

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## Trials&TRIBULATIONS

# Tolling statute of limitations for abandoned appeals

Section 205(a) of the Civil Practice Law and Rules provides a six-month toll of the statute of limitations for a plaintiff to refile a lawsuit where it was “timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits ...” Although New York courts have cautioned against a narrow interpretation of this rule, it has been oft stated that this so-called “savings” clause is “designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits,” *Gaines v. City of New York*, 215 N.Y. 533 (1915) (emphasis added).

However, the New York Court of Appeals, in *Malay v. City of Syracuse*, (2015 N.Y. Slip Op. 04164) recently held that the six-month toll of the statute of limitations provided by CPLR 205(a) is measured from the date when an appellate court dismisses an appeal filed as of right, even if that appeal is dismissed by reason of plaintiff's delay — in this case, her failure to perfect her appeal after being granted an extension of time to do so.

Although many might argue that the abandonment of an appeal is anything but diligent, the Court of Appeals, in *Malay*, determined that CPLR 205(a) still applies.

The decision stems from a case with an extraordinary fact pattern. On March 17, 2007, Eileen Malay was alone in her first-floor apartment, which was attached to the house owned by her landlords, Thach and Sopheap Ros, see *Malay v. City of Syracuse*, 2011 WL 4595201, \*1 (NDNY Sept. 30, 2011) (hereinafter “District Court decision”). That afternoon, Thach shot his wife, Sopheap, in the street in front of the house. Thereafter, Thach entered the house and fired several more shots. Thach's daughter-in-law, his 11-year-old son and another child were able to escape the house unharmed.

At this point, it was unclear whether Thach's son Peter was still alive. It was later learned he had been fatally wounded. Police were also concerned that Thach, being armed, would attempt to cause further harm to other potential occupants of the building, or that he would fire shots into the street.

During this time, plaintiff remained in her apartment, unaware of the danger directly outside her door. Plaintiff heard a disturbance outside, but did not realize the gravity of the situation. Police attempted to contact her to determine if she was at home, but they were unable to reach her.

Then, approximately two and a half hours after arriving on the scene, police deployed tear gas into the home, including into plaintiff's apartment. Plaintiff was eventually evacuated, but she was never permitted to return to her apartment and she lost all of her belongings due to contamination from the gas. Although plaintiff was not immediately seriously ill from the gas, she later developed symptoms attributed to the gas exposure that required long-term medical attention.

Not surprisingly, in June 2008, plaintiff sued the city of Syracuse and several police officers in federal court, alleging violations of her federal and state constitutional rights as well as state common law claims. Following discovery, defendants filed a motion for summary judgment. The court requested additional briefing and oral argument on plaintiff's Fourth Amendment claims regarding the use of gas by the police department and her claim that defendants failed to provide her necessary medical assistance following her evacuation.

On Sept. 30, 2011, the District Court granted defendants' motion for summary judgment with respect to plaintiff's federal claims and declined to exercise supplemental jurisdiction over plaintiff's remaining state law claims.

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Plaintiff, represented by counsel, filed a notice of appeal to the Second Circuit Court of Appeals. Plaintiff attended a conference in May 2012, but ultimately failed to file the requisite brief and appendix to perfect her appeal. On June 26, 2012, the Second Circuit issued an order warning plaintiff that her appeal would be dismissed if not perfected. Plaintiff failed to perfect her appeal and it was dismissed, effective July 10, 2012, *Malay*, Slip Op. at 1.

Plaintiff filed a state court action on June 25, 2012, in New York State Supreme Court, Onondaga County. Pursuant to CPLR 205(a), defendants moved to dismiss the state court action as untimely, as it was filed nearly nine months after the District Court dismissed her claims and she abandoned her appeal.

The New York Court of Appeals has previously held that, for the purposes of CPLR 205, the six-month tolling period of the statute of limitations is measured from the date any non-discretionary appeal is terminated or the date when a discretionary appeal is decided on the merits, *Malay*, Slip Op. at 2-3. In this case, although plaintiff's non-discretionary appeal to the Second Circuit was officially terminated on July 10, 2012, defendants argued that the six-month tolling period should have been measured from Sept. 30, 2011, when the District Court dismissed her complaint, because her appeal was terminated based on her own delay. Plaintiff, however, claimed that after the conference with the Second Circuit in May 2012, she realized that she was unlikely to succeed on her appeal and that she would achieve a quicker resolution by filing a new action in state court.

Notably, this is not a case where a pro se plaintiff, unfamiliar with the substantive law or the various procedural rules of the state and federal courts, was afforded leniency in the interests of justice. Plaintiff was represented by counsel, who briefed her case on many occasions — including opposing a motion to dismiss before the District Court and the motion for summary judgment, in which the District Court requested additional briefing and oral argument. Moreover, plaintiff filed her federal lawsuit in June 2008 and it was not finally determined until September 2011.

Considering the amount of time spent on this case, one would assume that plaintiff's attorneys could have easily determined within the six-month tolling period provided by CPLR 205(a) whether it was strategically wise to file an action in state court or to pursue the appeal in federal court.

The Supreme Court dismissed the case, agreeing with defen-

dants that the action terminated for the purposes of CPLR 205(a) on Sept. 30, 2011, when the District Court rendered its decision. The Appellate Division, Fourth Department affirmed without writing.

Reversing the Fourth Department, the Court of Appeals, in a unanimous decision, held that the six-month tolling provision of CPLR 205(a) runs from the date the non-discretionary appeal is terminated — in this case, July 10, 2012 — regardless of whether it was terminated due to plaintiff's abandonment of her appeal. Rejecting defendants' arguments, the Court of Appeals reasoned that defendants were on notice of plaintiff's claims based on the timely filing of the federal action, and that even if an appeal is abandoned by the plaintiff, CPLR 205(a)'s remedial purpose of "allowing plaintiffs to avoid the harsh consequences of the statute of limitations and have their claims determined on the merits" supported the determination to permit a plaintiff to abandon an appeal and effectively extend the statute of limitations, *Malay*, Slip Op. at 3.

Dismissing defendants' argument that the decision would result in frivolous appeals where plaintiffs seek to enlarge the time to file a new action, the Court of Appeals reasoned that "a plaintiff who engages in such behavior would not be able to do so for long, inasmuch as the dismissal of the nondiscretionary appeal due to failure to perfect generally would foreclose any subsequent appeal of the same issues," *Malay*, Slip Op. at 3. However, this reasoning seemingly ignores the situation present in this case, where a plaintiff's state law claims are dismissed for lack of jurisdiction in federal court, following the dismissal of all of her federal claims, which is certainly not uncommon.

In sum, the Court of Appeals determined that the equitable considerations underpinning CPLR 205(a) supported a decision granting plaintiff additional time to file a new lawsuit, despite her arguable lack of diligence in pursuing her claims. Although this seems contrary to the fundamental basis for a statute of limitations — to protect individuals from "stale claims" because, "[a]s time passes, the defense of an action may become more difficult" (see *McCarthy v. Volkswagen of Am., Inc.*, 55 N.Y.2d 543, 548 (1982) — at least under these circumstances, even the plaintiff who abandons an appeal will reap the benefits of any time it might take an appellate court to dismiss the neglected appeal plus the additional six-months provided by CPLR 205(a).

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