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# Discretionary Stays on Appeal by Court Order: A Refresher

By Joseph F. Castiglione

Civil Practice Law and Rules (CPLR) 5519 provides the primary means for litigants in civil judicial proceedings to obtain a stay of enforcement of a judgment or order, pending appeal of that judgment or order. The statute identifies several categories of possible “automatic” stays provided to parties, with the application of each category of automatic stay predicated upon the occurrence of specified facts and/or events in each case. For example, a stay is automatically provided in cases when a notice of appeal or an affidavit of intention to move for permission to appeal is served, and the “judgment or order directs the payment of a sum of money, and an undertaking in that sum” is provided by the appealing party. A stay is also automatically provided when “the judgment or order directs the execution of any instrument, and the instrument is executed and deposited in the office where the original judgment or order

is entered.” And, as is well known amongst the bar, an automatic stay is afforded when “the appellant or moving party is the state or any political subdivision of the state or any officer or agency of the state or of any political subdivision of the state.”<sup>1</sup>

While the terms of CPLR 5519 list specific circumstances when a stay is “automatically” imposed in a case, what about situations when the judgment or order appealed from doesn’t meet the prerequisites for an “automatic” stay under § 5519(a) or (b)? Those cases fall within the general “catchall” stay provided by § 5519(c), known as the “discretionary stay” by court order.

This article provides practitioners with a refresher on the “discretionary stay” provisions of CPLR 5519(c). Our review includes the history of the stay provision, the availability and/or prerequisites for seeking a discretionary stay, and the standard employed by courts, including

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the facts and law that have been considered by the courts, when deciding an application for a discretionary stay under CPLR 5519(c).

### **CPLR 5519(c): Its History and Availability in Civil Judicial Proceedings**

The terms in CPLR 5519(c) afford litigants in civil judicial proceedings with the opportunity to obtain a court-ordered stay of a judgment or order in the discretion of the court, pending appeal. The relevant provisions of the statute are as follows:

(c) Stay and limitation of stay by court order. The court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case not provided for in subdivision (a) or subdivision (b), or may grant a limited stay or may vacate, limit or modify any stay imposed by subdivision (a), subdivision (b) or this subdivision . . . <sup>2</sup>

The stays “provided for in subdivision (a) or subdivision (b)” are the specified “automatic” stays of proceedings to enforce certain judgments or orders appealed from, when the identified prerequisites listed in § 5519(a) and (b) are satisfied for those certain judgments or orders. A stay provided by either subsection (a) or (b) is considered to be “automatic” because, once the identified criteria or events are satisfied under each respective subsection, a stay is imposed by the terms of the statute itself “without [any] court order.”<sup>3</sup> Contrary to subsections (a) and (b), a stay under § 5519(c) can be obtained only “by court order.”<sup>4</sup>

The present language in § 5519(c) was enacted in 1963 as part of the Legislature’s promulgation of the then-new Civil Practice Law and Rules.<sup>5</sup> Before CPLR 5519, the methods for obtaining stays on appeals were supplied by various different provisions throughout the former Civil Practice Act and other rules of civil practice. The provisions in “CPLR § 5519 consolidate[d] all of the provisions of the State’s [prior] civil procedure code regarding stays pending appeal.”<sup>6</sup>

Relative to discretionary stays by court order, § 598-a of the former Civil Practice Act (CPA) allowed courts to issue a “Stay of execution, pending appeal, by order.”<sup>7</sup> Specifically, § 598-a provided, in relevant part:

[A] stay of the execution of the judgment or order results only when the appellant gives the undertaking prescribed in section five hundred and ninety-three and the supreme court or appellate division or the court of appeals or a judge of any of said courts grants a stay in the exercise of discretion upon such terms as to security or notice or otherwise as justice requires.<sup>8</sup>

