A CASE STUDY ON COURT OF APPEALS FINALITY

*Michael Nolan**

The jurisdictional requirements and limitations of the New York State Court of Appeals can make taking an appeal there an arduous experience. Just ask Laszlo Tauber. Over a period of four years, Mr. Tauber attempted to bring his case—*Tauber v. Bankers Trust Co.*[1]—to the Court on five occasions. On each of the first four, the appeal, or motion for leave to appeal, was dismissed with the ubiquitous entry that "the order sought to be appealed from does not finally determine the action within the meaning of the Constitution."[2] Those dismissals, of course, meant that the Court did not even consider the merits of the case; it could not, because the jurisdictional prerequisite of finality was not met.[3]

The *Tauber* case illustrates the pitfalls (not to mention expense) that any litigant can face in attempting to appeal to the Court of Appeals. It also shows that the Court's jurisdictional limitations can confound even the best lawyers. *Tauber* involved a multi-million dollar currency swap deal, and both parties had retained highly respected counsel.[4] This article will follow the *Tauber* case as it wove its way through the appellate courts, illustrating the

* Mr. Nolan is Principal Law Clerk to New York State Acting Supreme Court Justice Robert Wiggins. He was formerly Principal Law Clerk to Judge Richard C. Wesley of the New York Court of Appeals, and Justice Stephen K. Lindley at the Appellate Division, Fourth Department. Mr. Nolan would like to thank Andy Klein, Esq., former Chief Clerk of the Court of Appeals, for his editorial help, and his wife, Cindy Carroll Nolan, and children Matthew and Robert for their love and support.

[1] The first reported decision is Tauber v. Bankers Tr. Co., 657 N.Y.S.2d 686 (App. Div. 1997). There are two more reported decisions at the First Department, as well as four Court of Appeals entries dismissing or, ultimately, denying leave to appeal. Tauber v. Bankers Tr. Co., 767 N.E.2d 152 (N.Y. 2002); Tauber v. Bankers Tr. Co., 735 N.E.2d 1286 (N.Y. 2000); Tauber v. Bankers Tr. Co., 716 N.E.2d 700 (N.Y. 1999); Tauber v. Bankers Tr. Co., 691 N.E.2d 636 (N.Y. 1998); Tauber v. Bankers Tr. Co., 700 N.Y.S.2d 678 (App. Div. 2000); Tauber v. Bankers Tr. Co., 688 N.Y.S.2d 508 (App. Div. 1999).

[2] *Tauber*, 735 N.E.2d at 1286. This is the Court's standard entry in cases dismissed on finality grounds. *See, e.g.*, Lattuca v. Lattuca, 45 N.E.3d 614, 614 (N.Y. 2016); Manford v. Wilbur, 44 N.E.3d 235, 235 (N.Y. 2016).

[3] *See* CLERK'S OFFICE, N.Y. COURT OF APPEALS, THE NEW YORK COURT OF APPEALS CIVIL JURISDICTION AND PRACTICE OUTLINE 5–6, https://www.nycourts.gov/ctapps/forms/civil outline.pdf (last visited Nov. 12, 2016).

[4] *See Tauber*, 657 N.Y.S.2d at 686, 686–87.

concept of finality by putting it into a practical perspective.

I. A BRIEF OVERVIEW OF THE COURT OF APPEALS' JURISDICTION

Before taking up the *Tauber* case, a brief overview of the Court of Appeals' jurisdiction is in order. At the outset, it is well known by this point that the Court of Appeals is largely a *certiorari* court, controlling its own docket by choosing which cases it wishes to hear.[5] There are three general exceptions: (1) two justice dissents; (2) constitutional questions; and (3) stipulations upon judgment absolute.[6] An appeal as of right lies from a decision where there is a two justice dissent at the Appellate Division on a question of law,[7] and also where a substantial constitutional question is directly involved.[8] Even these limited categories of cases are further limited by the Court's fairly restrictive view of what constitutes a dissent on "a matter of law," when a constitutional question is "directly involved," and whether a constitutional question is "substantial."[9] Where it appears to the Court that the disagreement at the Appellate Division depended on a differing view of the facts,[10] or an exercise of discretion,[11] there is no question of law. If a case involving a constitutional issue was decided on a procedural, statutory, or common law point, rather than directly on the constitutional question (or indeed, even if it might have been so decided), it is not directly involved.[12] The relatively obscure stipulation upon judgment absolute is also appealable as of right, but is little used.[13]

All other appeals must be sought through a motion for leave, which essentially is an attempt to convince the Court that a case is so important that New York jurisprudence would be forever

[5] This was not always the case. Prior to 1985, the category of appeals as of right was much broader, including cases in which only one Appellate Division justice dissented and any case in which the Appellate Division reversed or modified a lower court decision. *See* DAVID D. SIEGEL, NEW YORK PRACTICE § 527 (3d ed. 1999).

[6] *See id*.

[7] *See* N.Y. C.P.L.R. 5601(a) (McKinney 2016).

[8] *See id*. at 5601(b).

[9] *See, e.g.*, Broughton v. State, 335 N.E.2d 310, 313, 316 (N.Y. 1975).

[10] *See, e.g.*, Ohdan v. City of New York, 706 N.Y.S.2d 419, 420–21 (App. Div.); *id.* at 423 (Rosenberger, J., dissenting), *appeal dismissed*, 738 N.E.2d 779 (N.Y. 2000).

[11] *See, e.g.*, Guarracino v. Cent. Hudson Gas & Elec. Corp., 712 N.Y.S.2d 389, 389, 390 (App. Div. 2000) (Goldstein, J., dissenting), *appeal dismissed*, 745 N.E.2d 1012 (N.Y. 2001).

[12] *See* Bd. of Educ. v. Wieder, 527 N.E.2d 767, 771 (N.Y. 1988); ARTHUR KARGER, THE POWERS OF THE NEW YORK COURT OF APPEALS § 7:8 (3d ed. 2005).

