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New York Courts Reinforce the Broad Remedial Purpose of the New York Savings Statute

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Client Advisory

In two recent decisions, the Court of Appeals and the Appellate Division, First Department, significantly clarified the reach of New York's saving statute, CPLR 205(a), holding that an action does not terminate until an appeal as of right is exhausted (even if it is exhausted by the failure to perfect, abandonment, or voluntary dismissal or withdrawal).

New York's savings statute allows a plaintiff whose underlying case is dismissed other than voluntarily or upon a final judgment on the merits to re-file the case within six months after termination (presumably after correcting problems or defects identified by the courts), even if the statute of limitations on the claims would have otherwise expired and barred the case. The statute states, in relevant part:

If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits the plaintiff … may commence a new action upon the same transaction or occurrence … within six months after the termination [if the original action was timely]

See CPLR 205(a) (Termination of Action; New Action by Plaintiff). Savings statutes, like the one in New York, have been in existence for centuries, and have the broad remedial purpose of preventing plaintiffs who filed an action within the prescribed limitations period from losing their right to have their claims determined on the merits when the action was terminated without a judgment on the merits because the statute of limitations lapsed during the pendency of the terminated action.

It has long been clear that the six-month period is tolled by the timely filing of an "as of right" appeal from the court's dismissal of the case, and a plaintiff is not required to file a new action until that appeal is decided. *See Lehman Bros. v. Hughes Hubbard & Reed*, 92 N.Y.2d 1014, 1016-1017 (1998) (holding that a prior action terminates for purposes of CPLR 205(a) when an appeal taken as of right is exhausted). Less clear was what would happen if a plaintiff took an appeal as of right, but then the appeal was terminated by means other than a decision on the merits. Because the statute provides an additional six months to re-file the case from the date of "termination" of the initial action, the courts have had to assess what it means for the earlier action to be "terminated" for purposes of the statute.

Parties opposing the filing of a new case by plaintiffs have argued that voluntary dismissal of an appeal, or the failure to perfect an appeal, should not be deemed the termination date, and that the termination date should be the date the lower court dismissed the case. The logic of this argument is that the tolling provided by the appeal should be considered null and void because, in effect, a plaintiff would be able to delay the start of the six-month period under CPLR 205(a) by at least nine months (the time period by which an appeal must be perfected in most appellate departments) by simply filing a frivolous notice of appeal under CPLR 5513(a) and then waiting until the last minute to voluntarily withdraw or dismiss the appeal, or by simply failing to perfect the appeal within the prescribed period.

The Court of Appeals, in *Malay v. City of Syracuse*, recently brushed aside these concerns as "overblown" and a necessary casualty of the broad remedial purpose of CPLR 205(a), holding that the initial case terminated after dismissal of the plaintiff's appeal for failure to perfect. 25 N.Y.3d 323, 329 (2015). The Court concluded that "where an appeal is taken as of right, the prior action terminates for purposes of CPLR 205(a) when the nondiscretionary appeal is truly 'exhausted,' either by a determination on the merits or by dismissal of the appeal, even if the appeal is dismissed as abandoned." *Id*. Accordingly, CPLR 205(a)'s six months savings period does not begin to run until after dismissal of the appeal for failure to perfect.

The Court—while noting that the above-referenced concerns over frivolous appeals are "not unreasonable"—emphasized that plaintiffs "are generally motivated to obtain a determination on their merits in their favor as quickly as possible" and are not seeking to unduly delay the process. *Id*. The Court pointed out that it is not generally in a plaintiff's interest to frivolously file and then fail to perfect an appeal "inasmuch as the dismissal of the nondiscretionary appeal due to failure to perfect generally would foreclose any subsequent appeal of the same issues." *Id.*[1] Further, the Court rejected the argument that plaintiffs should be required to file their new action within six months of the lower court dismissal even if their appeals are still pending (if there is any chance they might not pursue their appeal), noting that this "would be wasteful of the limited time and resources of courts and litigants, inasmuch as the appeal 'might, and in many cases would, determine the right of the parties in the controversy and prevent further costs and litigation.'" *Id.* at 330.

Because *Malay* could be limited to the situation in which an appeal was dismissed by a court for failure to perfect, the question of whether a plaintiff's voluntary withdrawal of his appeal would similarly be deemed the start of the six months savings period, in order to achieve the same remedial purpose, remained open. On November 5, 2015, that question was answered affirmatively by the First Department in *Loreley Financing (Jersey) No. 3, Ltd. v. Morgan Stanley & Co. Inc.*, when it unanimously reversed a lower court's dismissal of a later filed action as untimely where that action was filed within a month of the plaintiff's voluntary withdrawal of its appeal, but more than six months after the original order dismissing the action was entered. Index. No. 651633/14 (1st Dep't, Nov. 5, 2015). The First Department held that, "[b]y analogy to *Malay*, the [earlier action] terminated for purposes of CPLR 205(a) when plaintiffs withdrew their appeal"—not when the lower court dismissed the earlier action. Id.

One practical import of these decisions is that they should prevent instances where a plaintiff feels compelled to perfect and prosecute an appeal solely because the plaintiff is concerned that it must have its appeal decided on the merits in order to take advantage of the savings statute. In resolving any ambiguity about when the savings period begins where an appeal is voluntarily withdrawn or dismissed for a failure to perfect, these decisions should eliminate an incentive for plaintiffs to make strategic decisions that are wasteful and inefficient. With these two decisions, the courts have reinforced the broad remedial purpose served by CPLR 205(a).

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Endnote

[1] The Court also reiterated the sharp line drawn between appeals as of right and discretionary review. In the case of the latter, the six-month period is not tolled unless discretionary review is granted by the court. See *Malay*, 25 N.Y.3d at 328 (summarizing that the court in *Lehman Bros.* "followed previous decisions of this Court holding that a prior action terminates for purposes of CPLR 205(a) upon the order of the intermediate appellate court when an appeal is taken as of right, or, when discretionary appellate review is granted on the merits, upon the order of the appellate court that granted discretionary review.") As such review is rare, a practitioner should not bet that CPLR 205(a) would be available.

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