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COURT OF APPEALS
STATE OF NEW YORK

MALAY,

Appellant,

-against-

CITY OF SYRACUSE, et al.,

Respondents.

No. 62

Syracuse University College of Law
950 Irving Avenue
Syracuse, New York 13244
March 25, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 with number 62, Malay v. City of Syracuse.

3 Counselor? Do you want any rebuttal time,
4 counsel?

5 MR. GATTUSO: No, sir, Your Honor.

6 CHIEF JUDGE LIPPMAN: No rebuttal time.
7 Okay, you're on. Go ahead.

8 MR. GATTUSO: Good afternoon. May it
9 please the court, Frank Gattuso for the plaintiff,
10 the appellant. There's a lot of law to discuss, but
11 I think it's really appropriate to have a slight
12 review of the facts of procedural history.

13 CHIEF JUDGE LIPPMAN: Tell us - - - tell us
14 what really happened here with this proceeding. Why
15 did it not go forward with - - - on appeal? What
16 happened?

17 MR. GATTUSO: Plaintiff filed a notice of
18 appeal with the Second Circuit. Five months later
19 there was a pre-briefing conference before - - - with
20 the Second Circuit by telephone.

21 CHIEF JUDGE LIPPMAN: Right.

22 MR. GATTUSO: After this pre-briefing
23 conference, the plaintiff decided to take her state
24 common law claims and - - -

25 CHIEF JUDGE LIPPMAN: Right.

1 MR. GATTUSO: - - - move them to state
2 court. She had a - - - every right to do that.

3 JUDGE READ: But why isn't that, sort of,
4 just like a failure to prosecute, though, in the
5 federal court?

6 MR. GATTUSO: I - - - I don't see it as a
7 failure to prosecute at all.

8 CHIEF JUDGE LIPPMAN: What is it, if it's
9 not a failure prosecute?

10 MR. GATTUSO: It's - - -

11 JUDGE READ: Because - - - because she
12 didn't perfect the appeal as I understand it.

13 MR. GATTUSO: There's - - - there's nothing
14 in the law that requires her to go forward with that
15 appeal.

16 CHIEF JUDGE LIPPMAN: What - - - why is it
17 not - - - under 205(a), why is it not a neglect to
18 prosecute it? What do those magic words in the
19 statute mean, where they say neglect to prosecute?
20 What did you do as it relates - - -

21 MR. GATTUSO: Well - - -

22 CHIEF JUDGE LIPPMAN: - - - to the wording
23 of - - - of the statute?

24 MR. GATTUSO: Well, the statute talks about
25 termination of an action, but - - -

1 CHIEF JUDGE LIPPMAN: They talk about two
2 different things, right? What exactly does the
3 statute - - -

4 MR. GATTUSO: Neglect to prosecute - - - I
5 see neglect to prosecute, as a plaintiff attorney,
6 there's been times where my case might have been
7 moving slow, and I was defense - - - defendant said,
8 well, we're going to bring a motion to dis - - -
9 dismiss for failure to prosecute.

10 CHIEF JUDGE LIPPMAN: Is your argument,
11 this is more in the nature of an abandonment? What
12 is it?

13 MR. GATTUSO: No - - -

14 CHIEF JUDGE LIPPMAN: What happened?

15 MR. GATTUSO: I - - - I don't think it's an
16 abandonment at all. It's an argument the defense
17 raised. This was a litigation strategy. It was a -
18 - - she had - - -

19 CHIEF JUDGE LIPPMAN: Why is it not a
20 disqualifier? What would be a disqualifier?

21 MR. GATTUSO: There's nothing in the law,
22 in the statute or any case law that makes it a
23 disqualifier.

24 JUDGE FAHEY: But wouldn't - - - wouldn't
25 your argument be that - - - that it's a matter of

1 right? That you have a right to do this.

2 MR. GATTUSO: Yeah, absolutely.

3 JUDGE FAHEY: It's not discretionary,
4 right?

5 MR. GATTUSO: It is the plaintiff's right
6 to - - -

7 JUDGE FAHEY: You're entitled to the six
8 months, and so, yes, it does drag out the case for
9 six more months, but you have a right to that. This
10 isn't - - - this isn't a discretionary appeal. You
11 have an automatic right to it. So the question then
12 becomes, going back to Judge Read's question,
13 assuming you exercise that right, your federal appeal
14 was dismissed for abandonment is, I think, what they
15 put in the federal appeal, is that right?

