing Court must set forth its rationale and articulate the facts essential to its determination in rendering judgment. Otherwise, the Appellate Term might remand for a new trial.[186]

Likewise, the Appellate Term might decide that the record is so slender or limited that it prohibits intelligent appellate review of the trial court findings. In that case, the Appellate Term will remand for a new trial.[187] The Appellate Term might also remand if documentary evidence was shown to the court of first instance but it was neither admitted into nor excluded from evidence[188] or when the centerpiece document of the parties' appellate briefs is ambiguous and is "virtually ignored during the trial proceedings."[189]

(Endnotes)

[140] *See* C.P.L.R. Article 25 (undertakings).

[141] C.P.L.R. 5519(a)(6).

[142] *See* Eric A. Portugese, *CLS Commentaries to C.P.L.R. 5519.*

[143] *See, e.g., Horowitz v. Safeco Ins. Co. of Am.*, 50 A.D.2d 1042, 1042, 377 N.Y.S.2d 750, 751 (3d Dep't 1975) (mem.); *In re Eleven Eleven Book Ctr., Inc. v. Ribaudo*, 86 Misc. 2d 17, 19-20, 381 N.Y.S.2d 643, 644-45 (Sup. Ct. N.Y. County 1976) (dismissing Article 78 petition to stay warrant and fix undertaking, but only because petitioner did not appeal judgment of eviction); *Oleck v. Pearlman*, 49 Misc. 2d 202 *passim*, 267 N.Y.S.2d 76 *passim* (Sup. Ct. Kings County 1966); *Mountbatten Equities v. Tabard Press Corp.*, 87 Misc. 2d 861, 864-65, 386 N.Y.S.2d 785, 788 (Civ. Ct. N.Y. County 1976), *modified on other grounds*, 88 Misc. 2d 831, 390 N.Y.S.2d 513 (App. Term 1st Dep't) (per curiam); *Moskowitz v. Rassbach*, N.Y.L.J., Apr. 2, 1997, at 29, col. 2 (Hous. Part Civ. Ct. N.Y. County). One court even found that automatic stays apply to landlords. *See Brown v. 99 Sutton LLC*, 2002 N.Y. Slip Op. 40223(U), *2, 2002 W.L. 1275171, at *2 (Hous. Part Civ. Ct. Kings County May 22, 2002) (setting undertaking for landlord that wanted to appeal ruling favoring tenant in illegal-lockout proceeding).

[144] Andrew A. Scherer, Residential Landlord-Tenant Law in New York § 18:27, at 988 (2007-2008 ed.).

[145] C.P.L.R. 5519(a)(6); *Pisano v. County of Nassau*, 41 Misc. 2d 844, 845-46, 246 N.Y.S.2d 733, 736 (Sup. Ct. Nassau County 1963), *aff'd*, 21 A.D.2d 754, 252 N.Y.S.2d 22 (2d Dep't) (mem.) *lv. denied*, 14 N.Y.2d 489, 202 N.E.2d 158, 253 N.Y.S.2d 1027 (1964).

[146] *Landlord-Tenant Appeals*, *supra* note 133, at 16.

[147] C.P.L.R. 5519(c); *Hunt v. Grinker*, 169 A.D.2d 477, 478, 564 N.Y.S.2d 350, 351 (1st Dep't 1991) (mem.).

[148] Eric A. Portugese, *CLS Commentaries to C.P.L.R. 5519.*

[149] C.P.L.R. 5519(e).

[150] <www.courts.state.ny.us/reporter/decisions.htm> [last visited Mar. 14, 2008].

[151] *See* 22 N.Y.C.R.R. 640.9(c) (providing for stay applications pending motion for reargument or leave to appeal before Appellate Term, First Department).

[152] *Compare* C.P.L.R. 5519(e)(ii) *with* 5519(e)(i).

(Continued on page 8)

(Residential Landlord-Tenant appeals, continued from page 7)