[13] *See* N.Y. C.P.L.R. 5601(c).

diminished were the Court not to decide it.[14] Whether by leave or as of right, however, all appeals must satisfy basic jurisdictional thresholds, found in article six, section three of the New York State Constitution, and articles five and fifty-six of the CPLR. These "appealability" rules include: (1) the party taking the appeal must be aggrieved by the decision below[15] (a party is not considered "aggrieved" if he was given complete relief in the court below, but simply does not like the court's reasoning); (2) the appeal must be taken, or motion for leave filed or served, in a timely fashion (i.e., within thirty days of the date of receiving the order or judgment with notice of entry[16]—thirty-five if the notice of entry is served by mail[17]); (3) the appeal must be from a decision originating in an appropriate court;[18] and finally, the requirement with which this article will be primarily concerned: (4) the appeal must be from a final order or judgment.[19]

The purpose of the finality requirement is to conserve the Court's resources by insuring that any given case is heard by the Court only once.[20] So stated, the concept may sound simple, but the exceptions that apply, as well as the application of the doctrine to certain situations, can prove confusing. The basic theory is that there is only one appealable paper; anything that comes before or after that paper is, in general, non-final and not appealable.[21] While this, too, may sound fairly straightforward, the sheer number of dismissals of appeals for lack of finality attests to how difficult it can be to determine just what that one appealable paper is. Specifically, in 2014, the Court decided 934 applications for leave to appeal in civil cases, of which 20.7% were dismissed for jurisdictional defects.[22] Almost 200 dismissals were, at least in part, for lack of finality.[23]

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[14] *See* SIEGEL, *supra* note 5, § 528.

[15] *See* N.Y. C.P.L.R. 5511.

[16] *See id.* 5513.

[17] *See id.*; *id.* at 2103(b)(2).

[18] *See* N.Y. CONST. art. VI, § 7 (describing the jurisdiction of supreme courts in New York State).

[19] *See id.* art. VI, § 3 (detailing the jurisdiction of the Court of Appeals in New York State).

[20] *See* Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 HARV. L. REV. 1004, 1006–07 (1978).

[21] *See* Bernard S. Meyer, Outside Counsel, *Taking an Appeal to the Court of Appeals*, 202 N.Y. L. J. 22 (1989).

[22] *See* ANDREW W. KLEIN, ANNUAL REPORT OF THE CLERK OF THE COURT TO THE JUDGES OF THE COURT OF APPEALS OF THE STATE OF NEW YORK 7 (2014), http://www.nycourts.gov/ctapps/news/annrpt/AnnRpt2014.PDF.

[23] A Westlaw search using terms from the Court's standard order for finality dismissals yields 194 hits for the year 2014. Of these, 148 appear to have been straight finality dismissals. The remaining 46 were largely bifurcated entries—i.e., the appeal was partially dismissed on finality grounds, and partly granted, denied, or dismissed on other grounds.

With the basic proposition that there can be only one appealable paper in a case in mind, it would follow that the appealable paper would be the one that disposes of the case on the merits, in its entirety. If the order sought to be appealed comes too early[24] (or too late)[25] to finally determine the merits, it clearly will not be final. Even if the merits are addressed, and appear to be finally dealt with, if further judicial action is necessary to effectuate that order, it is not final.[26] A classic example, which applied in the *Tauber* case, is an order of the Appellate Division that awards attorney's fees, but leaves the calculation of those fees to the trial court.[27]

Two principal exceptions to the concept of finality are first, party finality, and second, severance.[28] Party finality applies when all claims against a particular party are fully resolved, but other claims against other parties remain pending.[29] The most common scenario is a motion to dismiss or motion for summary judgment that results in one defendant being granted a judgment or dismissal order that removes that defendant from the case entirely.[30] While the action remains pending against other parties, since all claims by or against that particular defendant have been resolved, the order or judgment dismissing that defendant from the case is deemed final as to that particular party.[31] The rationale would appear to be that once all claims against a particular defendant have been resolved, it would be unduly prejudicial to both parties, but particularly parties whose claims have been completely resolved, to make them await the

[24] Judge Meyer provides a brief list exemplifying orders that are not final because they come too early in the case—those that merely administer the course of litigation (such as those dealing with discovery issues, class certification, changes in venue, stays, and other provisional remedies), and orders addressed to the pleadings. *See* Meyer, *supra* note 21.

[25] Generally, these are post-judgment motions seeking to enforce or provide relief from the particular order. *See id.* (providing examples of post-judgment motions that must be filed in a timely manner).

[26] *See, e.g.*, Tauber v. Bankers Tr. Co., 688 N.Y.S.2d 508, 508 (App. Div. 1999). This is not to say that a judgment is non-final simply because further proceedings may be necessary to enforce it. In fact, orders made upon applications to enforce a judgment are themselves generally non-final—this is because it is the previous judgment that is final, and, as set forth above, there can generally only be one final judgment. *See* KARGER, *supra* note 12, § 4:11. On the other hand, if a judgment is amended, the order granting the amendment is deemed a new final order. *See id.* § 4:16.

[27] *See* KARGER, *supra* note 12, § 4:8.

[28] *See id.* §§ 5:4, 5:9 (describing both the party finality and severance exceptions to the finality requirement).

[29] *See id.* § 5:9.

