



John R. Marvin
Sean M. Kemp

LAW OFFICES
MARVIN KEMP, PLLC
44 WEST MARKET STREET - P.O. BOX 151
RHINEBECK, NEW YORK 12572

Telephone: (845) 876-3024
Facsimile: (845) 876-5622
www.marvinkemp.com

August 25, 2022

Via: UPS and Court of Appeals Companion Filing Upload Portal

Lisa LeCours, Chief Clerk and Legal Counsel to the Court
State of New York Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: *Favourite Limited v. Cico*
APL-2022-00102
Our File No.: 6441.34.01.21
Rule 500.10 Joint Jurisdictional Response on behalf of Carla Cico
and Benedetto Cico

Dear Ms. LeCours:

On behalf of Defendants-Respondents Carla Cico and Benedetto Cico (“Respondents”), we respectfully submit this Joint Jurisdictional Response to this Court’s request, dated August 8, 2022, concerning whether the order appealed from finally determines the proceeding within the meaning of the Constitution¹. For the reasons set forth below, this Court should not retain subject matter jurisdiction over this appeal because the order appealed from is a nonfinal order which is not appealable under CPLR 5601(a) and Article VI §3 of the Constitution.

Plaintiffs-Appellants Favourite Limited, Claudio Gatelli, Graziano Sghedoni, Alberto Brentegani, Sirio SRL, Oile SRL, and Upper East Side Suites, LLC (“Appellants”) appeal from a Decision and Order of the Appellate Division, First Department, dated June 21, 2022 (the “Decision”), that modified, on the law, so much of the Trial Court’s Decision and Order dated June 8, 2021, that granted Appellants’ motion for leave to file a third amended complaint, and denied said relief.

Appellants timely filed their notice of appeal to this Court and identified CPLR 5601(a), dissents on the law at the Appellate Division, as the jurisdictional basis for this appeal. CPLR 5601(a) provides in relevant part that:

¹ Jurisdictional Responses were originally due on or before August 18, 2022, however, Plaintiffs-Appellants requested and received an extension of time to submit responses.

An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which **finally determines** the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal. (emphasis added)

Here, the thrust of Appellants' appeal is from that portion of the Decision that denied their request for leave to file an amended pleading. The Court of Appeals has consistently held that the denial or granting of leave to file an amended pleading is a nonfinal order. See, Best v. Yutaka, 90 N.Y.2d 833 (1997); Arnav Indus. Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, 96 N.Y.2d 300 (2001).

This Court's holding in Oakes v. Patel, 20 N.Y.3d 633 (2013) does not change this conclusion as that decision only reversed Best and Arnav to the extent that those decisions held that "an order granting or denying a motion to amend" could not necessarily affect the final judgment for the purposes of appellate review. In other words, unlike this case, the holding in Oakes related to the "reviewability" of a prior nonfinal order on appeal from a subsequent final judgment as opposed to the "appealability" of a nonfinal order which is at issue in this matter. See generally, Siegel, NY Prac §§527 and 529. Neither Oakes nor any other case holds that the granting or denial of leave to file an amended pleading can be deemed a final order for purposes of an appeal under CPLR 5601(a).

In Whitfield v. City of New York, 90 N.Y.2d 777 (1997), the Court of Appeals addressed the issue of finality and held that "[i]n analyzing which paper is the final appealable paper for purposes of taking an appeal pursuant to CPLR 5601. . . , strict attention should be paid to the express language of the Appellate Division order". Here, the Appellate Division stated in no uncertain terms that the March 2020 dismissal order, which unconditionally dismissed Appellants' action in its entirety based on Appellants' lack of capacity to sue, is the order that finally determined this action. See, Decision at p.22 ("we find that the Supreme Court did not have discretion to grant leave to amend a complaint that had already been dismissed by this Court"). This holding is correct. After the Appellate Division entered its March 2020 dismissal order, Appellants' action was no longer pending before the Trial Court. Accordingly, the March 2020 dismissal order finally determined Appellants' action within the meaning of CPLR 5601.

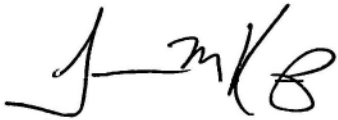
Since the March 2020 dismissal order, and not the Decision that forms the basis of Appellants' appeal, is the final appealable paper, any subsequent order, i.e. the Decision as well as the Trial Court's Decision and Order dated June 8, 2021, should be treated as a nonfinal determination. See, e.g. Cadichon v. Facelle, 15 N.Y.3d 877 (2010) ("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").

As the Appellate Division noted in the Decision, after the March 2020 dismissal order, Appellants could have cured their lack of capacity and commenced a new action within the six-

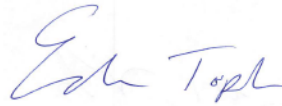
month window provided by CPLR 205(a), but they chose not to. Instead, they chose a path that was procedurally and substantively defective. The fact that they learned that they chose the wrong path after the applicable statute of limitations expired does not transform what is routinely considered a nonfinal order into a final order for the purposes of an appeal to the Court of Appeals under CPLR 5601(a).

Based on the foregoing, the Decision did not finally determine this action. Accordingly, this Court should not retain subject matter jurisdiction over this appeal as the Decision is a nonfinal order that is not appealable under CPLR 5601(a) and the Constitution.

Respectfully,



SEAN M. KEMP



EDWARD TOPTANI

cc: Peter Jakab, Esq. (via UPS)