[153] *Motion Practice*, *supra* note 131, at 70.
[154] C.P.L.R. 2221(a)(2).
[155] *Greenhaus v. Milano*, 242 A.D.2d 383, 384, 661 N.Y.S.2d 664, 665 (2d Dep't 1997) (mem.).
[156] For a discussion of that option, see Gerald Lebovits, *Post-Eviction Motions to Restore*, 33 N.Y. Real Prop. L.J. 84 (Spring 2005) (updated and reprinted in two parts at 5 Landlord-Tenant Monthly 1 (June 2007) and 5 Landlord-Tenant Monthly 1 (July 2007)).
[157] Scherer, *supra* note 144, at § 18:32, at 989-90 (Fern Fisher, View from the Bench).
[158] *See 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.); *accord Wilmaud Realty Corp. v. Burnett*, — H.C.R. —, N.Y.L.J., Aug. 22, 2003, at 21, col. 4 (App. Term 2d & 11th Jud. Dists.) (mem.).
[159] *See generally Doe v. Axelrod*, 73 N.Y.2d 748, 750, 532 N.E.2d 1272, 1272, 536 N.Y.S.2d 44, 44 (1988) (per curiam).
[160] *Thoda v. Arcoleo*, 179 A.D.2d 508, 509, 579 N.Y.S.2d 30, 31 (1st Dep't 1992) (mem.); *Creative Cabinet Corp. of Am., Inc. v. Future Visions Comp. Store*, 140 A.D.2d 483, 484, 528 N.Y.S.2d 596, 597 (2d Dep't 1988) (mem.).
[161] C.P.L.R. 5511; *Parochial Bus Sys.*, 60 N.Y.2d 539, 544-45, 458 N.E.2d at 1243, 470 N.Y.S.2d at 566; *Arvic Realty Corp. v. RST Assocs., L.P.*, 9 Misc. 3d 137(A), 2005 N.Y. Slip Op. 51723(U), *1-2, 2005 W.L. 2764265, at *1-2 (App. Term 1st Dep't Oct. 25, 2005) (per curiam) ("[W]e have no occasion to address those portions of the final judgment as may be deemed to have been adverse to petitioner.").
[162] C.P.L.R. 5501.
[163] *See 87th St. Owners Corp. v. Olnick Org.*, 21 H.C.R. 8A, N.Y.L.J., Jan. 7, 1993, at 21, col. 2 (App. Term 1st Dep't) (per curiam) (holding that respondent may not get additional attorney fees from court below absent cross-appeal).
[164] C.P.L.R. 5513(c).
[165] *In re Sudarsky v. Div. Hous. Comm. Renewal*, 285 A.D.2d 704, 706, 685 N.Y.S.2d 704, 707 (1st Dep't 1999) (mem.).
[166] *D'Onofrio Bros. Const. Corp. v. Bd. of Educ.*, 72 A.D.2d 760, 760, 421 N.Y.S.2d 377, 378 (2d Dep't 1979) (mem.).
[167] *Cross Westchester Develop. Corp. v. Sleepy Hollow Motor Ct., Inc.*, 222 A.D.2d 644, 644-45, 636 N.Y.S.2d 372, 373 (2d Dep't 1995) (mem.), *lv. denied*, 88 N.Y.2d 802, 667 N.E.2d 338, 644 N.Y.S.2d 688 (1996).
[168] N.Y.L.J., Mar. 7, 2003, at 20, col. 3 (App. Term 2d Dep't 9th & 10th Jud. Dists.) (mem.)
[169] N.Y.L.J., Apr. 16, 2001, at 34, col. 2 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).
[170] *Hegeman Asset L.L.C. v. Smith*, 5 Misc. 3d 8, 11, 783 N.Y.S.2d 192, 195 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2004) (mem.).
[171] *Id.* at 13, 783 N.Y.S.2d at 196.
[172] C.P.L.R. 5521(a).
[173] *Id.* 731.5, 732.5.
[174] *Id.* 640.2(a).
[175] *See id.* 640.2(c).
[176] *Id.* 731.1(a), 732.1(a).
[177] *Id.* 731.1(c), 732.1(c).
[178] N.Y.C. Civ. Ct. Act § 1704.
[179] *Id.*
[180] 22 N.Y.C.R.R. 640.6(a)(1).
[181] *Zetlin v. Hanson Holdings, Inc.*, 63 A.D.2d 878, 878, 405 N.Y.S.2d 472, 473 (1st Dep't 1978) (mem.).
[182] *Tonkonogy v. Jaffin*, 21 A.D.2d 264, 249 N.Y.S.2d 934 (1st Dep't 1964) (per curiam).
[183] *Manhattan Mansions*, 2003 N.Y. Slip Op. 51445(U), * 1 (quoting *Zetlin*, 63 A.D.2d at 878, 405 N.Y.S.2d at 473).
[184] 245 A.D.2d 974, 975, 667 N.Y.S.2d 107, 109 (3d Dep't 1997).
[185] 22 N.Y.C.R.R. 731.1(a), 732.1(a).
[186] *Nederpelt*, 18 Misc. 3d 138(A), 2008 N.Y. Slip Op. 50314(U), *1, 2008 W.L. 480036, at *1.
[187] *See generally Joseph v. Trust*, 7 Misc. 3d 75, 795 N.Y.S. 2d 813 (App. Term 1st Dep't 2005) (per curiam).
[188] *Driscoll v. AV Polo Run Assocs.*, 17 Misc. 3d 128 (A), 851 N.Y.S.2d 63, 2007 N.Y. Slip Op. 51932(U), *1, 2007 W.L. 2962738, at *1 (App. Term 1st Dep't Oct. 11, 2007) (per curiam).
[189] *Joseph*, 7 Misc. 3d at 77, 795 N.Y.S.2d at 814.