Curtis v Phillip
2018 NY Slip Op 33974(U)
September 17, 2018
Supreme Court, Dutchess County
Docket Number: 52674/16
Judge: Maria G. Rosa

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa

Justice

WILFRED ROBERT CURTIS, EN BLANC 1190, LLC and EN BLANC 5580, LLC,

Plaintiffs,

DECISION AND ORDER AFTER INQUEST

-against-

Index No. 52674/16

JUNITA PHILLIP a/k/a SASHA KING and TD BANK,

Defendants.

An inquest in this matter was held on June 13, 2018. In advance of the inquest the parties agreed that the issues concerned the real property in Brooklyn known as 1190 Bedford Avenue, Brooklyn, New York and the sum of $28,000.00. Plaintiff, through his guardian *ad litem*, Mishael Pine, alleges that due to his mental incapacity, Wilfred Robert Curtis ("Plaintiff") was subject to the undue influence of the defendant, Junita Phillip a/k/a Sasha King ("Defendant") as a result of which Plaintiff transferred the subject property from an LLC under his sole ownership and control into joint tenancy with Defendant with rights of survivorship. This occurred in or about June 2016.

Plaintiff also claims that in or about November 2015 he sold real estate at 155 Duane Street, New York, NY for $7,000,000.00 and set up two limited liability companies for the purpose of effecting an IRS §1031 exchange. He claims that the subject Brooklyn property was purchased in February 2016 for $3,521,134.84 and was originally held in an LLC he established for this purpose entitled En Blanc 1190, LLC.

The plaintiff also alleges that he intended to purchase a second property in Staatsburg, New York in order to use the rest of the proceeds of the sale of the Duane Street property so as to effect an additional IRS §1031 exchange but claims that the defendant convinced him not to make that purchase. Plaintiff claims Defendant's influence thereby caused him to incur unnecessary tax liability to the Internal Revenue Service in the sum of $727,784.51 and to the New York State Department of Taxation and Finance in the sum of $291,640.62.

Plaintiff alleges that in or about November 2016 the defendant attacked him physically and that both parties obtained Orders of Protection against each other. It was Defendant who retained the use of the subject property in Brooklyn, to Plaintiff's exclusion. That Order of Protection expired in April of 2018.

The subject property includes six residential apartments referred to as Apartments 2A (aka 2F), 2B, 3A (aka 3F), 3B, 4A (aka 4F) and 4B. There is also a store on the first floor out of which the defendant runs her retail business.

Plaintiff is no longer seeking damages against the defendant for the tax bills incurred but seeks a ruling from this court that the reason that the IRS §1031 exchange was not complete was due to Defendant's undue influence over the plaintiff. While the defendant acknowledged in her testimony that she shared with the plaintiff her opinion that the purchase of the Staatsburg property would not be wise based upon the actual value of the property as compared to the price sought, this court cannot find on the basis of the evidence presented that Defendant's influence was the sole basis for the plaintiff's failure to complete the 1031 exchange.

Ms. Pine, also an attorney, has received no rent payments on Plaintiff's behalf although Defendant was allegedly collecting those rent payments and paying the expenses for the Brooklyn property. Instead, Ms. Pine has had to pay expenses to preserve Plaintiff's interest in the subject property including a tax lien of $170,872.50, a New York City Water Board lien for $3,290.30, another water lien of $393.39, a New York City Department of Finance tax bill of $48,809.14, a third water bill of $315.77, and Merrimack insurance bills of $1,600.00 and approximately $2,500.00.

Plaintiff seeks damages for uncollected rent in the total sum of $376,800.00 for the residential units plus an additional $72,000.00 for the defendant's store. Since the rent would have covered the expenses, Plaintiff is not seeking reimbursement. Plaintiff is erroneously calculating the sum due. Plaintiff is double counting the rent by twice seeking $72,000.00 for unit 4A (aka 4F) the unit in which Defendant resides.

Plaintiff seeks return of the engagement ring given to the defendant by the plaintiff claiming that it is also the product of her undue influence against him, and since they are no longer engaged.

In sum, Plaintiff seeks $448,800.00, plus $28,000.00 as explained below, return of the engagement ring, an order directing Defendant to vacate the subject premises and an order directing the defendant to deed the property back to the plaintiff.