16 MR. GATTUSO: I - - - I - - - the - - -

17 JUDGE PIGOTT: Default.

18 JUDGE FAHEY: Default.

19 MR. GATTUSO: - - - the federal appeal was
20 dismissed. I don't - - -

21 JUDGE FAHEY: Judge Pigott's correct,
22 default.

23 MR. GATTUSO: Okay.

24 JUDGE FAHEY: That's right. And - - - but,
25 of course, one of the distinguishing points here is

1 that your action was brought before it was dismissed
2 in federal court, wasn't it?

3 MR. GATTUSO: Exactly. That is a very
4 important point.

5 JUDGE ABDUS-SALAAM: Counsel, could you
6 tell me - - - I may have missed it in the record, but
7 was there - - - did you include the notice of appeal
8 in the Second - - - in the circuit court in your
9 record here?

10 MR. GATTUSO: I - - - I believe the notice
11 of appeal is part of the record. But - - - but - - -

12 JUDGE ABDUS-SALAAM: I didn't see it
13 anywhere. I - - -

14 MR. GATTUSO: But - - - okay.

15 JUDGE ABDUS-SALAAM: One of the brief - - -
16 there was supposed to be an attachment, Exhibit A,
17 that was the notice of appeal, but I - - - I didn't
18 see it. I looked.

19 MR. GATTUSO: The notice of appeal was
20 filed in January of 2012. I - - - I - - - and there
21 was no dis - - - there's been no dispute that the
22 appeal was not filed - - -

23 CHIEF JUDGE LIPPMAN: Counsel, what - - -

24 JUDGE ABDUS-SALAAM: I'm not talk - - - I'm
25 sorry, counsel.

1 CHIEF JUDGE LIPPMAN: I'm sorry, Judge
2 Abdus-Salaam, go ahead.

3 JUDGE ABDUS-SALAAM: But it's - - - it's
4 not about whether the appeal was filed, it's what did
5 you appeal. That's what I was trying to figure out.

6 MR. GATTUSO: Oh, I see, okay. Got you.

7 JUDGE ABDUS-SALAAM: And I - - - I thought
8 the notice of appeal would tell me that. I know you
9 talk about it in your briefs, but I wanted to see the
10 notice of appeal for myself.

11 MR. GATTUSO: Sure. And I understand why
12 you're asking that. The appeal was for - - - for the
13 dismissal of the - - - the federal case was dis - - -
14 dismissed on summary judgment. The - - - there were
15 Constitutional claims that were dismissed. The court
16 then did not - - - no longer had pending jurisdiction
17 of the state law claims. The appeal was going to
18 focus on the Constitutional issues. That was the
19 issue that was going to be decided by the - - -
20 addressed by the Second Circuit. But if that appeal
21 was successful, the entire case would have gone back.
22 The fed - - - the district court - - -

23 JUDGE ABDUS-SALAAM: So the pending state
24 claims would have come back as well.

25 MR. GATTUSO: Exactly, Judge, yes.

1 JUDGE ABDUS-SALAAM: But I'm - - - I'm
2 trying to figure out why it wasn't in the record, so
3 that I can see what was actually appealed. But it's
4 okay.

5 MR. GATTUSO: Okay.

6 JUDGE RIVERA: So did - - -

7 CHIEF JUDGE LIPPMAN: Counsel, what was the
8 reasoning? Why did you choose not to perfect it?

9 MR. GATTUSO: The - - - after the pre-
10 briefing conference - - -

11 CHIEF JUDGE LIPPMAN: Right.

12 MR. GATTUSO: - - - it seemed that the
13 chances of success on that appeal might have been
14 less than what we thought. There were the state law
15 claims - - - and - - - and it would have taken twelve
16 or eighteen months - - -

17 CHIEF JUDGE LIPPMAN: The federal - - - the
18 federal court was not taking up those state law
19 claims anyway?

20 MR. GATTUSO: The - - - I don't see why
21 they would have been argued before the Second
22 Circuit. There were Constitutional claims there.
23 That's what the focus would have been on.

