Taking an appeal in an E-filed Matrimonial Action

By Joel R. Brandes

Taking an appeal in an e-filed case can be daunting because of the maze of court rules that must be navigated to successfully take an appeal. Apart from the Civil Practice Law and Rules (CPLR) a matrimonial practitioner must be thoroughly familiar with the electronic filing rules in the Uniform Civil Rules for the Supreme Court and County Court (22 NYCRR 202.5-b**),** the Practice Rules of the Appellate Division (22 NYCRR Part 1250), the Electronic Filing Rules of the Appellate Divison (22 NYCRR Part 1245) including the formatting provisions in Attachment A, the Local Rules of the Appellate Divisions and the electronic filing webpage of each Department of the Appellate Division.

After the commencement of a civil action where e-filing is authorized, documents may be electronically filed and electronic service may be made only upon a party or parties who have consented to electronic filing. (22 NYCRR 202.5-b (b)(2)(i)). Where parties in civil actions commenced in the Supreme Court consent to e-file, all documents required to be filed with the court by a party must be filed and served electronically, except as otherwise provided in the efiling rules. (22 NYCRR 202.5–b (b)(1)).

A party who consents to e-filing in an action agrees to the use of e-filing in the action and be bound by the filing and service provisions in 22 NYCRR 202.5-b. (22 NYCRR 202.5-b (b)(2)(ii)).

A party who has commenced an action electronically must serve upon the other parties together with the initiating documents a notice of e-filing in a form approved by the Chief Administrator. Except for an unrepresented litigant, a party served with the notice must promptly record his or her consent electronically at the NYSCEF site or file with the court and serve on all parties of record a declination of consent. (22 NYCRR 202.5-b (b)(2)(ii)).

Service of Notice of Appeal

Taking an appeal as of right from an order or judgment of the Supreme Court consists of serving on the adverse party a notice of appeal and filing it in the office where the judgment or order of the court of original instance is entered. The notice of appeal must designate the party taking the appeal, the judgment or order or specific part of the judgment or order appealed from, and the court to which the appeal is taken. (CPLR 5515(1)).

The “taking” of the appeal invokes the jurisdiction of the appellate court. The designation of only a part of the order or judgment appealed from in the notice of appeal limits the jurisdiction of the appellate court to the portion of the order or judgment listed in the notice of appeal. (See Christian v. Christian, (55 A.D.2d 613, 389 N.Y.S.2d 136 (2d Dep't 1976)).

Time to take appeal – Service of Notice of Entry

The time to take an appeal is jurisdictional. (CPLR 5514(c); A. & B. Service Station, Inc. v. State, 50 A.D.2d 973, 376 N.Y.S.2d 656 (3d Dep't 1975)). An appeal as of right must be "taken" within 30 days after service by a party upon the appellant of a copy of the order or judgment with notice of entry. (CPLR 5513(a)).

In Lombardi v. Lombardi, (67 A.D.2d 896, 413 N.Y.S.2d 716 (1st Dep't 1979)) the Appellate Division observed that the time to appeal does not start to run until service by a party of a copy of the order with notice of entry. There, it did not appear that a copy of the order appealed from was ever served upon the appellant. All that was ever mailed to the appellant was a document entitled "Notice of Order of Support and Instructions to Petitioner and Respondent." The document was not a copy of the order appealed from and thus the time to appeal from the order had not begun to run.

When the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days of that service. (CPLR 5513(a)). Where that service is by mail pursuant to CPLR 2103(b)(2), or by overnight delivery pursuant to CPLR 2103(b)(6), the additional days provided by those paragraphs (5 days for mail and 1 day for overnight delivery) apply to the action, regardless of which party serves the judgment or order with notice of entry. (CPLR 5513(d))

22 NYCRR 202.5-b (f)(2)(ii) provides that an e-filing party causes the service of an interlocutory document to be made upon another party participating in e-filing by filing the document electronically. Except as provided otherwise in 22 NYCRR 202.5-b (h) (2), (which deals with service of a notice of entry) the electronic transmission of the notification constitutes service of the document on the e-mail service addresses identified therein. "*A party may, however, utilize other service methods permitted by the CPLR provided that, if one of such other methods is used, proof of that service shall be filed electronically*.' (Emphasis supplied)

Service of an order or judgment by efiling does not constitute notice of entry of a judgment or order. (22 NYCRR 202.5-b). 22 NYCRR 202.5-b(h)(2) provides that in an efiling matter where the parties have registered their consents, a party must serve notice of entry of an order or judgment on another party by serving a copy of the order or judgment and written notice of its entry by filing them with the NYSCEF site. This will cause the transmission by the site of notification of the receipt of the documents, which constitutes service by the filer. In the alternative, a party may serve a copy of the order or judgment and written notice of its entry in hard copy by any method in CPLR 2103 (b) (1) to (6). If service is made in hard copy by any method in CPLR 2103 (b) (1) to (6) and a copy of the order or judgment and notice of its entry and proof of hard copy service are then filed with the NYSCEF site, transmission by NYSCEF of notification of the receipt of those documents does not constitute additional service of the notice of entry on the parties to whom the notification is sent. (22 NYCRR 202.5-b(h)(2)).

