

BY-LINED ARTICLE

Awarding Costs on Appeal

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The right to recover costs in an action as well as the amount of such costs, if awarded, exists only by virtue of statutory authority.¹ At common law, neither costs nor disbursements were allowed to the prevailing party in any case, the courts having no inherent power to include an award of costs in their judgment.² In the case of appeals, the applicable statutes governing costs are CPLR §§8107, 8203, 8204 and, for taxable disbursements which a party awarded costs may recover, §8301.

CPLR §8107, "Costs upon appeal," provides: "The party in whose favor an appeal is decided in whole or in part is entitled to costs upon the appeal, whether or not he is entitled to costs in the action, unless otherwise provided by statute, rule or order of the appellate court. Where a new trial is directed upon appeal, costs upon the appeal may be awarded absolutely or to abide the event." The amount of costs is fixed by §8203(a) on appeals to the appellate division (\$250 unless a lesser amount is ordered) and §8204 on appeals to the court of appeals (\$500 unless a lesser amount is ordered).

Statutory costs are a matter of right. They are "in the nature of incidental damages allowed to indemnify a party against the expense of successfully asserting his rights in court."³ They are "not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. . . . [C]osts in an action are not awarded as a gratuity or emolument for inconvenience sustained, but constitute compensation for expense ordinarily incurred in the action."⁴

While it was written over 100 years ago by an English judge that "there is one panacea which heals every sore in litigation, and that is costs,"⁵ that remark does not apply to modern day appellate litigation in New York. Rather, it must be understood in the context of the "English Rule" which awards the prevailing party its full costs, including attorney's fees.

Under the prevailing rule in New York, known as the "American Rule," "attorneys' fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule."⁶ There is a well-recognized exception, to this rule, however, "where the damages are the proximate and natural consequence of defendants' tortious act which requires plaintiff to defend or to bring an action against a third party. In such a case, reasonable attorney's fees necessarily incurred are considered recoverable."⁷

Awards and Denials

While, generally, the prevailing party is awarded its costs, the appellate court has the discretionary power to withhold costs from the winner. This is usually done as an expression of the court's displeasure with the winning party's brief or tactics. For example, costs on the appeal were denied "due to the poor quality of respondent's brief. Not only was that brief unresponsive to appellants' claims, but it was only two and one-half pages long and cited no legal authority, which, under the circumstances, was inappropriate."⁸ Costs were also denied by the Court of Appeals when counsel went to the other extreme and submitted 203 pages of briefs.⁹

In another case, costs were denied to the defendant because of its counsel's failure to draw the court's attention to the reversal of a decision relied on in its brief in which defendant's counsel was also involved.

The court found "no excuse for the failure to bring that fact to this court's attention."¹⁰ It reminded counsel that the "function of an appellate brief is to assist, not mislead, the court. Counsel have an affirmative obligation to advise the court of adverse authorities, though they are free to urge their reconsideration."¹¹ Costs were also denied where counsel made improper reference in a brief to an alleged agreement that was not made part of the record and where there no support for or reference to any such agreement in the record.¹²

In appropriate circumstances, the court may even award costs to the loser. Thus, the Appellate Division affirmed an order denying a judgment creditor's motion to punish a witness for contempt on condition that the witness appear and submit to further examination, finding that this sufficiently protected the rights of the judgment creditors. "However, it cannot be said that the witness was entirely without fault in his refusal to answer pertinent and proper questions and in obstructing the judgment creditors' attempt to obtain information regarding the judgment debtor's assets. For that reason we are assessing costs and disbursements in favor of appellant."¹³

Since costs and disbursements are taxed by the clerk when judgment is entered, CPLR §8108, specification of denial or award of costs, provides that the "decision on appeal shall specify the disposition made in regard to costs," to let the clerk know whether the statutory costs are to be applied or the appellate court has exercised its discretion and deviated therefrom.