24 CHIEF JUDGE LIPPMAN: Right.

25 MR. GATTUSO: But if it's successful, like

1 I just said - - - if successful, the state law claims
2 would have gone back also. The - - -

3 JUDGE PIGOTT: You had every expectation
4 that if you came back to district court, you'd be
5 back to square one, essentially, with all of it
6 together.

7 MR. GATTUSO: Precisely, Judge.

8 JUDGE PIGOTT: Right. And - - -

9 JUDGE RIVERA: Yeah, but - - - your point
10 that district court declines to exercise supplemental
11 jurisdiction, because it'd gotten rid of the federal
12 claims, so if the federal claims are reinstated, you
13 have your argument now again as to why the court
14 should proceed on - - - to exercise supplemental
15 jurisdiction on the state-based claims.

16 MR. GATTUSO: I - - -

17 JUDGE RIVERA: I assume that's what you're
18 basically arguing.

19 MR. GATTUSO: Yes. Yes, exactly. State
20 law claims would have been back also.

21 CHIEF JUDGE LIPPMAN: Judge - - -

22 JUDGE READ: Well, are you arguing it's
23 automatic or as Judge Rivera indicated it would up to
24 the federal district court again to decide whether or
25 not to let the supplemental claims stay in the case?

1 MR. GATTUSO: It would have been automatic,
2 because the district court did not address the merits
3 of those state law claims.

4 JUDGE RIVERA: It addressed it only on the
5 procedural question of - - - dismiss the federal
6 claims so I could choose not to exercise supplemental
7 jurisdiction over the state claims?

8 MR. GATTUSO: In - - - exactly, yes, yes.

9 JUDGE PIGOTT: What do you - - -

10 CHIEF JUDGE LIPPMAN: Counsel, can I go
11 back to 205(a) - - -

12 MR. GATTUSO: Okay.

13 CHIEF JUDGE LIPPMAN: - - - and tell us how
14 you're particular situation, given now this context,
15 how does it fit into 205(a)?

16 MR. GATTUSO: Well, 205 - - -

17 CHIEF JUDGE LIPPMAN: Why is it not a
18 disqualifier?

19 MR. GATTUSO: Well, 205(a) gives a
20 plaintiff six months after termination. Termination
21 is - - - this court explained that termination in
22 Lehman Brothers, and I'm going to quote, because I
23 think it's important. "The prior action was
24 terminated within the meaning of 205(a) the date
25 plaintiff's nondiscretionary appeal was exhausted.

1 The statutory six-month period began to run at that
2 time".

3 JUDGE READ: But that's the question. Did
4 you really exhaust your federal appeal by just filing
5 the notice of appeal?

6 MR. GATTUSO: There's - - - we exhaust - -
7 - the - - - the federal appeal was exhausted on July
8 10, 2012, when the Second Circuit dismissed it. So
9 this case was brought to state court before the
10 205(a) time even began to run.

11 JUDGE RIVERA: Yeah, but - - - right - - -
12 but - - -

13 MR. GATTUSO: The plaintiff had until
14 January of the following year.

15 JUDGE RIVERA: - - - the question is
16 whether or not that exha - - - what you're calling
17 exhaustion is a - - - is a consequence of failure to
18 act or proceeding on the case and not being
19 successful at the Second Circuit.

20 MR. GATTUSO: At - - - at that time, there
21 was nothing in the law that told the plaintiff, any
22 plaintiff, that you could not move your case to state
23 court. There was nothing - - - this idea that you
24 needed a decision on the merits of the appeal is a
25 complete falsehood. The - - - there's no appellate

1 court that says that. And the state's trial courts
2 that use the - - - that term go back to the Buchholz
3 case in 1945, and that issue is not even before the
4 court.

5 JUDGE STEIN: So - - -

6 MR. GATTUSO: The Buchholz court - - -

7 JUDGE STEIN: So you say that there's no
8 reason why you couldn't make your decision whether
9 you wanted to stay in federal court or go to state
10 court - - - you didn't have to make it at the outset
11 before you filed your appeal in federal court. Is
12 that what you're saying?

13 MR. GATTUSO: No, it - - - precisely, yes.

14 JUDGE STEIN: And - - - but once you did
15 that, it was a voluntary - - - would you agree it was
16 a voluntary discontinuance of that - - - of that
17 appeal?

