

## NEW YORK COURT OF APPEALS

### Cadichon v. Facelle

15 N.Y.3d 877 (2010) · Decided October 26, 2010

#### SUMMARY

The New York Court of Appeals reconsidered its prior dismissal of part of an appeal involving an order denying a motion to vacate a dismissal under CPLR 3216. The Court held that, because the lower court's order was ambiguous about automatic dismissal, the order denying vacatur constituted the final appealable paper, and an appeal as of right properly lay due to a two-Justice dissent on a question of law.

#### CASE DETAILS

|                       |                                                                                                                                                                                                                                                                    |
|-----------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | New York Court of Appeals                                                                                                                                                                                                                                          |
| WRITING FOR THE COURT | Chief Judge Lippman; Judge Ciparick; Judge Graffeo; Judge Read; Judge Smith; Judge Pigott; Judge Jones                                                                                                                                                             |
| JURISDICTION          | New York                                                                                                                                                                                                                                                           |
| DECIDED               | October 26, 2010                                                                                                                                                                                                                                                   |
| DISPOSITION           | other                                                                                                                                                                                                                                                              |
| PROCEDURAL POSTURE    | The New York Court of Appeals reconsidered its prior dismissal for nonfinality of part of plaintiffs' appeal, addressed the appealability of an order denying a motion to vacate dismissal under CPLR 3216, and resolved the related requests for leave to appeal. |
| STANDARD OF REVIEW    | De novo review of appellate jurisdiction and finality under the New York Constitution and CPLR.                                                                                                                                                                    |
| PRECEDENTIAL VALUE    | Published New York Court of Appeals memorandum opinion; binding on the stated appellate-jurisdiction and finality rule.                                                                                                                                            |
| PARTIES               | Plaintiffs v. Thomas Facelle, M.D., Good Samaritan Hospital, Montefiore Medical Center, Louis May                                                                                                                                                                  |

#### TOPICS

[appellate jurisdiction](#)[final judgment rule](#)[appellate procedure](#)[motion for reconsideration](#)[civil procedure](#)

#### PRACTICE AREAS

## QUESTIONS PRESENTED

1. Whether an order denying a motion to vacate a dismissal-related disposition is a final appealable paper when it is unclear whether the action was automatically dismissed by statute, rule, or court order.
2. Whether plaintiffs had an appeal as of right under CPLR 5601(a) from the Appellate Division order denying the motion to vacate when that order included a two-Justice dissent on a question of law.
3. Whether the appeal from the amended Supreme Court judgment should be dismissed because the Appellate Division order affirming the relevant Supreme Court order was the final appealable paper.

## HOLDINGS

1. When it is unclear whether an action was automatically dismissed by operation of statute, rule, or court order, the order denying the motion to vacate is deemed the final appealable paper for purposes of the Court of Appeals' jurisdiction.
2. Because the Appellate Division order denying the motion to vacate included a two-Justice dissent on a question of law, an appeal as of right properly lies under CPLR 5601(a).
3. The appeal from the amended judgment must be dismissed because the Appellate Division order affirming the relevant Supreme Court order was a final appealable paper from which an appeal was properly taken.

## KEY QUOTATIONS

*“Where, as here, it is not clear that the action was automatically dismissed by operation of statute, rule or court order, the order denying the motion to vacate shall be deemed the final appealable paper for purposes of this Court’s jurisdiction.” (879)*

## FACTUAL BACKGROUND

Supreme Court issued an order under CPLR 3216 specifying a deadline for plaintiffs to file a note of issue. The order was ambiguous as to whether failure to meet the deadline would automatically dismiss the action without a further court order. Plaintiffs later sought to vacate the dismissal-related disposition, and the Appellate Division affirmed the denial of that motion.

## PROCEDURAL HISTORY

Supreme Court issued an order under CPLR 3216 and later denied plaintiffs' motion to vacate the dismissal-related order. The Appellate Division affirmed the August 26, 2008 Supreme Court order and denied the motion to vacate, with a two-Justice dissent on a question of law. The Court of Appeals had previously dismissed part of the appeal as nonfinal, but upon reconsideration retained jurisdiction over that part, dismissed the appeal from the amended judgment, and dismissed other leave applications as unnecessary or unavailable.

## DISPOSITION

other

#### CASES CITED

- *Paglia v. Agrawal*, 124 A.D.2d 793 (1986), appeal dismissed, 69 N.Y.2d 946 (1987)

#### OPINION

#### PER CURIAM.

OPINION OF THE COURT Memorandum. The motion, insofar as it seeks leave to appeal from that portion of the Appellate Division order (71 AD3d 520 [2010]) that affirmed the August 26, 2008 Supreme Court order, treated as a motion for reconsideration of so much of this Court's July 1, 2010 order (15 NY3d 767 [2010]) as dismissed plaintiffs' appeal as of right from that portion of the Appellate Division order, should be granted, and, upon reconsideration, jurisdiction of so much of the appeal should be retained.

The motion, insofar as it seeks leave to appeal from the above-recited part of the Appellate Division order should be dismissed as unnecessary. The motion, insofar as it seeks leave to appeal from the remainder of the Appellate Division order should be dismissed upon the ground that it does not finally determine the action within the meaning of the Constitution.

The motion, insofar as it seeks leave to appeal from the amended judgment of Supreme Court pursuant to CPLR 5602 (a) (1) (ii), should be dismissed upon the ground that the portion of the Appellate Division order that affirmed the August 26, 2008 Supreme Court order is a final appealable paper from which an appeal was properly taken (see CPLR 5611).

The appeal from the amended judgment should be dismissed, without costs, by the Court, on its own motion, upon the ground that the portion of the Appellate Division order that affirmed the August 26, 2008 Supreme Court order is a final \*879appealable paper from which an appeal was properly taken (see CPLR 5611).

In considering the finality limitation on its jurisdiction, this Court has consistently treated the automatic dismissal of an action pursuant to CPLR 3404, or pursuant to other statutes or court rules, as a final determination and it has treated any subsequent order denying a motion to vacate the dismissal as a nonfinal determination (see e.g. *Paglia v Agrawal*, 124 AD2d 793 [1986], lv dismissed 69 NY2d 946 [1987]).

Accordingly, reading Supreme Court's order pursuant to CPLR 3216 in this case as providing that the complaint would be dismissed automatically upon plaintiffs' failure to file a note of issue by the date specified in the order, the Court dismissed for nonfinality the part of the appeal taken from the order affirming the denial of the motion to vacate (15 NY3d 767 [2010]).

Upon reconsideration, it is recognized that Supreme Court's order is ambiguous as to whether it mandated a dismissal without further court order. Where, as here, it is not clear that the action was automatically dismissed by operation of statute, rule or court order, the order denying the motion to vacate shall be deemed the final appealable paper for purposes of this Court's jurisdiction.

As the Appellate Division order denying the motion to vacate had a two-Justice dissent on a question of law, an appeal as of right pursuant to CPLR 5601 (a) properly lies. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.