On the morning of the inquest, the defendant's attorney indicated that he had just been retained and asked for an adjournment. He also made certain procedural arguments claiming an impediment to proceeding with the inquest. Those arguments were denied by the court for the reasons set forth on the record that day including as follows:

> "The Court: ... I will note that with the proposed Order to Show Cause there was an Affidavit from Michael Daras, D-A-R-A-S, MD, there was an Affidavit from Mishael Pine, there was an Affidavit from Talitha, T-A-L-I-T-H-A, Jones, in addition to the Memorandum of Law, and while technically, counselor, there wasn't an affirmation that stated that there would be prejudice if the defendant were put on notice of the proposed

temporary restraining orders it was clear from the Affidavit, including of Dr. Daras, what the concerns were and underscored by counsel in the Memorandum of Law and I found that that was sufficient to warrant the granting, to the limited extent that I did, of the TRO, and, as you said, much of it was not granted, and I just - -

I know you're new to this case, but just to give a brief background of why I denied your application to postpone today's inquest and to proceed in this matter, this is a 2016 action. It was commenced by Order to Show Cause. Plaintiff appeared with counsel on November 16th, 2016 as did the defendant, then defendant TD Bank by counsel and Ms. Phillip who indicated she was *pro se* but looking for counsel. I adjourned the matter for in excess of 30 days to give Ms. Phillip the opportunity to obtain counsel and set a preliminary conference for December 20, 2016, and again Ms. Phillip was present on that day. There was a Ms. Mare [sic] [Jose Polanco, P.C.] here with and for her, and plaintiff's counsel was here and our preliminary conference order was made with regard to setting a discovery schedule. That discovery was supposed to proceed to include depositions on January 31 and February 1 of both sides, and a compliance conference was scheduled for February 5th of 2017. On that date Mishael Pine was here, plaintiffs' counsel was here. There was - - let's see. Ms. Pine was here as the Court Appointed Guardian for the plaintiff and indicated that she had planned to hire an attorney to represent the plaintiff here and in an action that was pending in Orange County. I have in my notes that there was an Answer, that plaintiff moved to strike the answer and it was granted. Defendant had failed to appear. There was a further Court date set for November 20, 2017. Plaintiff was again represented by counsel. Defendant had another attorney here, Kalmon, K-A-L-M-O-N, Glovin, G-L-O-V-I-N, and Ms. Pine was here again. There was an amended discovery schedule set and a compliance conference was set for December 20, 2017. There was another conference held and again discovery dates were adjusted and the next conference was May 31, 2017. Plaintiff moved to change venue, and that application was denied. I have notes from multiple other conferences at which counsel for both sides appeared and sometimes Ms. Phillip appeared *pro se*, and those dates include January 19, 2017, March 28, 2017, before that February - - no, sorry, February 27, 2018, April 5, 2018 and now we're here again today.

So, I would say at the very least the time to object to lack of service or anything else has long been waived by the defendant. She's appeared on numerous occasions both *pro se* and with several different attorneys, and there was never any such objection made. I have tried to give Ms. Phillip every opportunity to participate in her defense in this case. I have given her

> numerous adjournments to obtain new counsel. Each time she found herself in a position to be without counsel, and there were various reasons why that happened, and this inquest is now scheduled I believe for the third time, and I just think that it is unfair to continue to prevent the plaintiff from having his day in court and that there's really no legitimate basis to postpone it again.
>
> So, I understand you're in a difficult position, you were just retained, but when you were retained, I'm sure Ms. Phillip told you there was an inquest scheduled, and you know, that's the chance you took..."

Although the defendant's attorney claims that this court disagreed with Defendant's claim that Plaintiff had an obligation to put on a *prima facie* case, that is not so and the transcript of the June 13, 2018 proceedings belies that claim. Plaintiff clearly made out a *prima facie* case as discussed herein. Further, Defendant's attorney incorrectly asserts that no affidavit of service of the Summons and Complaint was filed. In fact, it was. The Summons was filed November 2, 2016. The affidavit of service on file indicates service of the Summons and Complaint was made personally upon the defendant at 50 Market Street, Poughkeepsie, New York, in family court on November 14, 2016.