18 MR. GATTUSO: No, I see it different as a
19 voluntary discontinuance. I've done voluntary
20 discontinuances. That is when a plaintiff signs a
21 voluntary discontinuance, files with the county
22 clerk, and says we're discontinuing our action. We
23 just - - - the plaintiff has moved her ca - - - took
24 her state law claims that were still viable under the
25 federal context - - -

1 CHIEF JUDGE LIPPMAN: Is that the key here?
2 Is that your - - - your - - - the key distinction
3 that you didn't file a discontinuance with the clerk?

4 MR. GATTUSO: I - - - I think that's very
5 important. That is a plaintiff attorney saying or a
6 plaintiff saying to the court, to the county - - -

7 CHIEF JUDGE LIPPMAN: That's what the
8 statute is talking about when it says - - -

9 MR. GATTUSO: I - - - exactly, Judge. That
10 what I was trying - - - I was getting to earlier.
11 There's a voluntary discontinuance is when an
12 attorney - - - like a stipulation discontinuance at
13 the end of an action, a voluntary discontinuance - -
14 -

15 JUDGE RIVERA: So the line you're drawing
16 is volitionally you choose not to continue, as
17 opposed to - - - I'm just not going to act, and I'll
18 let the court just dismiss my appeal - - -

19 MR. GATTUSO: The - - -

20 JUDGE RIVERA: - - - for failure to act.

21 MR. GATTUSO: I don't know if I see it like
22 that, because I - - - I think in June 2012 - - -

23 JUDGE RIVERA: Well, I may see it like
24 that.

25 MR. GATTUSO: Okay, yes, the - - -

1 JUDGE RIVERA: You tell me why - - -

2 MR. GATTUSO: Yes.

3 JUDGE RIVERA: - - - why I shouldn't see it
4 like that?

5 MR. GATTUSO: Well, I - - - and I don't
6 know if that distinction is - - - I think the
7 plaintiff had a right in June 2012 to bring her state
8 court claims over.

9 JUDGE PIGOTT: If - - - if for example, you
10 had that - - - that pre-appeal conference, as they
11 call it, which are pretty rough with the Second
12 Circuit clerk telling you your case is worthless, why
13 are you wasting your time - - -

14 MR. GATTUSO: Yes, and I'm one of those.

15 JUDGE PIGOTT: - - - money and all of that.
16 I think if - - - if at that point, you know, you
17 talked to your client and she said, I can't afford
18 it; you're telling me that it's going to be expensive
19 and that the odds are low; I want you to - - - I want
20 you to discontinue it, is it your - - - is it your
21 belief that if you would then sign a stipulation of
22 discontinuance that you were forfeiting your state
23 rights?

24 MR. GATTUSO: Well, a stipulation of
25 discontinuance would only be executed at that point

1 if there was a settlement.

2 JUDGE PIGOTT: Stipulating discontinuance
3 as to your federal claim.

4 MR. GATTUSO: Only the federal claims?

5 JUDGE PIGOTT: Only the Fifth - - - the
6 Fifth claim and the Fourteenth claim.

7 MR. GATTUSO: You know, I don't - - - I
8 don't see any plaintiff attorney approaching the
9 defense at that point and saying we're going to
10 stipulate to discontinuance.

11 JUDGE PIGOTT: No, I - - - if I said
12 defendant, I meant your client.

13 MR. GATTUSO: Yes.

14 JUDGE PIGOTT: I mean, if you're client
15 says I'm - - - I'm not going to pay you; I can't
16 afford it.

17 MR. GATTUSO: Oh, now I see, okay.

18 JUDGE PIGOTT: So - - - so then you
19 stipulate to end your federal case, assuming - - - I
20 would assume - - - that your state claim is still
21 alive, and then you - - - you - - - you'd already
22 started it, but that did not affect the liveness of
23 your state claim, right?