[30] *See id.*

[31] *See, e.g.*, Gelbard v. Genesee Hosp., 656 N.E.2d 597, 597 (N.Y. 1995), *appeal granted*, 664 N.E.2d 1240, 1241, 1243 (N.Y. 1996) (affirming the Appellate Division's order to dismiss all claims against the defendant-hospital, and so the order was final as to that defendant even though claims were left pending against the individual defendant-doctor).

ultimate outcome of a case in which they are no longer involved before allowing an appeal.[32] This doctrine is generally fairly straightforward, although the issue of whether all claims against a particular defendant have been dismissed in their entirety sometimes produces confusion.[33]

The other principal exception to the finality requirement is the doctrine of severance. When part of an action is resolved, it may, under certain circumstances, be deemed "severed," and the judgment disposing of those particular claims is deemed final, even though additional claims remain pending.[34] There are two types of severance—express and implied.[35] An order expressly severing (or affirming the express severance of) a complete cause of action is generally given effect to create a final order, even though other claims remain pending.[36]

Generally, a severance, to be express, must be exactly that—expressed. The order must state that the claims that remain pending are severed from the determined claims.[37] To be effective, however, an express severance must finally dispose of the severed cause of action in its entirety; an express severance that, in essence, splits a cause of action, will not be given effect.[38] This generally applies where a court grants a portion of the plaintiff's requested relief, but leaves other requests for relief under the same cause of action pending.[39] It also appears that the manner of pleading can be determinative. For example, if a claim for attorney's fees is made by way of a request for relief within a given cause of action, then a judgment granting partial relief on that cause of action (i.e., on the underlying claim), cannot be severed from the claim for attorney's fees.[40] Claims for relief within a single cause of action cannot be

[32] *See, e.g.*, KARGER, *supra* note 12, § 5:9.

[33] *See, e.g.*, Herbert v. Morgan Drive-A-Way, 641 N.E.2d 147, 147 (N.Y. 1994) (noting that the order dismissing the complaint against certain defendants was not final where claims remained against another defendant, who in turn, had cross-claims still pending against the first defendants); Hart v. Sullivan, 433 N.E.2d 534, 534 (N.Y. 1982) (illustrating that when an action was brought against a corporation and managerial employees, the order dismissing the complaint against those employees in their managerial capacities was not final, as there were still claims against the defendants in their individual capacities).

[34] *See* KARGER, *supra* note 12, § 5:4.

[35] *See* Burke v. Crosson, 647 N.E.2d 736, 740 n.2 (N.Y. 1995); KARGER, *supra* note 12, § 5:4.

[36] *See, e.g.*, *Burke*, 647 N.E.2d at 739; Klonowski v. Dep't of Fire, 448 N.E.2d 423, 424 (N.Y. 1983).

[37] *See, e.g.*, Ellis v. Gold, 611 N.Y.S.2d 587, 587 (App. Div. 1994); Leirer v. Caputo, 586 N.Y.S.2d 976, 981 (App. Div. 1992) ("[T]he appellants' counterclaim is severed and continued . . . ."), *rev'd*, 616 N.E.2d 147, 150 (N.Y. 1993).

[38] *See, e.g.*, Sontag v. Sontag, 488 N.E.2d 1245, 1246 (N.Y. 1986).

[39] *See, e.g.*, *id*.

[40] *See, e.g.*, *Burke*, 647 N.E.2d at 740–41. In the years following the decision in *Burke*, the

expressly severed either.[41] On the other hand, as the Appellate Division held in its second memorandum decision in the *Tauber* case, it appears that where a claim for attorney's fees is stated as a separate cause of action, express severance can be applied.[42] The wisdom (and perhaps even the existence) of this rule may be questionable, however. The Court of Appeals has never stated that the effectiveness of an express severance of a claim for attorney's fees may depend upon the manner in which the claim was pled. This apparent rule can only be inferred from decisions which make oblique references to the procedural posture of the case.[43] It would appear to be somewhat inconsistent with the Court's modern disinclination to sever (or not) based upon pleading formalities.[44]

Implied severance is both at the same time broader and narrower than express severance. It is broader in the sense that it does not depend upon an expression by the lower court that the cause of action is severed.[45] It is, on the other hand, narrower in that it applies in a much smaller class of cases. As clarified in *Burke v. Crosson*, causes of action cannot be impliedly severed unless they arise out of different legal relationships and different sets of operative facts.[46] A typical scenario, again, is where the defendant is granted summary judgment dismissing some causes of action, but others are left pending. Prior to *Burke*, some lower court opinions appeared to be holding, based upon the Court's earlier decision in *Sirlin Plumbing Company v. Maple Hill Homes*,[47] that virtually any time a motion for summary judgment was granted in part,

court has attempted to emphasize this rule that claims for attorney's fees, when not separately pleaded, cannot be expressly severed, in a series of cases in which finality dismissals were made by way of enlarged entries. *See, e.g.*, Nat'l Union Fire Ins. Co. v. Clairmont, 700 N.E.2d 312, 312–13 (N.Y. 1998); Nalea Realty Corp. v. Pub. Serv. Mut. Ins. Co., 686 N.E.2d 1355, 1355 (N.Y. 1997). This rule was stated with even greater force and clarity in the second-to-last *Tauber* decision denying leave. *See* Tauber v. Bankers Tr. Co., 735 N.E.2d 1286, 1287 (N.Y. 2000).

41 *See* KARGER, *supra* note 12, § 5:6.

42 *See* Tauber v. Bankers Tr. Co., 688 N.Y.S.2d 508, 508–09 (App. Div. 1999); *see also* Genesis of Mount Vernon, Inc. v. Zoning Bd. of Appeals, 609 N.E.2d 122, 122 (N.Y. 1992) (describing how the court severed the part of the petition seeking attorney's fees and directed the petitioner to commence a separate action regarding those fees). Of course, in *Tauber*, the claim for attorney's fees arose out of a separate, though related, contract, to the contract that gave rise to the claim of breach. See *Tauber*, 688 N.Y.S.2d at 508–09. It is doubtful, however, that this fact was determinative, or that an express severance of a separately pleaded cause of action for attorney's fees would not be given effect simply because it arose out of the same contract as the underlying claim.

43 *See, e.g.*, *Genesis*, 609 N.E.2d at 122.

44 *See, e.g.*, KARGER, *supra* note 12, § 5:6.

45 *See Burke*, 647 N.E.2d at 740.