The plaintiff's first witness was Plaintiff's daughter, Talitha Jones, who described her father's deteriorating emotional, financial, and physical state throughout 2015. She testified that at the end of September 2015 she took her father to his long time neurologist, Dr. Michael Daras. It was soon thereafter that Ms. Jones learned that the plaintiff, her father, had hired the defendant, she thought as his caretaker. According to Ms. Jones, the plaintiff and the defendant became romantically involved. According to Ms. Jones, the defendant claimed to be pregnant with Plaintiff's child.

The plaintiff's daughter testified that in or about Thanksgiving 2015 the plaintiff said he was selling his 155 Duane Street, New York, N.Y. property for $7,000,000.00. The purchase price in 1988 was $180,000.00. Ms. Jones testified that she and he were concerned about capital gains.

On cross-examination Ms. Jones acknowledged that there were times when she and her father were estranged but that from 2015 to the present they kept in regular communication although they did not see each other frequently. She recalls that on Thanksgiving 2015 the defendant and her son and grandson came with others to Ms. Jones' house for dinner. The defendant and the plaintiff were romantically involved then. He was selling the New York City building because the tax liens were being foreclosed by New York City and Ms. Jones was concerned about the capital gains issue and making a 1031 exchange.

The plaintiff's second witness was Mishael Pine who was appointed by the Orange County Supreme Court as a guardian *ad litem* for the plaintiff pursuant to Article 81. Ms. Pine is an attorney who handles financial matters, real estate, banking, taxes and some medical documents for the

plaintiff and has dealt with his current doctor.. Her responsibility is to marshal the assets and understand the state of the plaintiff's assets and liabilities and to know his pension, social security, bank account and asset information. According to Ms. Pine, the plaintiff had multiple accounts and she put all funds into one account. She has spoken with him, his accountants, his daughter, his attorneys, and has searched his records, storage units and personal belongings to gather all of the information she needs. She assessed Ms. Jones' credibility and found her credible based on following up with her own research including by going to banks and sitting with bank officers and reviewing the plaintiff's accounts and records..

With regard to the 155 Duane Street property, the plaintiff was going to do a 1031 exchange and put half of the proceeds into the Brooklyn property through En Blanc 1190, LLC and the other half into En Blanc 5580, LLC but couldn't complete the 1031 exchange so has incurred tax liability with respect to the funds that did not go toward the Brooklyn property, about which Ms. Pine testified she was only now learning. She testified that the plaintiff intended to put the other half of the money into a property in Staatsburg, N.Y. or a property in St. Lucia, but that did not happen.

With respect to the Brooklyn property, Ms. Pine testified that the property was last in Plaintiff's and Defendant's names as joint tenants with rights of survivorship. According to Ms. Pine the transfer was made in June 2016 to put the property in Plaintiff's and Defendant's names as joint tenants with rights of survivorship. Her understanding of the agreement was that the defendant could use the commercial property and rent out the rest of the units, collect rent and manage the property. Ms. Pine testified that Mr. Curtis did not get rent, that he had paid the expenses on the Brooklyn property, and that she did a title search on November 15, 2017 which revealed that $158,000.00 was owed on the Brooklyn property. This was raised on at least one prior occasion in open court with both parties present. Ms. Pine went to the New York City Department of Finance and arranged to get notices of the tax bills. Exhibit 12 in evidence is a 90-day Notice of Intention to Sell Tax and Water liens which notice was issued by the N.Y.C. Department of Finance. It is dated February 12, 2018. Ms. Pine then began making payments on behalf of the plaintiff. She paid the New York City Water Board and the Department of Finance. In evidence as Exhibit 12A is a check Ms. Pine wrote for $170,872.50 on February 20, 2018 because of the tax sale notice, to the New York City Department of Finance. In evidence as part of 12A and as 12B are the Plaintiff's checks to the N.Y.C. Water Board for $3,290.30 on February 26, 2018 and $393.39 on March 16, 2018. In evidence as Exhibit 12C is a check Ms. Pine wrote on June 11, 2018 for $48,809.14 to cover taxes on the property through December 31, 2018, again to the New York City Department of Finance. Exhibit 12D in evidence is a 60-day Notice of Intention to Sell Water Liens issued by the N.Y.C. Department of Finance. Exhibit 12E in evidence is a tax bill from the New York City Department of Finance for $48,809.14. Exhibit 12F in evidence is the 2018 tax lien removal notice. Exhibit 12G in evidence is the print out from the Bureau of Customer Service as proof that payments were received and processed for the Water Board bills which include the $3,290.30 and $393.39 payments and prior payments of $100.00 and $150.00. Exhibit 12H in evidence includes the New York City Environmental Protection bill in the sum of $315.77 which Ms. Pine also paid on behalf of the plaintiff.