24 MR. GATTUSO: Yes, exactly, yes, I agree
25 with that. Okay.

1 The - - - and what - - - I think what we're
2 touching on but not really addressing fully is the
3 idea of judicial economy. And I talked about this in
4 my brief. If the plaintiff needed to - - -

5 CHIEF JUDGE LIPPMAN: Well, but we have a
6 statute to deal with. Judicial economy is one thing
7 - - -

8 MR. GATTUSO: Well - - -

9 CHIEF JUDGE LIPPMAN: - - - but if your
10 meet the terms of the statute one way or the other,
11 the case is over, right? Your - - - your point is
12 under the statute, you're okay; you didn't violate
13 any - - -

14 JUDGE READ: Or at least there's no case
15 law out there interpreting the statute differently,
16 is that your position?

17 MR. GATTUSO: Exactly, exactly.

18 JUDGE READ: Well, I guess we have to think
19 about the rule, and is there - - - is there a reason
20 why the - - - the - - - it's better to have it run
21 from something like a default, where somebody who
22 doesn't - - - takes the appeal, doesn't perfect it in
23 federal court, that that would qualify as their - - -
24 is there a reason why that would be a better rule
25 than the rule that the time goes from when the

1 federal district court acted?

2 MR. GATTUSO: I - - - I think it would help
3 if - - -

4 JUDGE READ: I mean, I know for your client
5 it would help.

6 MR. GATTUSO: Yes.

7 JUDGE READ: But I think going forward - -
8 -

9 MR. GATTUSO: Yeah.

10 JUDGE READ: - - - we'll clear it up one
11 way or another - - - why is it better to clear it up
12 in your direction?

13 CHIEF JUDGE LIPPMAN: What's the policy
14 reason why it's better?

15 MR. GATTUSO: The - - - the policy would be
16 simple. It would give the plaintiffs' bar a date
17 certain they know they have the six - - - the six
18 months to run. And the way the law reads now, it's
19 when the rights to litigation are exhausted. That
20 happened when the Second Circuit dismissed the case.
21 We had six months from then. To go back in time and
22 pick another date doesn't - - - that's not a good
23 policy for the plaintiff bar.

24 CHIEF JUDGE LIPPMAN: Okay, thanks,
25 counsel. Let's hear from your adversary. Thank you.

1 MR. GATTUSO: Thank you.

2 MS. ALEXANDER: Good afternoon, Your
3 Honors. Ann Alexander on behalf of the respondents.

4 CHIEF JUDGE LIPPMAN: Co - - - counselor,
5 what's the impact of their deciding not to perfect
6 the appeal? How does it relate to 205(a)?

7 MS. ALEXANDER: Well, I don't think the
8 City is trying to change the rule that this court
9 articulated in Lehman Brothers. That's pretty well
10 settled law. As we heard, if a party takes an appeal
11 as of right, it forestalls the running of that six-
12 month period. But what I think is implicit in this
13 court's ruling in Lehman Brothers is that the appeal
14 must actually, in fact, be taken, simply - - -

15 JUDGE STEIN: Why? Well, here it was
16 taken. It just wasn't taken to its - - -

17 JUDGE READ: Conclusion.

18 JUDGE STEIN: - - - to its conclusion.

19 JUDGE PIGOTT: Yeah.

20 JUDGE STEIN: Why - - - why does that
21 matter? I mean, I think - - -

22 MS. ALEXANDER: Sure.

23 JUDGE STEIN: I think it could be argued
24 that - - - that the - - - the purpose of that is to
25 let the federal claims play out - - -

1 MS. ALEXANDER: Sure.

2 JUDGE STEIN: - - - and it's an appeal as
3 of right. It's not just a series of discretionary
4 appeals. It's, you know - - - you're - - - you're
5 allowed to do that. So what if you change your mind?
6 And - - - and then there's - - - you know, if you
7 take it to its conclusion, then you have a
8 determination on the merits. But what if you change
9 your mind? So what? What - - - what is the problem
10 with that?

11 MS. ALEXANDER: Well, I would make two
12 points to that. As you all know, that the time to
13 file a notice of appeal, it's very short. You have a
14 very short window and it's pretty unforgiving. So
15 attorneys all the time, they file these protective
16 notices of appeal, without ever knowing whether
17 they're going to ultimately pursue that appeal - - -

18 JUDGE PIGOTT: You're talking about federal
19 - - - on the federal side or the state?

20 MS. ALEXANDER: On the federal side, on the
21 state side. Part - - - we - - - we file protective
22 notices of appeal quite frequently.

