Post Appeal Motions to Renew in the Supreme Court

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It ain't over till it's over

-*Yogi Berra*

Consider the following scenario:

1) A Defendant's Pre-Answer Motion to Dismiss is partially granted by a Court of original Jurisdiction, striking several of Plaintiff's Causes of Action as pled;

2) Both parties appeal to the Appellate Division, where the Lower Court's Order is affirmed in its entirety;

3) During the Discovery process, months, or maybe even years subsequent to the Order striking Plaintiff's originally pled Causes of Action, new facts and evidence come to light during the Discovery process whih clearly establish that Dismissal of one or more of Plaintiff's originally pled Causes of Action was in error.

Question: What do you do?

The Appeal has already been taken, the Lower Court has been affirmed, and Renewal (and/or Reargument if the Court has misapprehended the facts or law) in the Appellate Division is not only expensive, but the Intermediate Court is unlikely to overturn itself - especially if oral arguments have already been conducted.

Solution: consider a Motion to Renew in the Lower Court based on newly discovered facts/evidence.

Though a path not ordinarily taken, when warranted a post-Appeal Motion to Renew is a simple and effective means to challenge an adverse Decision; can prove instrumental in securing a client's long term success; and can instantly change the posture of any litigation where and when it successfully reinstates previously dismissed Causes of Action.

As almost all New York litigators know, CPLR § 2221(e) is the statutory basis by which a Party can seek Renewal of a prior Order where, *inter. alia.*, new facts are learned and/or new evidence is discovered which was not previously offered, but had it been available at the time of the underlying Motion would have changed the Court's determination However, few are aware of the lesser known procedural rule that allows a Court of original jurisdiction to entertain a Motion for leave to Renew based on new facts and/or evidence after an Appellate Court has affirmed their prior Order[1].

As with any Motion to Renew, the Party seeking post-Appeal leave to Renew must: 1) present new facts not offered in the original Motion, 2) establish a "reasonable justification for why these facts were not presented in the original Motion [the "due diligence" requirement], and 3) move for Renewal promptly after the discovery of the new facts and/or evidence. However, in addition to meeting these basic elements of a typical Motion to Renew, a Party seeking Renewal post-Appeal must also meet the 'heavy burden of showing due diligence in presenting the new evidence to the Supreme Court' in order to imbue the appellate decision with a degree of certainty."[2]

The opportunity make a post-Appeal Motion to Renew will typically present itself after Deposition testimony and/or new documentary evidence is found and exchanged during the Discovery process. This is because it is absolutely essential that the facts and/or evidence upon which the Motion is based is "new" within the meaning of CPLR 2221, and was not previously known to the Movant.

It is for this reason that Deposition testimony that contains admissions against interest is the perfect factual and/or evidentiary basis for a post-Appeal Motion to Renew, especially in the above offered scenario as there can be no question that it constitutes "new evidence" within the meaning of CPLR § 2221.[3] Indeed, unlike documentary evidence that is exchanged during the course of Discovery, and could have potentially been in the possession of a Party at the time of a Motion to Dismiss, Deposition evidence could not have existed at the time of the prior Motion as it was pre-Answer, and thus pre-Discovery.

For this same reason, Deposition testimony is also distinctively suited to satisfy the "due diligence" requirement imposed upon Parties which requires that they make a showing as to why the "new evidence" was not previously offered in the underlying Motion practice. Given that no such Deposition testimony existed at the time the underlying motion was made, is quite simply could not have been offered.[4]

Apart from the "new" evidence and "due diligence" requirements, the timing of this Motion remains an important factor. Unlike its counterpart Motion to Reargue, which has a hard 30 day deadline after the service of a Notice of Entry[5], the deadline to Move for Reargument based on newly discovered facts and/or evidence is dependent on when the new facts are discovered. Accordingly, a Party should make any such post-Appeal Motion to Renew as soon as practicable given the nature, complexity, and relevance of the newly discovered facts/evidence. In the case of Deposition testimony, a reasonable time to move could conceivable be several months after oral examination as, arguably, a Deposition Transcript cannot be used in support of any Motion until the 60 day period for a deponent to return a fully executed and corrected Deposition transcript (as set forth in CPLR 3116) has elapsed, unless of course the fully executed and corrected Deposition transcript has been received by counsel sooner. Nevertheless, the sooner relief is sought, clearly the better.

In sum, practitioners should always heed the words of the late, great Yogi Berra as in litigated matters one can never predict where the case will take you, and which procedural strategy will ultimately win the day – as vividly illustrated when a post-Appeal Motion to Renew successfully reinstates previously dismissed, and sometimes long forgotten, Causes of Action pled in a Complaint.

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[1] *See* Specialized Realty Servs., LLC v. Town of Tuxedo, 106 A.D.3d 987, 966 N.Y.S.2d 148; Sealey v. Westend Gardens Hous. Dev. Fund Co., Inc., 97 A.D.3d 653, 654–655, 949 N.Y.S.2d

[2] Derby v. Bitan,112 A.D.3d 881, 882, 977 N.Y.S.2d 405 *quoting* Levitt v. County of Suffolk, 166 A.D.2d 421, 423, 560 N.Y.S.2d 487)

[3] (*See* Quiroz v. Zottola, 96 A.D.3d 1035 [2nd Dept 2012][New evidence on the form of Deposition testimony showing Defendant's knowledge of their own wrongdoing supported Renewal regarding a Motion to Dismiss]; Sulger v. Danica Plumbing & Heating, LLC, 114 A.D.3d 929 [2nd Dept 2014][Plaintiff's admissions at Deposition that they acted in violation of insurance law warranted Renewal]; see also Morales v. Coram Materials Corp.,64 A.D.3d 756 [2nd Dept 2009][Testimony which had not been elicited at the time of original motion for summary judgment was new evidence for the purpose of a motion for leave to renew])

[4] (*See* Welsh Foods Inc v Wilson, 247 A.D.2d 830 [4th Dept 1998][Holding that is it movant's burden to establish "that purported 'new' material was not in existence or was unavailable at time of initial motion and proffer of valid excuse for failing to submit that material in support of defendants' initial motion")

[5] CPLR 2221(D)(3)