According to the testimony regarding the rent at the subject property, the rent for Apartment 2A is $1,800.00 per month; the rent for Apartment 2B is $2,000.00 per month; the rent for Apartment 3A is $2,200.00 per month; Apartment 3B is empty; the defendant lives in Apartment 4A and the defendant's son lives in Apartment 4B. The defendant's business occupies the store on the first floor. Rent has been collected for apartments 2A, 2B and 3A at a total of $6,000.00 per month. According to Ms. Pine Plaintiff collected $2,300.00 four times for Apartment 2A on February 29, 2016, April 2, 2016, May 3, 2016 and June 6, 2016; $2,200.00 for Apartment 2B in April, May, June and July of 2016, and $2,400.00 for Apartment 3A for March, April, May, and June of 2016. Exhibit 15 in evidence shows these payments plus $3,000.00 per month for Apartment 4A through May of 2016 and $3,000.00 per month through August of 2016 for Apartment 4B.

On cross-examination Ms. Pine testified that she is paid by a monthly accounting submitted to Judge Onofrey and counsel in that matter, Todd Kelson and if the Judge approves her accounting she pays herself from plaintiff's funds referred to as "guardianship account". She pays bills from the guardianship account for the taxes, water, sewer and insurance. The defendant has been in the building since 2016 and was to collect the rents and help maintain the building. Ms. Pine testified that the defendant should have at least been paying half of the bills since she is a joint owner and lives there and is supposed to be the manager of the building and is collecting the rent. As the guardian *ad litem*, Ms. Pine is responsible for Plaintiff's person including his living arrangements and health care and Plaintiff's property including marshaling the assets, maintaining the property, dealing with tax issues and dealing with litigation issues. Ms. Pine testified further that to get the full financial and physical picture of the plaintiff she talked with Plaintiff, with his attorneys, with his accountants, with his family members and with his health care providers. She reviewed his health records and went to his storage units and read his files. She said the plaintiff is "in and out" and that his short term memory is not great but that his long term memory is stable so she finds his information reliable. She testified that he is an attorney and a very intelligent man. With respect to the Brooklyn property Ms. Pine testified that the plaintiff seeks to void the June 2016 deed from En Blanc, LLC which transferred the property to the plaintiff and defendant.

Ms. Pine testified that there were two Staatsburg properties that she learned about. One was already owned by the plaintiff known as 5530 Albany Post Road. The other, 5580 Albany Post Road, was next door and the plaintiff was going to buy that as part of a 1031 exchange but did not. She also confirmed that the defendant was suggesting to the plaintiff that he buy the property in St. Lucia but that did not happen and this witness did not know why.

Ms. Pine testified that En Blanc 1190, LLC "was a brain child of Ms. Philip", formed shortly after purchasing 1190 Bedford Avenue. The plaintiff was the sole member of that LLC.

En Blanc 5580, LLC was formed by Plaintiff at the same time and was intended for the property next door to that which he owned at 5530 Albany Post Road.

Ms. Pine testified with respect to the plaintiff's three TD Bank accounts including those started in 2015 for En Blanc 1190, LLC and En Blanc 5580, LLC. The En Blanc 1190, LLC

account was closed. The checks in evidence as Exhibit 15 were deposited into those accounts. Ms. Pine believes this was done by Ms. Phillip. Ms. Pine also testified that the defendant withdrew Plaintiff's funds from the accounts at TD Bank in the total sum of $398,000.00 as of October, 2016. The TD Bank accounts were ultimately restrained. Of the $398,000.00 in those accounts, $378,000.00 was recovered which is the basis for Plaintiff's claim of $20,000.00. It is undisputed that the $398,000.00 held at TD Bank belonged to the plaintiff, were funds solely contributed by Plaintiff, and that Defendant was authorized to use said accounts solely to pay Plaintiff's bills.