23 CHIEF JUDGE LIPPMAN: Why is it different
24 between what happened here and if they had a filed a
25 stipulation of discontinuance in - - - in the court

1 with the clerk? Is that different? Would that have
2 changed - - -

3 MS. ALEXANDER: I - - - I don't think it
4 would be - - - it would be different at all.

5 CHIEF JUDGE LIPPMAN: The same?

6 MS. ALEXANDER: I think a voluntary
7 discontinuance - - -

8 CHIEF JUDGE LIPPMAN: Electing - - -
9 electing not to perfect and filing a stipulation of
10 discontinuance with the court is the same thing - - -

11 MS. ALEXANDER: I - - -

12 CHIEF JUDGE LIPPMAN: - - - for - - - as
13 far as its impact on this particular statute?

14 MS. ALEXANDER: I would say it is the same
15 thing. I'd say a vol - - -

16 JUDGE ABDUS-SALAAM: What case says that?

17 MS. ALEXANDER: Say that again?

18 JUDGE ABDUS-SALAAM: What case says that?

19 MS. ALEXANDER: Well, ob - - - obviously
20 we've referred the court to the case of Dinerman v.
21 Sutton. And in that case, that's exactly what
22 happened in this case. In Dinerman v. Sutton, the
23 plaintiff filed a new action six months and one day
24 after the original action was dismissed. And the
25 court in that case said that the - - - the second

1 action was still untimely, even though there was an
2 appeal pending. That appeal was dismissed eight
3 months after the notice of appeal was filed.

4 CHIEF JUDGE LIPPMAN: Counsel, what's - - -
5 what's the answer - - - Judge Read asked your
6 adversary - - -

7 MS. ALEXANDER: Sure.

8 CHIEF JUDGE LIPPMAN: - - - your adversary,
9 what's - - - why is it better - - - what's the - - -
10 the reason why finding for you from a - - - finding
11 for him from a policy perspective, why is it better?
12 I say the same thing to you. Why should we accept
13 your argument? Why is it a better rule, because what
14 happens in this case, obviously will affect other
15 cases that come up with the same issue?

16 MS. ALEXANDER: Sure, absolutely. If you
17 accept the plaintiff's proposition that an order of
18 default starts the running of the six month time
19 period, what you are going to be ruling and saying
20 practically in the future is that all any party needs
21 to do that is subject to - - - to 205(a), who has the
22 option to bring a section - - - second action, all
23 they have to do is simply file a notice of appeal, do
24 nothing with that appeal, wait around, wait for the
25 court to dismiss it - - -

1 CHIEF JUDGE LIPPMAN: Why is that bad?

2 MS. ALEXANDER: - - - and then they get an
3 additional six months.

4 CHIEF JUDGE LIPPMAN: Why is - - - why is
5 that bad?

6 MS. ALEXANDER: Well - - -

7 CHIEF JUDGE LIPPMAN: What's wrong with
8 that?

9 MS. ALEXANDER: Well, the argument of
10 judicial economy, I don't think actually - - -

11 CHIEF JUDGE LIPPMAN: And what's wrong with
12 the argument that at some point - - -

13 MS. ALEXANDER: Sure.

14 CHIEF JUDGE LIPPMAN: - - - you make a
15 decision whether to fully pursue the appeal to the
16 end. What's - - - what's the matter with that?

17 MS. ALEXANDER: Well, CP - - - the purpose
18 of CPLR 205(a) is to protect the diligent plaintiff,
19 to give them a second bite at the apple, when their
20 first action is dismissed for a technical reason. It
21 is not the purpose to protect a party who simply
22 files a notice of appeal and sits around and does
23 nothing with that appeal.

24 JUDGE PIGOTT: But that's not what happened
25 here. And - - - and what we're talking about are the

1 federal claims. The federal claims - - -

2 MS. ALEXANDER: Sure.

3 JUDGE PIGOTT: - - - because Judge Lowe had
4 - - - had severed. So the state claims were over
5 here, and I think that was one of reasons Judge
6 DeJoseph said you should have started it sooner, but
7 if they want to say we - - - we want to rely on the
8 Fifth and Fourteenth Amendments to the United States
9 Constitution in our case, and they - - - and we think
10 we're stronger if we do that, and then they get
11 talked out of it by - - - by the Second Circuit, why
12 - - - why does that all of a sudden - - - why are we
13 in the state court going to be guided by some - - -
14 some clerk in the Second Circuit who talks them into
15 not filing their federal claim?