46 *See id.*

47 Sirlin Plumbing Co. v. Maple Hill Homes, 230 N.E.2d 394 (N.Y. 1967).

dismissing some claims, the judgment was final as to those claims.[48] In *Burke*, the Court of Appeals took pains to emphasize that the doctrine of implied severance is much narrower, applicable only where the remaining claims arise out of a different legal relationship, and different set of operative facts, than those that were dismissed.[49] The general rule is that a motion that grants only partial summary judgment is patently non-final;[50] indeed, there may be no better example of a classic non-final order addressing the merits than an order granting only partial summary judgment.

To summarize the concept of severance: express severance applies only when the Appellate Division order, or the lower court order that it affirms, explicitly (or by necessary implication) states that a severance is intended, and then only when the cause of action severed has been completely addressed; a purported express severance that splits a cause of action will not be given effect. Implied severance, on the other hand, does not require an explicit statement by the lower court, but applies only in the limited circumstance where all of the remaining claims are legally and factually distinct from the dismissed claim, a requirement not applicable in the express severance context.[51]

With this background of the Court of Appeals' jurisdiction, and particularly its finality jurisprudence[52] in mind, we turn to the proceedings in the *Tauber* case.

II. THE *TAUBER* CASE

Mr. Tauber was an international currency trader who had trading relationships with, among others, the defendant, Bankers Trust

[48] *See, e.g.*, Crystal v. Manes, 530 N.Y.S.2d 714, 715 (App. Div. 1988), *appeal dismissed*, 534 N.E.2d 334, 334 (N.Y. 1989); *Sirlin Plumbing*, 230 N.E.2d at 394.

[49] *See Burke,* 647 N.E.2d at 740.

[50] *See id.*

[51] Karger is not altogether clear in his discussion of the distinction between express and implied severance; he appears in some cases to mix the discussion of the two doctrines. *See, e.g.*, KARGER, *supra* note 12, § 5:4. The Court in *Burke* made it clear that a different analysis is applicable in the context of express severance as opposed to implied severance, though. *See Burke,* 647 N.E.2d at 740 n.2. While the discussion in Karger is important and helpful in terms of its historic perspective, it can be confusing in that regard.

[52] There are other lesser invoked exceptions to finality, including the doctrine of irreparable injury. *See, e.g.*, KARGER, *supra* note 12, § 5:3. There are other miscellaneous provisions, such as an order that, though remitting the case for further judicial action, grants the party the full relief requested, and the principal, applicable particularly in probate and family court proceedings, that a petition under some circumstances can be deemed to start a separate special proceeding. *See, e.g.*, KARGER, *supra* note 12, § 5:24; Meyer, *supra* note 21.

Company.[53] Pursuant to a 1987 swap trading agreement, the parties regularly executed multi-million dollar currency swaps, but ultimately these transactions led to several disputes.[54] In order to resolve their differences and wrap up their business, the parties executed a settlement agreement closing most of their existing swap transactions, and bringing their relationship to a close, save for two new foreign currency swaps that plaintiff negotiated as part of the settlement.[55] While the vagaries of currency swaps are beyond the scope of this article, such transactions have closeout dates, which in this case were set for December 28, 1994, unless the parties mutually agreed to close them out earlier.[56] The gravamen of Mr. Tauber's complaint was that he had requested that the swap be closed out earlier, that a bank representative had agreed, but that the bank had then failed to close out the swap as agreed.[57] This resulted in Mr. Tauber having to pay over $3.5 million more for the swap than he would have had the bank honored the alleged agreement to close the transaction on the earlier date.[58]

Faced with this, Mr. Tauber sued the bank for breach of contract, negligence, and breach of fiduciary duty, claiming that the bank had failed to carry out the swap on the agreed upon earlier date.[59] The bank counter-claimed for $3.85 million, calculated based on the value of the swap on the originally agreed upon December 28, 1994, date, and for attorney's fees, as provided for under the original swap trading agreement with the bank that plaintiff had executed in April 1987.[60] The claim for attorney's fees, arising out of the original swap agreement, was pled as a separate and distinct counter-claim from the first counter-claim, which was based upon breach of the settlement agreement.[61]

After discovery, both sides moved for summary judgment.[62] The Individual Assignment System (IAS) court dismissed plaintiff's claims for breach of fiduciary duty and negligence, but held that there was a question of fact with respect to plaintiff's contract

[53] The factual recitation that follows is taken from the first *Tauber* Appellate Division decision: *Tauber v. Bankers Tr. Co.*, 657 N.Y.S.2d 686 (App. Div. 1997).

[54] *See id.* at 686–87.

[55] *See id.* at 687.

[56] *See id.*

[57] *See id.*

[58] *See id.*

[59] *See id.* at 688–89.

[60] *See id.*

[61] *See id.* at 689.

[62] *See id.*

claim.[63] It therefore denied the defendant's motion for summary judgment with respect to that claim, as well as for summary judgment on defendant's counter-claims.[64] The First Department modified by dismissing all of the plaintiff's claims in their entirety, and granting defendant summary judgment on its counter-claims.[65] That order was entered May 29, 1997.[66]

At first blush, this initial decision of the Appellate Division might look like a final order. It dismissed the plaintiff's claims in their entirety and granted defendant judgment on both of its counter-claims. One might think that there would be nothing more to resolve, and that the order would therefore be final. Had there been only a counter-claim based on breach of contract with a definitely ascertainable amount of damages, that may well have been correct. The Appellate Division order appeared to direct the immediate entry of judgment in defendant's favor on the counter-claim, and with respect to the first counter-claim, all that would have remained would have been the ministerial act of entering the amount due, with costs and interest.[67] However, the second counter-claim, unlike the first, required further judicial action of a non-ministerial nature—the amount of reasonable attorney's fees had to be ascertained before judgment could be entered. The Appellate Division order did not expressly sever the first counter-claim from the second, and the two were not sufficiently separate and distinct for implied severance to apply. Accordingly, as the Court of Appeals later held,[68] the May 29, 1997, Appellate Division order was not final.[69]

At that point, things began to get tricky. Within one week of the Appellate Division decision, the bank had moved before the IAS court to settle an order, requesting that judgment be entered on the first counter-claim, and further that that counter-claim be severed from the remaining counter-claim for attorney's fees.[70] On June 18, 1997, plaintiff's counsel filed an affidavit of intention to move for permission to appeal, which, he believed, operated to stay all

[63] *See id.*

[64] *See id.*

[65] *See id.* at 691.

