

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

Don Dokaj v. Ruxton Tower Limited Partnership

55 A.D.3d 662 · Decided October 14, 2008

SUMMARY

The Appellate Division, Second Department, dismissed the plaintiffs' appeal from an order denying leave to file a note of issue because the appeal was untimely. The court held that service of motion papers containing a stamped copy of the entered order and an attorney affirmation referring to it triggered the 30-day period for taking an appeal under CPLR 5513(a).

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Second Department
WRITING FOR THE COURT	Skelos, J.P.; Covello, J.; Balkin, J.; Dickerson, J.
JURISDICTION	New York
DECIDED	October 14, 2008
DISPOSITION	dismissed
PROCEDURAL POSTURE	Plaintiffs appealed from an order denying their motion for leave to file a note of issue. Respondents moved to dismiss the appeal as untimely.
PRECEDENTIAL VALUE	published
PARTIES	Don Dokaj, Plaintiffs v. Ruxton Tower Limited Partnership, Respondents

TOPICS

- appellate procedure
- civil procedure
- personal injury

PRACTICE AREAS

- appellate procedure
- civil procedure
- personal injury

QUESTIONS PRESENTED

1. Whether service of motion papers containing a copy of the entered order and an attorney affirmation referring to that order triggered the 30-day period for taking an appeal under CPLR 5513(a).

2. Whether the appeal was timely when the triggering papers were served on January 6, 2006, but the notice of appeal was filed no earlier than January 22, 2008.

HOLDINGS

1. Service by the appellants of motion papers that included a copy of the order appealed from stamped with the date of entry and an attorney affirmation referring to that order was sufficient to trigger the 30-day period for taking an appeal under CPLR 5513(a).
2. The appeal was untimely because the triggering papers were served on January 6, 2006, and the notice of appeal was not filed until no earlier than January 22, 2008.

KEY QUOTATIONS

“Service by the appellants upon the respondents of certain motion papers, which included a copy of the order appealed from stamped with the date of its entry and an affirmation by an attorney in support of the motion referring to that order, was sufficient to trigger the 30-day period to take an appeal” (663)

“As the motion papers were served on January 6, 2006, and a notice of appeal from the order was filed no earlier than January 22, 2008, the appeal from that order was untimely taken” (663)

FACTUAL BACKGROUND

The underlying action sought damages for personal injuries. Plaintiffs served respondents with motion papers that included a copy of the appealed order stamped with its entry date and an attorney affirmation referring to that order. Those papers were served on January 6, 2006, while plaintiffs filed their notice of appeal no earlier than January 22, 2008.

PROCEDURAL HISTORY

The Supreme Court, Queens County, denied plaintiffs' motion for leave to file a note of issue in an order entered September 27, 2005. Respondents separately moved in the Appellate Division to dismiss the appeal as untimely. The Appellate Division granted the motions and dismissed the appeal without costs or disbursements.

DISPOSITION

dismissed

CASES CITED

- Matter of Xander Corp. v. Haberman, 41 A.D.3d 489, 490
- Meyer v. Meyer, 228 A.D.2d 955, 956

OPINION

PER CURIAM.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Queens County (Schulman, J.), entered September 27, 2005, which denied their motion for leave to file a note of issue. Separate motions by the respondents to dismiss the appeal on the ground that the appeal was untimely taken. By decision and order on motion of this Court dated April 9, 2008, the motions were held in abeyance and referred to the Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motions and the papers filed in opposition thereto, and upon the argument of the appeal, it is, Ordered that the motions are granted; and it is further, Ordered that the appeal is dismissed, without costs or disbursements (see CPLR 5513 [a]). Service by the appellants upon the respondents of certain motion papers, which included a copy of the order appealed from stamped with the date of its entry and an affirmation by an attorney in support of the motion referring to that order, was sufficient to trigger the 30-day period to take an appeal (see CPLR *6635513 [a]; *Matter of Xander Corp. v Haberman*, 41 AD3d 489, 490 [2007]; *Meyer v Meyer*, 228 AD2d 955, 956 [1996]).

As the motion papers were served on January 6, 2006, and a notice of appeal from the order was filed no earlier than January 22, 2008, the appeal from that order was untimely taken and we grant the respondents' motions to dismiss the appeal (see CPLR 5513 [a]; *Matter of Xander Corp. v Haberman*, 41 AD3d at 490). Skelos, J.P., Covello, Balkin and Dickerson, JJ., concur.