16 MS. ALEXANDER: Well, I think the fact of
17 the matter is, you have six months. And six months
18 is a reasonable amount of time for a party to
19 determine whether their appeal has merit.

20 JUDGE PIGOTT: It's - - - it's even more -
21 - - it's even more reasonable time for you to make a
22 motion to dismiss, if you're so upset about what's
23 going over on in the federal court.

24 MS. ALEXANDER: I - - - I - - - he
25 absolutely had his right to go forward with that

1 appeal - - -

2 JUDGE PIGOTT: True.

3 MS. ALEXANDER: - - - or abandon it. We -
4 - - we don't have any position on - - - on - - -

5 CHIEF JUDGE LIPPMAN: Is it - - - did he
6 abandon it? Is that the term of art?

7 MS. ALEXANDER: Well, that's what he said
8 throughout his brief is that he's abandoned that
9 appeal. That's the term he used, so that's why I'm
10 using that today.

11 JUDGE FAHEY: So you're saying a default is
12 equal to a neglect to prosecute on the statute.

13 MS. ALEXANDER: I would say so.

14 JUDGE FAHEY: Let me ask you this. What do
15 you think the effect of them actually filing the
16 lawsuit before the federal order for default was
17 entered?

18 MS. ALEXANDER: I - - - I understand that
19 argument, but again that six-month time period has to
20 start from some order.

21 JUDGE FAHEY: So you're having the six
22 months - - - so - - - so under your argument, though,
23 the notice of appeal would have no effect. And it's
24 a notice of appeal as of right.

25 MS. ALEXANDER: The - - - the notice of

1 appeal simply puts the appellate court and - - - and
2 the parties on notice that an appeal - - -

3 JUDGE FAHEY: But it is an appeal - - -

4 MS. ALEXANDER: - - - may or not come - -
5 - come down the road.

6 JUDGE FAHEY: - - - it is an appeal as of
7 right, though?

8 MS. ALEXANDER: Absolutely.

9 JUDGE FAHEY: Okay. So - - -

10 JUDGE RIVERA: Well, but I don't think the
11 Second Circuit sees it as, oh, maybe they'll actually
12 appeal. They take it seriously that - - -

13 MS. ALEXANDER: You're right.

14 JUDGE RIVERA: - - - you've actually filed
15 a document, because they have a very busy docket.

16 MS. ALEXANDER: They - - - they certainly
17 do, which is why I think they issued such a strong
18 order saying we're dismissing this due to the
19 plaintiff's default.

20 JUDGE PIGOTT: Well, that's not new.

21 That's not new. Trust me. You know, the - - -
22 that's a fairly - - - I think there's probably a
23 form. But - - -

24 JUDGE STEIN: But isn't - - - isn't the
25 purpose of 205(a) also to - - - to make sure that the

1 other party has notice, and - - - and is prepared,
2 and - - - and doesn't lose, you know, evidence or
3 whatever.

4 MS. ALEXANDER: Right.

5 JUDGE STEIN: And - - - and here, how - - -
6 how is that affected?

7 MS. ALEXANDER: I would say - - - I would
8 say that it doesn't - - - the pur - - - the overall
9 purpose of the statute of limitations is to prevent
10 defendants from having to defend against stale claims
11 while also giving the other party - - - the plaintiff
12 - - - a reasonable amount of time to commence an
13 action. And I would submit that the plaintiff
14 certainly had a reasonable amount of time.

15 JUDGE STEIN: But isn't the alternative
16 here - - - wouldn't the alternative here, in your
17 view, have been for - - - let's just say - - - them
18 to put in a meager appeal, because they don't have a
19 lot of resources; they don't think they're going to
20 do well, and - - - and then follow it through to its
21 conclusion, which who knows how much longer that
22 would have taken, gotten a determination on the
23 merits, and then they still would have had six months
24 to file their state claims. So you're no worse off
25 here - - -

1 MS. ALEXANDER: Well, that - - -

2 JUDGE STEIN: - - - than you would have
3 been.

4 MS. ALEXANDER: - - - that - - - that is
5 true, but I think under the rule of CPLR 205(a), I -
6 - - I think the plaintiff always had three options in
7 this case. As soon as the district court order came
8 out, they could have commenced a state action in six
9 months. They could have pursued their federal appeal
10 to the - - - until there was a decision rendered on
11 the merits. And assuming it was affirmed, they would
12 have had that additional time, or they could have
13 tried to pursue both at the same time.

