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Trials and TRIBULATIONS

A clarification of the CPLR saves Medtronic defendants millions, for now

As litigators in New York State Court practice, we tend to think that nearly every order is appealable. In *Braun v. Cesareo, Medtronic, Inc., and Medtronic USA, Inc.*, 2019 N.Y. Slip Op. 01962 (4th Dep't 2019), the Appellate Division, Fourth Department clarified what is an appealable order as of right versus when a party appeals from a final judgment pursuant to CPLR 5501(a)(1). In its decision, to which Justice John Curran dissented, the Fourth Department held that even orders that are not appealable as of right and are the product of unnoticed oral pre-trial motions may nonetheless be reviewable on an appeal from a final judgment.

In *Braun*, the plaintiff filed a note of issue electing a non-jury trial. The defendants were required to exercise their constitutional right to demand a jury trial no later than Sept. 17, 2015. The defendants instead waited to make their demand for a jury trial until Sept. 18, 2015, the day the trial was scheduled to proceed. Ironically, the trial was supposed to proceed on Sept. 17, 2015, but the defendants were granted a one-day adjournment. The defendants claimed that they failed to notice that the plaintiff had not requested a jury trial on the note of issue, and they requested that the Court excuse them for the minor delay. Erie County Supreme Court Justice Catherine Nugent Panepinto determined that the defendants waived their right to a jury trial



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after “extensive discussion off the record” and following an oral application on the record with arguments from both sides. Nevertheless, the defendants never brought a formal motion on notice regarding the issue.

Later during the trial, following the liability phase, the defendants submitted a proposed order regarding the denial of their pre-trial oral application to file a late demand for a jury trial. The plaintiff objected, arguing that the oral application was not a motion made on notice and thus could not be reduced to an order under the CPLR. Nonetheless, Supreme Court executed the order over the plaintiff's objection and the defendants appealed from the order (First Appeal).

The First Appeal was dismissed on the motion of the plaintiff pursuant to CPLR 5701, because it was not a motion made on notice. Therefore, the Fourth Department ordered, the order was not appealable as of right. Moreover, defendants did not seek permission to appeal, nor follow any other procedural path to obtain an appealable order at that stage, such as, as Justice Curran points out in dissent, a motion (on notice) to vacate the order

denying their motion to file a late demand for a jury trial.

The trial proceeded and the plaintiff secured a judgment for \$21,451,518.69. The defendants thereafter appealed from the final judgment. In particular, the defendants raised the issue of Supreme Court's denial of their oral application for permission to file a late demand for a jury trial.

In dissent, Justice Curran would have held that the “order” the defendants obtained on the issue was not reviewable, even upon an appeal from a final judgment under CPLR 5501. Looking to other sections of the CPLR to define what constitutes an order reviewable under CPLR 5501, Justice Curran concluded that, to be reviewable, an order must be the product of something more than an oral application during a pre-trial proceeding, as was the case here.

Rather, in Justice Curran's reading of the CPLR, an appealable order requires a motion, on notice, such that a sufficient record is created for appellate review. Anything else, he reasoned, would flout the legislature's purpose in creating the rules regarding motion practice in the CPLR and would lead to an ad hoc approach of appellate courts determining what constitutes a sufficient record for appellate review.

Nevertheless, the majority disagreed and held that where there was a sufficient record (in this case the transcript

of the arguments on the oral motion), even a pre-trial oral motion made without notice is reviewable upon the appeal of the final judgment if it “affects the final judgment.” Accordingly, the Fourth Department held that the order denying the defendants’ application to make a late demand for a jury trial was reviewable. Turning to the merits, the Court held that Supreme Court abused

its discretion in denying the defendants’ application given the fact that it was only one day late, and the plaintiff had not shown any undue prejudice.

Thus, the Court reversed the \$21,451,518.69 judgment in favor of plaintiff and ordered a new jury trial. While plaintiff may ultimately prevail following the jury trial, certainly the Fourth Department dealt the plain-

tiff an unexpected setback and (given the inherent delays in scheduling trials and pursuing judgments) it could be years before any future judgment is collected.

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