Seemingly different than the former § 598-a, the current discretionary stay provisions provide the courts with two express grants of authority: a court can either “stay all proceedings” or alternatively “grant a limited stay”

of proceedings.<sup>9</sup> Similar to the former § 598-a, the current statute provides moving parties with three options to pursue a stay: by applying to “[t]he court from or to which an appeal is taken or the court of original instance.”<sup>10</sup> In other words, on an appeal from the trial court in the New York State Supreme Court, the trial court or the appellate court can grant a stay; and on an appeal from the Appellate Division of the Supreme Court, the statute allows an applicant to initially seek a stay from the Appellate Division (as the court “from . . . which an appeal is taken”), or the Court of Appeals (the court “to which an appeal is taken”), or the trial court (as “the court of original instance”).<sup>11</sup>

By its terms, the CPLR provides “the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute.”<sup>12</sup> The discretionary stay provisions of § 5519(c) therefore apply in civil judicial proceedings in the supreme court, but practitioners should take care to determine if the stay provisions apply in their particular proceedings. For example, in *In re John H.*, the Appellate Division, Third Department, determined that the New York Family Court Act preempted the automatic stay provisions of CPLR 5519(a)(1) but did not preempt the court-ordered discretionary stay provisions of § 5519(c).<sup>13</sup> The appellate court explained that “[f]inally, the specific language of Family Court Act § 1114 (a) – that the filing of a notice of appeal from a Family Court order does not give rise to a stay – abrogates the more general automatic stay provision of CPLR 5519(a)(1) – providing an automatic stay where the state or a political subdivision, such as petitioner, is the appellant[.]”<sup>14</sup> The court concluded, however, that “[n]ot having moved for a stay, petitioner was required to comply with Family Court’s order despite the prosecution of this appeal.”<sup>15</sup> Based upon its acknowledgement of the lack of a motion for a stay, the appellate court appeared to endorse the application of the court-ordered discretionary stay provisions of § 5519(c) to family court proceedings under the Family Court Act.

Even in civil proceedings in the N.Y. State Supreme Court, there are prerequisites that must be satisfied for a court-ordered discretionary stay to be available to litigants. For example, the Supreme Court, Bronx County, in *Plowden v. Manganiello*, held that “none of the stays authorized by CPLR 5519 may be granted” in proceedings where “there is no currently appealable paper in existence.”<sup>16</sup> In *Plowden*, the City of New York asserted that it had filed an affidavit of intention to move for permission to appeal to the Court of Appeals from an alleged “final judgment.”<sup>17</sup> The City alleged “that its ‘affidavit of intention’ relates to the appeal which it will seek to take to the Court of Appeals from the final judgment which will eventually be entered in this case.”<sup>18</sup> Even though the matter had not been finally resolved by the trial court, the City’s affidavit of intention asserted that “at such time as a final, appealable order is entered in this matter,

said defendants intend to move for leave to appeal to the Court of Appeals from said judgment.”<sup>19</sup> After serving its purported affidavit of intention under CPLR 5519(a), the City moved before the trial court “pursuant to CPLR 5519, to enjoin plaintiffs ‘from executing on and enforcing the \$1 million dollar money judgment entered [t]herein against the City until final resolution of th[e] case can be had in the Court of Appeals.”<sup>20</sup>

### The Standard Employed by Courts and Courts’ Considerations in Deciding an Application for a Stay Under CPLR 5519(c)

The language in § 5519(c) does not include any specific criteria or hard-and-fast rule for issuing a discretionary stay by court order; rather, the operative word in applying the discretionary stay provisions under § 5519(c) is “may.” New York courts have interpreted that language

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In holding that there was no actual final appealable paper in the case to support the City’s purported affidavit of intention in *Plowden*, the supreme court explained that

[t]he language of CPLR 5519 necessarily implies that the section applies only to extant orders and judgment. Thus, the introductory part of CPLR 5519(a) refers to a stay of “all proceedings to enforce the judgment or order appealed from.” The entire structure of CPLR 5519 relies on the premise that a stay affects only the immediate order or judgment involved, not any other order in the same case.<sup>21</sup>

Concluding that all of the provisions of CPLR 5519 applied to an immediate order or judgment only, and not a theoretical eventual final judgment in a case, the court determined that the automatic stay provided by CPLR 5519(a)(1) did not exist; however, the court further held that, as the City’s “motion also invokes the court’s discretion pursuant to CPLR § 5519(c) . . . [t]hat application must be denied for the same reason as indicated above. There is no extant order from which an appeal can be taken.”<sup>22</sup>