[66] *Id.* at 686.

[67] *See* KARGER, *supra* note 12, at § 4:10.

[68] Tauber v. Bankers Tr. Co., 691 N.E.2d 636, 636 (N.Y. 1998).

[69] *See id.*

[70] The sequence of events that follows is taken from the trial court's decision denying plaintiff a stay of execution of the judgment, which is reprinted in the record on appeal to the First Department's second memorandum decision on the merits. Tauber v. Bankers Tr. Co., 688 N.Y.S.2d 508, 508–09 (App. Div. 1999).

further proceedings, pursuant to CPLR 5519.[71] That section provides that, where a party serves a notice of appeal or notice of intention to move for leave to appeal, all proceedings to enforce the judgment or order appealed from are stayed, pending the determination of the appeal or motion for leave.[72] Having served such a notice, plaintiff's counsel must have believed that no further action would be carried out to effectuate the Appellate Division order. Unfortunately, that did not prove to be the case.

Later that very day, the IAS judge signed the plaintiff's proposed order calling for the entry of judgment in a specified amount on the first counter-claim, and severing the remaining counter-claim for attorney's fees.[73] The order was entered two days later, and a clerk's judgment on the order was entered June 24, 1997.[74] Tauber's attorney did not move to vacate the order or judgment or seek to appeal them directly. Instead, he timely moved before the Appellate Division for reconsideration or, in the alternative, leave to appeal to the Court of Appeals, from the *original* May 29, 1997, Appellate Division order.[75] This made for an interesting situation. As already discussed, the Appellate Division order itself was patently non-final. However, prior to leave being sought to the Court of Appeals, a final order was rendered on these claims—the trial court's June 18, 1997, order expressly severing the contract claim from the claim for attorney's fees.[76] That order, however, appeared to violate the automatic stay imposed by CPLR 5519. If that were the case, then the order should not have been given effect. How were the courts to proceed?

Fortunately for purposes of this article, this question can remain hypothetical. We need not worry about what might have happened had the stay been effective, because settled case law holds that it was not. CPLR 5519 does not apply where a litigant seeks permission to appeal from a non-final order of the Appellate Division, from which no appeal lies to the Court of Appeals.[77] Thus, it was plaintiff's stay application that was in fact a nullity, and the order and judgment severing (and thus, finalizing) the first counter-claim was in fact valid and, as set forth below, appealable directly to

[71] *See id.* at 508.

[72] N.Y. C.P.L.R. 5519(a) (McKinney 2016).

[73] *See* Record on Appeal at 46, 48, Tauber v. Bankers Tr. Co., 657 N.Y.S.2d 686 (App. Div. 1997) (No. 113339/94).

[74] *Id.* at 49.

[75] *Id.* at 11.

[76] *Id.* at 10, 48.

[77] *See* McCain v. Koch, 497 N.E.2d 679, 679 (N.Y. 1986).

the Court of Appeals pursuant to CPLR 5602(a)(1)(ii).

Thus, from the Court of Appeals' perspective, the issue with respect to the stay was irrelevant on this go-round.[78] The order sought to be appealed was solely the May 29, 1997, Appellate Division order, which was patently non-final.[79] The fact that a final judgment was entered afterward was not the Court's concern, because that order was not part of the record on appeal, and had not been included with the motion seeking leave to appeal.[80] Had it been included, the Court could then have deemed the appeal taken from the June 1997 final judgment, bringing up for review the prior non-final Appellate Division order, under CPLR 5512.[81] That provision allows the Court of Appeals to deem the appeal taken from the correct appealable paper, if it is provided. Unfortunately, again, the June order and judgment were not included with the motion for leave.[82] This may have been the single most crucial omission in the entire appellate history of the case.

Thereafter, Tauber filed a second appeal to the Appellate Division, this time from the trial court's decision denying his motion for a stay of enforcement of the June 1997 judgment.[83] In its March 23, 1999, decision affirming the trial court's denial of a stay, the Appellate Division spelled out the effect of the June 1997 order severing the contract claim from the claim for attorney's fees.[84] Citing *McCain v. Koch*, the First Department initially held that Tauber's filing of a notice of intent to appeal had been invalid,[85] and then noted that Tauber could have appealed the June 1997 judgment directly to the Court of Appeals under CPLR 5602(a)(1)(ii). That section allows a litigant to appeal directly to the

[78] *See id.* at 679 (explaining that where, as here, a motion to vacate statutory stay is denied as unnecessary when appellants filed an affidavit of intention to move for permission to appeal a non-final order).

[79] *See* Tauber v. Bankers Tr. Co., 719 N.E.2d 917, 917 (N.Y. 1999); Record on Appeal, *supra* note 73, at 11.

[80] The Court keeps a copy of all motion papers on file for approximately five years, and they are public records. *See* COURT OF APPEALS, STATE OF N.Y., *Court-PASS*, https://www.nycourts.gov/ctapps/courtpass/default.aspx (last visited Nov. 15, 2016) (providing public databases and access to court documents, including motion papers). A review of the plaintiff's motion papers in the *Tauber* case confirmed that the June 1997 final order was not submitted. *See generally* Record on Appeal, *supra* note 73 at 9, 10, 11 (indicating the lack of the Appellate Division's final order in plaintiff's various motions); *see also* Tauber v. Bankers Tr. Co., 688 N.Y.S.2d 508, 508 (App. Div. 1999) (explaining that the plaintiff never appealed the non-final order).