Plaintiff offered the video deposition and transcript of that testimony of Dr. Daras. Pursuant to CPLR 3117, the deposition of a medical doctor may be used by any party without the necessity of showing unavailability or special circumstances. (CPLR 3117[a][4]). Dr. Daras testified that Mr. Curtis became his patient in 2004. He saw him several times including on September 22, 2015 when his daughter, Ms. Jones, brought him to Dr. Daras. Mr. Curtis was complaining of memory loss and a tremor. Dr. Daras attributed the tremor to Mr. Curtis' alcoholism. He testified that Mr. Curtis' general appearance was not well, he was shaking and sweating excessively, was tachycardic, and had poor coordination. He had decreased sensation in his feet and absent reflexes in the ankles. His gait was wide-based so that he had to walk with his feet apart to keep his balance. He gave him a memory test consisting of telling him three words and asking him to repeat them. Dr. Daras testified that Mr. Curtis was able to do it, although with some difficulty. He was slow in his response. Dr. Daras saw Mr. Curtis again on September 30, 2015 at which time he was able to record only two out of the three words given in the memory test. Dr. Daras saw him again on November 11, 2015 after having referred him for neuropsychological testing. The results were that some of Mr. Curtis' functions were at a high level and some cognitive functions were impaired. "His memory was completely impaired". (Page 21 of the transcript of the video examination before trial of Michael Daras, M.D., lines 23 and 24). Mr. Curtis was also having some weakness in learning and delayed recall of words, numbers, and had poor retention during the testing. Dr. Daras concluded that the cognitive memory loss was due to structural problems related to the brain, Mr. Curtis' age, and the effect of alcohol on his brain. Dr. Daras went on to describe in detail the tests that were given and the reliability of those tests. Dr. Daras also gave his opinion that these types of cognitive problems occur over a period of time, not suddenly.

Dr. Daras saw Mr. Curtis again on June 7, 2016. Mr. Curtis' chief complaints were memory loss and neuropathy, and numbness in his feet. He had a small pituitary adenoma and had obstructive sleep apnea which, as Dr. Daras explained, may produce additional problems in the brain because during the periods of apnea the brain is not getting enough oxygen. Dr. Daras again did a memory test but Mr. Curtis could only remember one out of the three words. Mr. Curtis saw Dr. Daras again on November 1, 2016 when Mr. Curtis reported that he had been attacked by his girlfriend causing him loss of consciousness. He reported that he was taken to a local hospital, Northern Dutchess Hospital, where he was evaluated and given a CT scan that was negative. Dr. Daras confirmed that the records he received indicated that it was the defendant, Sasha King, who Mr. Curtis accused of attacking him, and who was the same woman he had brought to his previous appointment with Dr. Daras.

Dr. Daras was specifically asked whether he had an opinion as to Mr. Curtis' capacity and ability to understand the full effect of the legal documents he executed between September of 2015 and November of 2016. In Dr. Daras' opinion "Mr. Curtis was at that time, during all this period of time was quite cognitively impaired and had problems realizing the details of his acts and what his acts could lead to...he definitely was not fully aware of what he was doing." (deposition transcript page 35 line 14 through page 36 line 2). In addition, Dr. Daras testified that Mr. Curtis had previously told him he was in an intimate relationship with the defendant, that he was "having the best sex of his life", and, given his condition Dr. Daras opined that Mr. Curtis could absolutely have been unduly influenced by the defendant. He further gave his opinion that real estate transfers during this time period were as a result of Mr. Curtis' cognitive impairment. Dr. Daras opined with a reasonable degree of medical certainty that between September 1, 2015 and November 1, 2016 Mr. Curtis had a significant cognitive impairment that affected his judgment and that Mr. Curtis was not capable of making any reasonable decision or realizing what the consequences could be for him. (deposition transcript page 39 line 11 through page 40 line 7).

The defendant was the only witness to testify on her behalf. She testified that she was Mr. Curtis' fiancée, and that she met him in 2002 through a mutual friend and had a business relationship until 2014 when it became romantic and "had been ever since". She testified that Mr. Curtis bought her an engagement ring in 2016.