Related to the final, extant appealable paper requirement discussed in *Plowden*, the Appellate Division, First Department, has similarly determined that there is “no basis for a discretionary stay” under § 5519(c), where a party “did not appeal the judgment or post a bond.”<sup>23</sup> Besides having an extant, final order or judgment that the party is actually appealing, an applicant for a discretionary stay must affirmatively oppose the relief requested that is ultimately awarded in the extant final judgment or order. The Fourth Department, in *Caruana v. Klipfel*, directly denied a discretionary stay because the movant had failed to oppose the relief requested by its adversary before the lower court, which was then awarded in the final judgment that the movant was seeking to stay on appeal under § 5519(c).<sup>24</sup>

as meaning that “granting of a stay pending appeal rests in the sound discretion of the court.”<sup>25</sup> That interpretation is consistent with the express language employed in the former CPA, which allowed courts to issue “a stay in the exercise of discretion upon such terms as to security or notice or otherwise as justice requires.”<sup>26</sup> This discretionary authority has been applied as allowing courts to impose conditions on the issuance of a discretionary stay on appeal.<sup>27</sup>

The standard for granting a court-ordered stay is based solely upon the court’s discretion, so litigants have no clear direction for preparing such an application to the court. There is, however, a seemingly endless number of cases discussing various facts and legal positions courts have reviewed when deciding if a stay was appropriate. These cases show that courts consider a plethora of factors when exercising their discretionary authority.

A primary factor considered by the courts is whether the party seeking a discretionary stay has demonstrated that the underlying appeal itself “may have merit.”<sup>28</sup> In fact, the Court of Appeals has unequivocally held that a “court considering the stay application may consider the merits of the appeal.”<sup>29</sup> In *Rosenbaum v. Wolff*, the Appellate Division, Second Department, denied a “motion for a stay of a pending [ ] appeal . . . for lack of a meritorious showing” of the underlying appeal on the stay application itself.<sup>30</sup> Thus, the merits of the appeal, and the application itself, should both be sufficiently addressed by an applicant through both supporting evidence and legal arguments.

Besides the merits of the underlying appeal, courts have considered the possible impacts on the “progress of [ ] important public work involved” if a stay is granted or denied in a case,<sup>31</sup> and whether the stay will “prejudice” other parties.<sup>32</sup> Relative to the prejudice arising from a stay consideration, the Court of Appeals has directly held that “the court entertaining the application is duty-bound

to consider the relative hardships that would result from granting (or denying) a stay.<sup>33</sup> Practitioners should take note that, practically speaking, the “relative hardships” of a stay could be projected beyond those immediately involved in any given order or judgment. Such hardships that arise from a stay seemingly could extend to identifying hardships suffered by non-parties.

A discretionary stay has also been reviewed in the context of staying an action on appeal, pending resolution of another action. In *Eisner v. Goldberger*, the Appellate Division, First Department, determined that the applicant for a discretionary stay “failed to show good cause [for] a stay” of a judgment in one action, “pending resolution of an action [the applicant had] more recently commenced” against the assignee of the judgment challenging the validity of the judgment.<sup>34</sup> “A stay of one action pending the outcome of another is appropriate only where the decision in one will determine all the questions in the other, and where the judgment in one trial will dispose of the controversy in both actions.”<sup>35</sup> In holding that the lower court “did not improvidently exercise its discretion in denying the stay,” the First Department determined that the request “appear[ed] to be merely an effort to avoid enforcement of the judgment.”<sup>36</sup> In their review, courts look for evidence demonstrating that a motion for a stay is “taken primarily for the purpose of delay” and, if found, may deny applications for a discretionary stay under CPLR 5519(c).<sup>37</sup>

Courts also consider whether an appeal may become “moot” and “academic.”<sup>38</sup> In *Van Amburgh v. Curran*,<sup>39</sup> for example, the court addressed a request to stay execution of an order pending appeal of a proceeding “to modify a subpoena served upon [six of the petitioners] requiring them to attend private hearings of the State Investigation Commission in the City of New York.” The court, holding “in the exercise of discretion, the application is granted pursuant to the provisions of CPLR 5519(c),” determined that “[a]bsent a stay pending appeal petitioners would be required to attend hearings in New York City . . . and thus the appeal would be rendered academic.”<sup>40</sup>