Taxable Disbursements

Rather than being a "healing medicine,"¹⁴ an award of costs may have unintended, harsh and inequitable results. For example, assume plaintiff, a person of modest means with some savings accumulated over a lifetime of work and some equity in a home, recovers a verdict after a lengthy trial of a personal injury action. Defendant, represented by its insurance carrier, elects to appeal.

The cost of procuring the voluminous stenographic minutes and reproducing them as part of the record on appeal can amount to tens of thousands of dollars, which are taxable disbursements.¹⁵ If defendant prevails on appeal and the judgment is reversed and complaint dismissed, with costs, plaintiff may end up with a very substantial judgment against him for costs that threaten to wipe out his life's savings. A scenario like this actually happened in a case in which one of the authors was appellate counsel for the plaintiff, but, happily, the Court of Appeals came to the rescue by reversing the Appellate Division, ordering a new trial and awarding plaintiff costs on appeal.¹⁶

In many commercial cases, the parties will order daily copy or selected portions of the transcript for use during the course of the trial or for post-trial motions in the event of an adverse decision. If these minutes are subsequently used in the preparation of the record on appeal, their cost is a taxable disbursement, notwithstanding that they were procured during the trial. Where a party is certain to appeal from an adverse decision, and its attorney states under oath that the minutes were ordered for the purpose of preparing a case on appeal or amendments to a case, they may be taxable as a disbursement notwithstanding that they were procured during the trial.¹⁷

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Endnotes

1. *Miss Susan Inc., v. Enterprise & Century Undergarment Co.*, 270 A.D. 747, 750, 62 N.Y.S.2d 250, 253 (1st Dept 1946)("Costs and allowances are controlled entirely by statute and a successful litigant may recover only the costs so authorized").
2. *Equitable Life Assur. Soc. of the U.S. v. Hughes*, 125 N.Y. 106, 108 (1890).
3. *Bernier v. Household Finance Corp.*, 183 Misc. 742, 745, 51 N.Y.S.2d 151, 155 (Sup. Ct., N.Y. Co. 1944).
4. *Hayman v. Morris*, 37 N.Y.S.2d 884, 891 (Sup. Ct., N.Y. Co. 1942).
5. *Cropper v. Smith*, 26 Ch.D. 700, 711 (U.K) (1884).
6. *Hooper Assoc., Ltd. v. AGS Computers*, 74 N.Y.2d 487, 491, 549 N.Y.S.2d 365, 366 (1989).
7. *Central Trust Co., Rochester v. Goldman*, 70 A.D.2d 767, 768, 417 N.Y.S.2d 359, 361 (4th Dept 1979).
8. *Stabulas v. Brooks Piece Dye Works Corp.*, 111 A.D.2d 803, 805, 490 N.Y.S.2d 549, 551 (2d Dept 1985).
9. *Horowitz Bros. & Margareten v. Margareten*, 64 N.Y.2d 1008, 1010, 489 N.Y.S.2d 53, 54 (1985).
10. *Amazon Coffee Co. v. Trans World Airlines Inc.*, 111 A.D.2d 776, 490 N.Y.S.2d 523, 524 (2d Dept 1985).
11. *Matter of Cicio v. City of New York*, 98 A.D.2d 38, 40, 469 N.Y.S.2d 467, 469 (2d Dept 1983).
12. *Matter of Valente*, 24 A.D.2d 945, 946, 265 N.Y.S.2d 370 (1st Dept 1965).
13. *Schiff v. Loomer*, 23 A.D.2d 481, 482, 255 N.Y.S.2d 482, 483 (1st Dept 1965).
14. *Cropper v. Smith*, 26 Ch.D. 700, 711 (U.K) (1884).
15. CPLR §8301(a)(6) ("the reasonable expenses of printing the papers for a hearing, when required").
16. *Patafio v. Porta-Clean of America, Ltd.*, 39 N.Y.3d 813, 385 N.Y.S.2d 764 (1976).
17. *Chelrob v. Barrett*, 180 Misc. 314, 41 N.Y.S.2d 97 (Sup. Ct., Nassau Co. 1943).

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