14 JUDGE PIGOTT: Well, if - - -

15 MS. ALEXANDER: They always had all the - -
16 -

17 JUDGE RIVERA: Well, no, actually you sound
18 like you're incentivizing that they don't appeal the
19 federal decision, because if - - -

20 MS. ALEXANDER: If they didn't - - -

21 JUDGE RIVERA: - - - if - - - if you have a
22 client who can't afford that, as you've just
23 described - - -

24 MS. ALEXANDER: All I'm saying is they - -
25 -

1 go ahead.

2 JUDGE ABDUS-SALAAM: Do you - - - do you
3 agree, counsel, that had plaintiff prosecuted the
4 appeal in the Second Circuit and won and gotten those
5 claims reinstated, then the pendant state claims
6 would have also come back?

7 MS. ALEXANDER: I believe that to be true.

8 JUDGE ABDUS-SALAAM: So if that's true,
9 then if, as you said, one of the choices might have
10 been that coun - - - that plaintiff pursued the
11 appeal - - - pursued the claims in state court while
12 the appeal was pending. Was there any risk in doing
13 that, for example, in having the state claims
14 dismissed because they were going on two different
15 tracks?

16 MS. ALEXANDER: Yes, and I understand that
17 the - - -

18 JUDGE ABDUS-SALAAM: So how is that
19 helpful?

20 MS. ALEXANDER: I understand that the
21 plaintiff has made this argument, and I quite frankly
22 found that argument a little confusing, because
23 that's actually what happened in this case. In one
24 sense the plaintiff was arguing, I can't bring my
25 state action because my federal appeal is technically

1 still pending, and it might be subject to a motion to
2 dismiss. But then on the flip side of that, he's
3 arguing but my state action is actually timely, based
4 on the fact that I brought it before my appeal was
5 technically dismissed. So I - - - I think that's a
6 confusing argument.

7 JUDGE PIGOTT: One of the things that
8 worries - - -

9 MS. ALEXANDER: I think it's a bit of a red
10 herring in this case.

11 JUDGE PIGOTT: That's - - - that's an
12 interesting argument. One of - - - one of the
13 worrisome things when I look at this is that we've
14 got 205(a). We're the state courts. Why should we
15 get into fencing over what the Second Circuit or any
16 other circuit or district court is or is not doing
17 with respect to a particular case? Why don't we take
18 a look at 205(a) when the case is - - - is done over
19 on the federal side, it's begun within six months,
20 we're - - - we're fine.

21 MS. ALEXANDER: Well, because I - - -

22 JUDGE PIGOTT: And then we don't have to
23 fight about it.

24 MS. ALEXANDER: - - - think you have to
25 think about the implications moving forward and - - -

1 JUDGE PIGOTT: Right.

2 MS. ALEXANDER: - - - how it could be
3 affected when it - - - when it arises in state court
4 - - - with an action that arises in state court. As
5 we know here, a party has an appeal as of right to
6 any of the Appellate Divisions, and there is a nine-
7 month outer time frame when that appeal has to be
8 perfected.

9 So if you go with plaintiff's proposition
10 that any plaintiff can file a notice of appeal, wait
11 those nine months for the Appellate Division to
12 dismiss that case, and then they get six months on
13 top of that, I don't believe that was what - - -

14 JUDGE PIGOTT: Is that happening a lot?

15 MS. ALEXANDER: I - - - I don't know. I
16 mean - - -

17 JUDGE PIGOTT: I don't think so.

18 MS. ALEXANDER: - - - clearly not - - - not
19 so far.

20 CHIEF JUDGE LIPPMAN: Okay, counselor.
21 Thank - - - thanks a lot.

22 MS. ALEXANDER: Thank you so much.

23 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Malay v. City of Syracuse, No. 62, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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