[81] *See* N.Y. C.P.L.R. 5512 (McKinney 2016) (defining and describing the appealable order).

[82] *See supra* notes 75–77 and accompanying text.

[83] *See* Tauber v. Bankers Tr. Co., 688 N.Y.S.2d at 508.

[84] *See id.*

[85] *See id.* (citing McCain v. Koch, 497 N.E.2d 679, 679 (N.Y. 1986)).

Court of Appeals from a final judgment of a lower court where the Appellate Division has already made an order on a prior appeal necessarily effecting that judgment.[86] In fact, the *Tauber* case was a perfect example of where this provision comes into play. The trial court having expressly severed and entered judgment on the first counter-claim,[87] that judgment was final, and all of the claims that plaintiff wished to bring to the Court of Appeals had been fully addressed in the prior Appellate Division order. However, his failure to appeal the June 1997 final judgment on the first counter-claim (whether directly to the Court of Appeals, or following a second intermediate appeal to the Appellate Division) was fatal to plaintiff's attempt to persuade the Court of Appeals to hear the merits of his case, at least at that time.

It would appear that all of plaintiff's subsequent efforts were aimed at salvaging the failure to appeal the final order severing the attorney's fees claim from the rest of the case. Mr. Tauber next attempted to bring his case before the Court of Appeals by way of an appeal as of right from the First Department's March 1999 Decision and Order denying his motion to stay enforcement of the June 1997 judgment.[88] The appeal was purportedly brought pursuant to CPLR 5601(b)—a directly involved constitutional question—and 5601(d), which provides for review of a previous non-final order meeting the other requirements of an appeal as of right under CPLR 5601(a) or (b) (i.e. dual dissent and constitutional grounds), where a final judgment is thereafter entered which is necessarily affected by the previous order.[89] Whether there was any constitutional question that was substantial appears extremely unlikely; in any event, it clearly was not directly involved. Plaintiff's arguments were directed entirely at the statutory question of whether a stay was either mandated, or should have been granted as a discretionary matter.[90] Plaintiff attempted to "constitutionalize" this statutory issue by arguing that whether the May and June orders were "final" presented a state constitutional issue (i.e., article six, section three, allowing appeals to the Court of Appeals, for the most part, only from final orders).[91] However, whether there was an appeal available to the Court of Appeals had not been the issue before the

[86] *See* N.Y. C.P.L.R. 5602(a)(1)(ii).

[87] *See* Record on Appeal, *supra* note 73, at 48.

[88] *See id.* at 3.

[89] *See id.* at 40.

[90] *See* Brief for Plaintiff-Appellant at 20, Tauber v. Bankers Tr. Co., 688 N.Y.S.2d 508 (App. Div. 1999) (No. 113339/94).

[91] *See* Tauber v. Bankers Tr. Co., 716 N.E.2d 700, 700 (N.Y. 1999).

lower courts—they were concerned only with the statutory issue of the applicability of the CPLR 5519 stay, and while the finality issue may have been related, it almost certainly was not directly involved.

In any event, whatever the merits of the constitutional issue, clearly the March 1999 Appellate Division decision, affirming the denial of the stay, was also patently non-final. This demonstrates the principal that orders pertaining to stays, whether granted or denied, are generally non-final[92] (although the irreparable injury exception to the finality requirement comes into play frequently in stay situations).[93] Accordingly, the Court of Appeals dismissed, once again, for lack of finality.[94]

Undeterred by the dismissal of this appeal on finality grounds, plaintiff then sought leave to appeal.[95] This was perhaps the least meritorious attempt that Tauber made to have his appeal heard. Having previously had his appeal as of right dismissed on finality grounds (as opposed to an appeal as of right not lying), it should have been clear that a motion for leave to appeal would be just as futile. As already noted, the finality requirement applies to both appeals as of right and motions for leave. By this point, however, it had apparently become clear to the plaintiff that he should have appealed the June 1997 judgment, and so, he sought leave to appeal not just from the March 1999 Appellate Division order, but from the 1997 Supreme Court judgment as well.[96]

Plaintiff's theory for bringing the June 1997 order before the Court at that point can only be guessed. Perhaps he believed that the 1997 order necessarily affected the 1999 Appellate Division order. However, if so, he had his appealability arguments reversed. While an appeal from a final judgment will bring up prior non-final orders that necessarily affect it,[97] here, the 1999 Appellate Division order (which was the only one that could timely be appealed) was non-final, and the 1997 judgment was final. If Tauber was seeking leave to appeal directly from the 1997 judgment, then, as the Court of Appeals indicated, that application was clearly untimely.[98] A motion for leave must be made within thirty or thirty-five days (depending on the manner of service) from the date of service of the order or judgment with notice of entry. It is difficult to see how

92 *See* Meyer, *supra* note 21.
93 *See supra* note 52 and sources cited therein.
94 *See Tauber*, 716 N.E.2d at 700.
95 *See* Tauber v. Bankers Tr. Co., 719 N.E.2d 917, 917 (N.Y. 1999).
96 *See id.*
97 *See* N.Y. C.P.L.R. 5501(a) (McKinney 2016).
98 *See Tauber*, 719 N.E.2d at 917.

plaintiff could have thought the Court would overlook the fact that it had been over two years since the 1997 judgment had been entered, and, of course, it did not; the entry dismissing leave makes explicit reference to the untimeliness of the appeal from the 1997 judgment.[99]

The case then went back to the trial court, which appointed a special referee to determine the reasonable amount of attorney's fees.[100] The referee determined that defendant was entitled to almost $400,000 in fees for services performed through May 1998.[101] The trial court then entered a judgment for that amount, and granted the bank leave to seek the balance of its legal fees at the conclusion of the proceedings.[102] In addition, the trial court expressly severed the claim for attorney's fees through May 1998 from the remaining claim for fees, and entered a judgment for that amount.[103]

At this point, Tauber's attorney had to believe he knew exactly the right thing to do. He had an order that expressly severed the judgment for fees through May 1998 from the remaining attorney's fees claims.[104] He had to believe that this was a final order, appealable directly to the Court of Appeals pursuant, once again, to CPLR 5602(a)(1)(ii). So the Court of Appeals had to decide his motion for leave on the merits, right? Moreover, if he could convince the Court to hear this appeal, he might even convince it to address the merits of the dismissal of his claims from over three years before; after all, certainly the merits of plaintiff's claims would bear on whether the defendant was entitled to attorneys' fees.