The requirements of CPLR 5513(a) must be strictly followed. (See Kelly v. Sheehan, 76 N.Y. 325, 1879 WL 10628 (1879)). The failure to comply is jurisdictional. In Reynolds v. Dustman (1 N.Y.3d 559, 772 N.Y.S.2d 247 (2003)) the Court of Appeals pointed out that the requirements of CPLR 5513 (a) must be strictly followed. Compliance with CPLR 5513(a) requires a notice of entry that refers to the appealable paper, and the date and place of its entry. The Supreme Court paper respondents served identified itself as both a decision and order, but the respondents' cover letter describing the enclosure as a “decision filed” was not notice of entry of a judgment or order. Consequently, the cover letter was insufficient for the notice of entry required by CPLR 5513(a). Thus, the petitioner's time to appeal never commenced running and his appeal was timely taken.

The time for filing a notice of appeal is nonwaivable and jurisdictional (Jones Sledzik Garneau & Nardone, LLP v Schloss, 37 A.D.3d 417, 829 N.Y.S.2d 230, (2 Dept., 2007)

Service on Adverse Party

CPLR 2103(b) provides that papers to be served upon a party in a pending action shall be served upon the party's attorney. If a party to appeal has not appeared by an attorney, service of the notice of appeal must be upon the party by any method specified in CPLR 2103(b) (1), (2), (4), (5), or (6). (CPLR 2103(c))

An attorney who has consented to efiling may be served with the notice of appeal by e-filing. (22 NYCRR 202.5–b (b)(2)(i)).

Who may serve or be served with a notice of appeal after the termination of a matrimonial action?

The entry of judgment normally terminates the attorney-client relationship. However, until an attorney of record is discharged in the mode prescribed by law, the attorney is authorized to act for all purposes incidental to the entry and enforcement of the judgment, and as to adverse parties, his authority continues unabated. (Hendry v. Hilton, 283 A.D. 168, 127 N.Y.S.2d 454 (2 Dept. 1953); Moustakas v. Bouloukos 112 A.D.2d 981, 492 N.Y.S.2d 793. (2 Dept. 1985)). Until that time the attorney may serve and file a notice of appeal upon an adverse party. (Hendry v. Hilton, supra).

A client may also retain a new attorney who was not the attorney of record during the trial to serve a notice of appeal and prosecute an appeal without obtaining an order of substitution. (Vitale v. La Cour, 92 A.D.2d 892, 459 N.Y.S.2d 881(2 Dept. 1983); Gradl v. Saulpaugh, 268 A.D. 787, 49 N.Y.S.2d 51 (2 Dept. 1944)).

Where the notice of appeal is served upon a party’s attorney after the attorney is discharged, but before his discharge in the mode prescribed by law, the service of the notice of appeal upon the attorney is sufficient to fulfill the statutory requirements of service. In Siegel v Obes, (112 A.D.2d 930, 931, 492 N.Y.S.2d 447 (2 Dept., 1985)) the

Appellate Division held that service upon appellant's attorney of record after the time that the appellant allegedly discharged him, but before his discharge in the mode prescribed by law, was adequate to fulfill the requirements of CPLR 2103(b).(See also Stancage v Stancage, 173 A.D.2d 1081, 570 N.Y.S.2d 418 (3d Dept.,1991)).

There are different ways that attorney-client relationships can be ended besides the termination of the action. The client can discharge the attorney, which can be done at any time with or without cause. The attorney and client can execute a Consent to Change Attorney or execute a stipulation of substitution, which is then filed with the court in accordance with CPLR 321(b). Alternatively, the attorney may move, to be relieved as counsel by court order (see CPLR 321(b)(2)). A discharge of an attorney by the client is immediate. From the standpoint of adverse parties, counsel's authority as an attorney of record in a civil action continues unabated until the withdrawal, substitution, or discharge is formalized in a manner provided by CPLR 321. (Farage v Ehrenberg, 124 A.D.3d 159, 996 N.Y.S.2d 646, 652 (2 Dept., 2014)).

A problem we have observed with NYSCEF is that the discharge of an attorney according to law does not remove his consent to be served and representation in NYSCEF. An attorney discharged in one of these ways must log in to NYSCEF and remove his or her consent. There are only three options under “reason for removal.” Under the first or second option, a consent to change attorney or an order of the court removing the attorney must already be e-filed in the case. Under the third option, the attorney will be permitted to remove consent only if there is another attorney recorded as representing that party in NYSCEF. (See https://iappscontent.courts.state.ny.us/NYSCEF/live/help/RemoveConsentInstructions.pdf). There is no option for removal upon the entry of judgment or discharge by the client in a matrimonial action. In matrimonial actions, the Court has continuing jurisdiction to enforce or modify its judgment. (Haskell by Alberts v. Haskell, 6 N.Y.2d 79, 188 N.Y.S.2d 475 (1959)). It appears that where an attorney has been discharged by his client or removed in one of these ways, he may be served with a notice of appeal or initiating papers in post-judgment proceedings by efiling, if he has not removed his consent from NYSCEF. The consent the attorney filed remains active in NYCSEF as a consenting party until removed from the system by the consenting attorney or court order. (id.)