The potential application of CPLR 5519(c) is seemingly broad, as the singular standard is the “discretion” of the court. However, practitioners should not assume the availability of a discretionary stay under CPLR 5519(c). Courts may consider a party’s access to other, more appropriate, stay provisions.<sup>41</sup> The Court of Appeals has directly denied applications for discretionary stays, based upon the party’s apparent right to pursue alternative relief under the “automatic” stay provisions in CPLR 5519(a)(2).<sup>42</sup>

Apart from the vague guidance provided by the word “may,” which implies the court’s discretion, there are no express criteria to look to when asking a court to invoke its discretionary powers under § 5519(c). Some courts have discussed whether exercising their discretion on such an issue was “just or reasonable” based upon

the facts and law before the court,<sup>43</sup> but a decision that something is “just or reasonable” is still made under the subjective discretion of any given court. However, while discretion in considering an application for a stay under § 5519(c) may be subjective, it is ultimately subject to the general abuse of discretion standard of review by an appellate court.<sup>44</sup> Practitioners must take note that, while a determination to issue a stay is discretionary and subject to the abuse of discretion standard of review, the Court of Appeals has been clear that “there is no entitlement to a stay” under CPLR 5519(c).<sup>45</sup>

## Conclusion

Discretionary stays under CPLR 5519(c) are a powerful tool for parties in litigation and are potentially available in the broad array of cases that are otherwise excluded by CPLR 5519(a) and (b). The key is to stay focused. If not, practitioners may find themselves on the wrong side of a client’s exercise of discretion for their continued employment. ■

1. See CPLR 5519(a)(2), (5), (1).
2. See CPLR 5519(c).
3. See CPLR 5519(a).
4. See CPLR 5519(c).
5. See CPLR 5519 (citing to the 1962 N.Y. Laws ch. 308, as first enacting CPLR 5519); see also CPLR 101.