Unfortunately for Mr. Tauber, his fourth attempt to convince the Court of Appeals to hear his case ran smack into footnote five of *Burke v. Crosson*.[105] *Burke* dealt primarily with the doctrine of implied severance, and clarified that it is a limited doctrine invoked only where the claims disposed of are truly legally and factually

[99] *See id.*

[100] *See* Record on Appeal, *supra* note 73, at 27.

[101] *See* Tauber v. Bankers Tr. Co., 700 N.Y.S.2d 678, 678 (App. Div. 2000).

[102] *See* Judgment at 4, Tauber v. Bankers Tr. Co., 700 N.Y.S.2d 678 (App. Div. 2000) (No. 113339/94).

[103] *See id.*

[104] *See id.*

[105] *See* Burke v. Crosson, 647 N.E.2d 736, 741 n.5 (N.Y. 1995) ("[A]ny attempt expressly to sever . . . pending attorneys' fee[s] claim[s] from the resolved substantive claims . . . [is] ineffectual, since items of relief within a single cause of action cannot be expressly or impliedly severed.").

distinct from the remaining claims.[106] In a footnote, however, the Court gave a clue to an essential aspect of the doctrine of express severance as well.[107] While indicating that express severance is subject to a very different analysis, it noted that the claims in *Burke* could not even have been expressly severed, because a portion of a single cause of action cannot be severed.[108] The Court would attempt to reinforce this point in a half dozen or so extended entries in the years following the *Burke* decision, dismissing leave to appeal from orders attempting to affect an invalid express severance, and citing specifically to footnote five of *Burke v. Crosson*.[109] However, given the lack of explicit attention that the Court has given to the express severance doctrine (the brief footnote in *Burke* is probably the most helpful explication of the doctrine in at least the last two decades), it is not surprising that the concept continues to elude practitioners.

The purported severance of attorney's fees through May 1998 clearly split a single cause of action—the defendant's second counter-claim for attorney's fees. That counter-claim did not ask for attorney's fees only through a certain date, and certainly to do so would have been foolish. Rather, the counter-claim appropriately asked for all attorney's fees due in connection with the action, and the order fixing fees for a set period did not finally dispose of that entire cause of action.[110] Accordingly, it did not finally determine the second counter-claim, but only a part thereof, and was not severable. The Court of Appeals used the opportunity to spell its position out in a rare expanded entry. The Court explained: "The judgment affirmed by the Appellate Division purports to expressly sever a determined part of the second counterclaim from the pending portion of that counterclaim. The Court of Appeals will not give effect to a severance which splits a single cause of action."[111]

So yet again, the *Tauber* case went back to the lower courts, in

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[106] *See id.* at 740 & n.2 (citing Heller v. State, 611 N.E.2d 770, 771 n.1 (N.Y. 1993); Lizza Indus., Inc. v. Long Island Lighting Co., 329 N.E.2d 664, 664 (N.Y. 1975)); *see also* N.Y. C.P.L.R. 5601(a) (McKinney 2016) (allowing an order from the Appellate Division to be appealed as of right to the Court of Appeals where there is a final determination of the action and dissent on a question of law from at least two justices).

[107] *See Burke*, 647 N.E.2d at 741 n.5.

[108] *See id.* at 740 n.2, 741 n.5.

[109] *See* cases cited *supra* note 40.

[110] *See* Answer to Amended Complaint and Counterclaims Dated June 12, 1995 at 7, Tauber v. Bankers Tr. Co., 700 N.Y.S.2d 678 (App. Div. 2000) (No. 113339/94).

[111] Tauber v. Bankers Tr. Co., 735 N.E.2d 1286, 1286 (N.Y. 2000) (citing *Burke*, 647 N.E.2d at 741 n.5; Sontag v. Sontag, 488 N.E.2d 1245, 1246 (N.Y. 1986)).

order to allow the defendant to seek his full attorney's fees award.[112] Ultimately, on November 30, 2001, the Supreme Court, New York County, made one last order in the case, awarding defendant a money judgment on the remainder of its counter-claim for attorney's fees.[113] Surely, this had to amount to a final order. So once again, Tauber filed a motion for leave to appeal to the Court of Appeals.[114]

III. APPEALABLE—BUT REVIEWABLE?

This time, the Court of Appeals' entry was different—and much shorter. It stated simply that the motion for leave to appeal had been "denied."[115] The fact that leave was denied, rather than dismissed, meant that Tauber's attorney had finally found a final, appealable paper that the Court had the power to review. But why did the Court choose not to take the appeal?

The answer to that question can only be guessed, but there are at least two possibilities. The Court could have determined that the issues to be decided simply were not "leaveworthy"—in other words, they were not interesting or important enough to merit Court of Appeals review. However, while speculating whether the Court will choose to hear a given case is more foolish than attempting to time the stock market, there are aspects of the *Tauber* case that might have made it attractive to the Court had the main issues been reviewable. While, on the one hand, it was in a sense a "simple" breach of contract action, involving the application of settled principles of law to a new set of facts, those factual complexities might have made it a leaveworthy case. The Court of Appeals takes great pride in the fact that it is the highest Court in the State that is arguably the financial capital of the world, and it likes to put its stamp on complex commercial cases. The prospect of dealing with the intricacies of currency swap agreements might have been enough for the Court to take the case. Indeed, coincidentally, only one week after the lower court issued the severance order that may have doomed Mr. Tauber's efforts to appeal, the Court of Appeals decided *In re Matter of N.Y. Agency of Bank of Commerce*,[116] a case dealing with International "Eurodollar" currency swaps.