Filing Notice of Appeal

Unless the court directs otherwise, in all civil matters counsel for the appellant must file with the clerk of the court of original instance and serve on all parties, with the notice of appeal and the order or judgment appealed from, an initial informational statement on a form approved by the court and in such number as the court may direct. (22 NYCRR 1250.3(a)).

Initial Consent and filing

In any appeal designated by the Appellate Division for e-filing, counsel for the appellant or the petitioner, unless an exempt attorney, must within 14 days of the filing of a notice of appeal: (1) register or confirm registration as an authorized e-filer with NYSCEF; and (2) enter electronically in NYSCEF the information about the cause and parties, and e-file the documents, which the court requires. (22 NYCRR 1245.3(a)).

Counsel for an appellant must then do an initial filing on NYSCEF in the appellate division by filing the copy of the notice of appeal with proof of efiling, a copy of the informational statement, and a copy of the order or judgment appealed from. There is a $65 filing fee.

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When the court approves the filing counsel for the appellant who participates in e-filing will receive an e-mail with the appellate case number, which must be entered on the appropriate Notification of Case Number form. Within seven (7) days of receipt of the case number, counsel for who participates in e-filing must complete and serve **in** hard copy pursuant to CPLR 2103 the Notification of Case Number on all the other parties to the appeal and e-file proof of service of the notification**.** (22 NYCRR 1245.3(b)) The 'Notification of Case Number' form that was sent to the parties must be attached to the filed proof of service of the notification of case number.

Counsel for a party served with a Notification of Case Number is required to register or confirm registration as an e-filer in NYSCEF and enter the contact information requested within 20 days of service. After the 20-day period, an attorney who has not entered the information required under 22 NYCRR 1245.3 will be deemed served with any e-filed documents. (22 NYCRR 1245.3 (d))

All authorized e-filers who have entered information for a matter as required under 22 NYCRR 1245.3 will be able to e-file and be served electronically in that matter. (22 NYCRR 1245.5 (a)). Before the expiration of the 20-day period for entry of information described in 22 NYCRR 1245.3 (d), filing and service of documents by, and service upon, parties who have not entered the information must be in hard copy. (22 NYCRR 1245.5(b)). Upon expiration of the 20-day period for entry of information service and filing by and upon all parties other than exempt attorneys and exempt litigants must be by e-filing. Thereafter, an attorney who has neither entered information nor given notice as an exempt attorney pursuant to 22 NYCRR 1245.4 (a) (2) will be deemed served with any e-filed document. (22 NYCRR 1245.5(c))

A self-represented litigant is exempt from and is not required to participate in e-filing. He or she must be served in hard copy. A self-represented litigant may voluntarily participate in e-filing. A self-represented litigant may voluntarily participate in e-filing by electronically recording his or her consent at the NYSCEF site, registering as an authorized e-filer with NYSCEF, entering the case and contact information about the matter, and e-filing a copy of the notice of appeal, the judgment or order appealed from and the informational statement as required by the rules. (22 NYCRR 1245.4)

Local Rules of the Appellate Divisions

Local Rules of the Appellate Divisions deal with the entry of initial information. In the First Department counsel for the appellant is required to e-file a copy of the notice of appeal with proof of filing; a copy of the order or judgment appealed from; and a copy of the informational statement consolidated in one PDF document. Counsel will not be able to perfect an appeal or file a motion without entering the initial information and obtaining a case number. The court will not accept hard copy filing of an appeal or motion which is mandated to be electronically filed. (See https://www.nycourts.gov/courts/ad1/E-Filing/EfilingFAQVersion2.pdf)

In the Second Department, the entry of initial information also requires the e-filing of the notice of appeal, with proof of filing, the order or judgment appealed from, and an informational statement in a single pdf document. (See:https://www.nycourts.gov/courts/ad2/efiling/Technical_Guidelines_for_Efiled_Matters.pdf)

In the Third Department, the document a single document containing a copy of the Notice of Appeal with Proof of Filing and the Informational Statement must be e-filed. (see https://www.nycourts.gov/ad3/e-file/civil%20efiling%20instructions.pdf)

In the Fourth Department, the required documents are a copy of the Notice of Appeal; a copy of the order or judgment appealed from; and proof of service of the notice of appeal. These documents must be consolidated into one PDF document and e-filed. The Court does not require the filing of an initial informational statement under 22 NYCRR 1250.3 (a). (22 NYCRR 1000.3)

Conclusion

An attorney who has consented to efiling must be served with the notice of appeal from an interlocutory order or final judgment by e-filing until he has been discharged in the mode prescribed by law and has removed consent from NYSCEF. Once his consent has been removed from NYSCEF service must be on the adverse party pursuant to CPLR 2103 (b).

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