

Effect of COVID-19 EOs on Statutes of Limitations

Governor Andrew Cuomo's executive orders, commencing at the outset of the COVID-19 pandemic, effectively froze statutory and court imposed deadlines for all manner of legal proceedings. For civil proceedings, at least, that stoppage lasted through Nov. 3, 2020. In the months since, a few courts have had a chance to interpret the orders and address some of their inherent ambiguities.

BY ALICE K. JUMP

As most New York practitioners are aware, Gov. Andrew Cuomo's Executive Orders, commencing in March 2020 at the outset of the COVID-19 pandemic, put New York on "pause"—effectively freezing statutory and court imposed deadlines for all manner of legal proceedings. For civil proceedings, at least, that stoppage lasted through Nov. 3, 2020. In the months since, a few courts have had a chance to interpret the orders and address some of their inherent ambiguities.

The Second Department's recent decision in *Brash v. Richards*, 2020-08551, June 2, 2021, has provided the most guidance to date.

The dispute in *Brash* involved the deadline set forth in CPLR 5513(a), which mandates that an appeal must be taken within 30 days after service on the appellant of the notice of entry of the judgment or order appealed from. In *Brash*, respondents served a notice of entry on Oct.

3, 2020. The appellant did not file his notice of appeal until Nov. 10, 2020. Respondents claimed that the filing was untimely, arguing that the Executive Orders had only suspended applicable deadlines until Nov. 3, and he did not file until a week later. In response, appellant argued that the Governor had tolled all deadlines, meaning that appellant had 30 days from Nov. 3 to file his appeal. As the court explained, "a toll suspends the running of the applicable time period of limitation for a finite time period, and the period of the toll is excluded from the calculation of the time period. Unlike a toll, a suspension does not exclude its effective duration from the calculation of the relevant time period. Rather, it simply delays the expiration of the time period until the end date of the suspension" (internal quotations and citations omitted).

In holding that the deadline had been tolled rather than



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just suspended, the Second Department examined the language of Governor Cuomo's initial Executive Order No. 202.8 (9 NYCRR §202.8), issued on March 20, 2020, which declared: "In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, any specific time limit for the commencement, filing, or service of any legal action, notice, motion,

or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020."

The Second Department noted that while subsequent executive orders did not always use the word "toll," the order which ended the freeze, Executive Order No. 202.67 issued on Oct. 4, 2020, did provide that "for any civil case, such suspension is only effective until Nov. 3, 2020 and after such date any such time limit will no longer be tolled."

The *Brash* court also rejected respondents' claim that Cuomo did not have the authority to toll the deadlines imposed by the CPLR. Respondent argued that, by its express language Executive Law 29-a(1), the law under which Executive Orders were issued, only gave the governor the authority to "temporarily suspend" statutes. In response, the court cited to Executive Law 29a-(2)(4) which empowers the Governor to provide for "the alteration or modification of the requirements of such statute, local law,

ordinance, order, rule or regulation suspended, and may include other terms and conditions." Under the court's analysis, a tolling order constituted an "alteration" or "modification" of the statute.

Given the somewhat ambiguous language of the Executive Orders, which seem to use the terms tolling and suspension interchangeably, the Second Department may well have been sympathetic to a litigant who missed the relatively short deadline to file an appeal. Other cases have also favored the tolling interpretation. In *Foy v. State of New York*, **71 Misc.3d 605 (N.Y. Ct. Cl. 2021)**, a case heavily relied upon by the Second Department, the Court of Claims held that the statutorily proscribed 90-day period for filing a claim for reinstatement of employment was tolled by the Executive Order. And *In the Matter of the Application of 701 River Street Associates*, EF2021-268027 (N.Y. Sup. Ct. Rensselaer Cnty., April 27, 2021), the court also found that the one year deadline to file an action to foreclose on a mechanic's lien had not lapsed because the "[executive orders] provided for tolls [and], such tolls were authorized."

The executive orders provide a significant benefit to plaintiffs in civil cases in New York, effectively adding 228 days to a statute of limitations for bringing a claim. In cases where the statute of



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limitations would have provided a complete defense to a claim but for the governor's actions, it is likely that defendants will continue to challenge both the governor's underlying authority to issue the orders and the interpretation that the deadlines were tolled rather than suspended. There is, therefore, a certain risk in relying on the extension until the matter is finally resolved by the Court of Appeals.

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