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[112] *See infra* text accompanying notes 113–15.
[113] *See* Tauber v. Bankers Tr. Co., 767 N.E.2d 152, 152 (N.Y. 2002).
[114] *See id.*
[115] *See id.*
[116] In re N.Y. Agency of Bank of Commerce, 683 N.E.2d 756, 757 (N.Y. 1997).

The fact that the case, on the merits, was potentially leaveworthy leads to the possibility that the Court determined that, while the November 30, 2001, order was appealable, it did not bring up for review the merits of the underlying case. In other words, while "appealability" may have been satisfied, "reviewability" may not have been. While the principal of reviewability is not the main focus of this article, it points out a potentially thorny issue that bears noting. The final order in Mr. Tauber's case dealt only with defendant's counter-claim for attorney's fees.[117] What Mr. Tauber really wanted to appeal was the underlying judgment dismissing his complaint and awarding defendant summary judgment on its first counter-claim. But did the appeal from the November 30, 2001, judgment bring the prior underlying issues up for review?

Under CPLR section 5501(a), a final judgment brings up for review all prior non-final orders which "necessarily affect" it.[118] The question is, does that provision apply to bring up for review a prior judgment entered upon claims expressly severed? Arguably, that would be seeking to bring up for review a prior *final* judgment, not a prior "non-final" one. Resolution of this issue may depend on the proper view of the express severance doctrine—does an express severance represent an exception to the general rule that there can be only one final judgment, in the sense that it results in a truly final judgment, which can then be followed by another final judgment? Or, on the other hand, does it simply represent an exception to the finality requirement, allowing the judgment to be appealed even though it is non-final? In *Crystal v. Manes*, the Fourth Department explicitly endorsed the former approach, holding that an order dismissing several causes of action that were impliedly severed from the remaining claims was not brought up for review upon entry of the final judgment because "the prior order . . . was a final order and, thus, cannot be brought up for review [under CPLR section 5501(a)] on appeal even from an appeal from a final judgment."[119] The First and Third Departments have made similar pronouncements.[120]

While the Court of Appeals, in *Burke v. Crosson*, endorsed some aspects of the Fourth Department's decision, the high Court has not

[117] *See* Judgment, *supra* note 102, at 3–4.

[118] N.Y. C.P.L.R. 5501 (McKinney 2016).

[119] Crystal v. Manes, 516 N.Y.S.2d 823, 823 (App. Div. 1987).

[120] *See, e.g.*, Pollak v. Moore, 926 N.Y.S.2d 434, 435 (App. Div. 2011); Burke v. Axelrod, 456 N.Y.S.2d 135, 136–37 (App. Div. 1982).

confronted this issue squarely in any published decision.[121] Indeed, the Court of Appeals has not expanded the concept of implied severance to the extent that the Appellate Division decisions appear to.[122] It might well be that the Court would reason that litigants should not forfeit their right to full appellate review from a truly final judgment simply because they did not appeal a previous impliedly severed order. Notably, in 2011, the New York State Bar Association Committee on Civil Practice Law and Rules recommended amending CPLR section 5501 in an attempt to ameliorate the final/non-final order problems created by the implied severance doctrine.[123] The proposed amendment would eliminate the concept of final orders entirely, meaning only judgments would be deemed final, and any prior orders necessarily effecting that judgment would be automatically brought up for review.[124] The Bar Association's Committee on Courts of Appellate Jurisdiction opposed the proposal, however, at least initially.[125] The Committee on Civil Practice Law and Rules continues to push for the amendment,[126] while the Office of Court Administration has recommended eliminating the "necessarily affects" requirement from CPLR section 5501. Neither proposal has been enacted so far, and neither would seem to be necessary if the Court of Appeals would simply expound on its jurisdictional rules more often and more fully elucidate the implied severance doctrine. The tortured appellate route that the *Tauber* case took should more than serve to illustrate the need for further clarification by the high Court.

IV. CONCLUSION

If the *Tauber* case was a book, it might be titled *A Tale of Two Severances*. The first—and apparently valid—express severance order resulted in a judgment that was not timely appealed. The second severance order, which was appealed, ironically turned out not to be a valid express severance and so did not result in a final

[121] *See* Burke v. Crosson, 647 N.E.2d 736, 738–39 (N.Y. 1995).

[122] *See* KARGER, *supra* note 12, § 5:8.

[123] *See* N.Y. STATE BAR ASS'N COMM. ON C.P.L.R., PROPOSED AMENDMENT TO C.P.L.R. 5501 (2011), http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=44141.

[124] *See id.*

[125] *See Minutes of the January 27, 2012 NYSBA C.P.L.R Committee Meeting*, N.Y. ST. BAR ASS'N, http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=59157 (last visited Nov. 10, 2016).

[126] *See Minutes of the January 30, 2012 NYSBA C.P.L.R Committee Meeting*, N.Y. ST. BAR ASS'N, http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=59211 (last visited Nov. 10, 2016).

order appealable to the Court of Appeals.

In the end, the lesson to be learned from *Tauber* may be the one that first Professor Siegel and now Mr. Reilly teach in the Practice Commentary to CPLR section 5512 (defining the appealable paper)—appeal everything.[127] While their advice is given in a slightly different context, it applies with equal, if not greater force, here. If litigants are unfortunate enough to mistake a final order for a non-final one, and do not appeal, thinking they will wait for the final judgment to bring the prior one before the Court pursuant to CPLR section 5501(a), they may forfeit their opportunity for Court of Appeals review. On the other hand, appealing patently non-final orders is a waste of both the litigants' money and the Court's time, but, given the alternative, it is probably best to err on the side of caution.

[127] RICHARD REILLY, PRACTICE COMMENTARIES, *in* N.Y. C.P.L.R. 5512 (McKinney 2016).