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6. See *Summerville v. City of N.Y.*, 97 N.Y.2d 427, 430 (2002).
7. See CPA § 598-a; see also 1945 N.Y. Laws ch. 841.
8. See CPA § 598-a (emphasis added); see also 1945 N.Y. Laws ch. 841, § 598-a.
9. See CPLR 5519(c).
10. See *id.*
11. See *id.*
12. See CPLR 101.
13. See 56 A.D.3d 1024, 1026–27 (3d Dep’t 2008).
14. See *id.*
15. See *id.* at 1027 (emphasis added).
16. 143 Misc. 2d 446, 448 (Sup. Ct., Bronx Co. 1989).
17. See *id.* at 448.
18. See *id.* at 449.
19. See *id.* at 448 (internal quotes and brackets omitted).
20. See *id.*
21. See *id.*
22. See *id.* at 449–50.
23. See *Levine v. Neiva*, 58 A.D.3d 411 (1st Dep’t 2009).
24. See 135 A.D.2d 1146, 1146–47 (4th Dep’t 1987).
25. See *In re Mott*, 123 N.Y.S.2d 603, 608 (Sup. Ct., Oswego Co. 1953) (citing *Genet v. Delaware & Hudson Canal Co.*, 113 N.Y. 472 (1889)); see also *Navy Yard Hous. Dev. Fund, Inc. v. Carr*, 2002 WL 1174711, \*2 (Civ. Ct., Kings Co. 2002); *Russell v. N.Y. City Hous. Auth.*, 160 Misc. 2d 237, 239 (Sup. Ct., Bronx Co. 1992) (reiterating “discretionary stay under CPLR 5519(c)”); *Grisi v. Shainswit*, 119 A.D.2d 418, 421 (1st Dep’t 1986).
26. See CPA § 598-a; see also 1945 N.Y. Laws ch. 841.
27. See *Gettys v. Ryan*, 267 A.D. 1029, 1029 (3d Dep’t 1944); see also *Cavanagh v. Hutcheson*, 232 A.D. 470, 471 (1st Dep’t 1931).
28. See *Wilkinson v. Sukiennik*, 120 A.D.2d 989, 989 (4th Dep’t 1986); see also *Navy Yard Hous. Dev. Fund, Inc.*, 2002 WL 1174711, \*2 (noting that relevant factors to consider in deciding to issue a stay include “the presumptive merits of the appeal,” and holding that “Defendant has failed to establish any grounds to justify a stay pending appeal in this action”); see also *Herbert v. City of N.Y.*, 126 A.D.2d 404, 407 (1st Dep’t 1987) (holding that “stays pending appeal will not be granted, or where the stay is automatic, [or] continued, in cases where the appeal is meritless”).
29. See also *Da Silva v. Musso*, 76 N.Y.2d 436, 443 n.4 (1990).
30. 270 A.D. 843, 843 (2d Dep’t 1946) (citing *Black v. Maitland*, 1 A.D. 6 (2d Dep’t 1896)).
31. See *In re Mott*, 123 N.Y.S.2d at 608 (quoting *Horton v. Thomas McNally Co.*, 153 A.D. 905 (2d Dep’t 1912)).
32. See *Russell*, 160 Misc. 2d at 239; see also *Navy Yard Hous. Dev. Fund, Inc.*, 2002 WL 1174711, \*2 (noting that relevant factors to consider in deciding to issue a stay include “any exigency or hardship confronting any party.”).
33. See *Da Silva*, 76 N.Y.2d at 443 n.4.
34. 28 A.D.3d 354, 354 (1st Dep’t 2006).
35. See *id.*
36. See *id.* at 355.
37. See, e.g., *Herbert v. City of N.Y.*, 126 A.D.2d 404, 407 (1st Dep’t 1987); see also *In re Mott*, 123 N.Y.S.2d at 608–09.
38. For a discussion on “mootness” in civil litigation, see Joseph F. Castiglione, *A “Moot Point” Is an Ongoing Concern for Everyone*, N.Y. St. B.J. (Feb. 2010), p. 38.
39. 73 Misc. 2d 1100, 1100 (Sup. Ct., Albany Co. 1973).
40. See *id.* at 1100.
41. See *Sullivan v. Troser Mgmt., Inc.*, 30 A.D.3d 1118, 1118 (4th Dep’t 2006) (holding “[b]ecause appellant can obtain an automatic stay (see CPLR 5519(a) (4), (5)), a discretionary stay is not available pursuant to CPLR 5519(c)”; see also *Norcross v. Cook*, 199 A.D.2d 1079, 1079 (4th Dep’t 1993).
42. See *Hill v. St. Clare’s Hosp.*, 65 N.Y.2d 689, 690 (1985); see also *Pan Am. World Airways v. Overseas Raleigh Mfg.*, 49 N.Y.2d 780, 780 (1980).
43. See *Bethlehem Baptist Church v. Trey Whitfield Sch.*, 2003 WL 21262379, \*2 (N.Y. City Civ. Ct. 2003); see also *64 B Venture v. Am. Realty Co.*, 179 A.D.2d 374, 375 (1st Dep’t 1992).
44. See *State of N.Y. v. Spodex*, 89 A.D.2d 835, 836 (1st Dep’t 1982); see also *In re Foley*, 140 A.D.2d 892, 893 (3d Dep’t 1988) (stating “we see no abuse of discretion here”); see also *Varkonyi v. S.A. Empresa De Viacao Airera Rio*, 22 N.Y.2d 333, 337 (1968); *64 B Venture*, 179 A.D.2d at 375–76 (reviewing the duration of a stay granted by trial court, the appellate court stated that “it was an improvident exercise of the court’s discretion”); *MacLeod v. Shapiro*, 20 A.D.2d 424, 428 (1st Dep’t 1964) (noting that, as to duration of a stay, “[j]udicial power should not be so abused”); *Navy Yard Hous. Dev. Fund, Inc. v. Carr*, 2002 WL 1174711, \*2 (Civ. Ct., Kings Co. 2002).
45. See *Da Silva v. Musso*, 76 N.Y.2d 436, 443 n.4 (1990).

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