As to the 1031 exchanges, the defendant testified that the property in St. Lucia was not purchased because she did not think it was a good idea to have property so far away. She testified that the property in Staatsburg was not purchased because the asking price was double the appraised value.

Defendant denied that there was an agreement that she would live rent free in exchange for taking care of the property and collecting the rents from the other tenants. She testified she was never a caretaker for the plaintiff or anyone. She testified that she is an HVAC technician and operating engineer and that she did plumbing and electrical work for someone who worked for Mr. Curtis in both New York City and Staatsburg. She said their personal relationship ended when she got a restraining order in November 2016. Therefore, by her own admission, they were no longer engaged.

Ms. Philip testified that she did not know about the unpaid real property taxes. She testified that she made one insurance payment but the bills then went to Ms. Pine. Defendant acknowledges that she collects the rent by money order or cash. She testified that she paid some bills including the electrical bills for the common area, bills for elevator repairs and monthly elevator maintenance, plumbing work and cleaning products. She did not offer evidence of this. She testified that she paid cash for the electric bills. She did not recall the name of the elevator company and testified that she pays by cash and gets a receipt for the elevator repairs and maintenance. Again no receipts for any of these alleged payments nor other evidence was provided. As to the retail store she operates at the subject property, she testified that she had a ten year lease before she became a joint owner with Mr. Curtis, that the rent was $400.00 per month and other sums at different times, that her son works in

the store when she is not there, that she pays him cash, and pays herself cash.

At the end of the evidentiary portion of the trial, the defendant moved for dismissal. Defense counsel argued that this case was commenced by the plaintiff at a time when his own doctor said he had no capacity. This is not a basis for dismissal of the action particularly since a guardian *ad litem* was appointed soon thereafter and has been representing the plaintiff's interests ever since. Moreover, the guardianship was on consent of the plaintiff and the guardian *ad litem*, an attorney, also determined that the plaintiff's claim had merit. Therefore, it is hereby

ORDERED that defendant's motion to dismiss is denied. It is further

ORDERED that Plaintiff is granted judgment for rent he should have received for the months of July 2016 through June 2018 at a total of $12,000.00 per month: Apartment 2A $1,800.00 per month, Apartment 2B $2,000.00 per month; Apartment 3A $2,200.00 per month, Apartment 4A $3,000.00 per month per the previous lease; and Apartment 4B $3,000.00 per month per the previous lease totals $12,000.00 per month. The court is not granting judgment for either Apartment 3A or for the store since the court finds it credible, and in fact it was undisputed as between Ms. Pine on Plaintiff's behalf and the defendant, that there was an agreement for the defendant to use the store for free, and since there was no evidence as to the rent for Apartment 3A. Twenty-four months times $12,000.00 per month is $288,000.00. The plaintiff is entitled to collect $12,000.00 per month and add that to the judgment for the months of July 2018, August 2018, September 2018 and continuing until Defendant vacates the property unless Plaintiff has collected rent during those months. It is further

ORDERED that Plaintiff is entitled to judgment in the additional sum of $20,000.00 representing the $398,000.00 held at TD Bank less the $378,000.00 that was restrained and returned to Plaintiff's use and control. It is further

ORDERED that the deed dated June 10, 2016 transferring 1190 Bedford Avenue from En Blanc 1190, LLC to Plaintiff and Defendant is vacated as void. The Kings County Clerk shall so correct its records. It is further

ORDERED that the defendant shall vacate 1190 Bedford Avenue, Brooklyn, New York on or before October 26, 2018 and shall leave both the residential portion and commercial portion of the property which she occupies in good order and broom swept condition; and it is further

ORDERED that within ten days of service of a copy of this order with notice of entry Defendant shall have returned to Plaintiff, through his attorney, her engagement ring; and it is further

ORDERED that interest shall run on the $20,000.00 judgment from November 1, 2016 and on the $288,0000.00 judgment from June 1, 2016, at the legal rate of 9% per year and Plaintiff shall have execution thereon; and it is further

ORDERED that the Plaintiff's application for an order appointing a receiver was granted and the Amended Order Appointing Receiver signed August 21, 2018 shall continue until Defendant vacates the subject premises and these proceedings are concluded.

The foregoing constitutes the decision and order of the Court.

Dated: September 17, 2018
Poughkeepsie, New York

ENTER:

MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.