

Appeal from denial of motion with leave to renew or without prejudice to renewal

The Appellate Division Second Department has held that the denial of a motion without prejudice to renewal is an appealable order.¹ The Third Department has also held that it is an appealable order.² In each of these cases the courts have held that the order “affect[ed] a substantial right” of the parties, making it appealable (citing [CPLR 5701\[a\]\[2\]\[v\]0](#))

The First Department has held that the denial of motion with leave to renew or without prejudice to renewal it is not an appealable order where the motion is denied with leave to renew upon proper papers, where the initial submission was palpably improper³ as has the Fourth Department.⁴

¹ [Keller v. Frank P. Eberhard Co.](#), 110 A.D.2d 686, 487 N.Y.S.2d 603 (2d Dep’t 1985)(Although order denying motion without prejudice to renewal is appealable as of right, record presents issues of fact warranting denial of summary judgment at this juncture.); [Okin v. White Plains Hosp.](#), 97 A.D.2d 399, 467 N.Y.S.2d 225 (2d Dep’t 1983); [Samuels v. Ames Realty Corp.](#), 79 A.D.2d 651, 433 N.Y.S.2d 829 (2d Dep’t 1980); [Ciaffone v. Manhattantown, Inc.](#), 20 A.D.2d 666, 246 N.Y.S.2d 804 (2d Dep’t 1964).

² [Bezio v. New York State Office of Mental Retardation and Developmental Disabilities](#), 95 A.D.2d 135, 466 N.Y.S.2d 804 (3d Dep’t 1983), order rev’d on other grounds, 62 N.Y.2d 921, 479 N.Y.S.2d 6, 467 N.E.2d 890 (1984) Preliminarily, we must determine whether the order denying the motion to dismiss without prejudice to renew is appealable. An appeal may be taken to the Appellate Division as of right if the order of Supreme Court was made upon notice and affects a substantial right ([CPLR 5701](#), subd. [a], par. 2, subpar. [v]). An order directing a hearing which will prolong resolution of the issues raised on the motion affects a substantial right ([Grand Cent. Art Galleries v. *137 Milstein](#), [89 A.D.2d 178](#), [454 N.Y.S.2d 839](#)). Accordingly, the matter is properly before this court.)

³ [Walden v. Nowinski](#), 63 A.D.2d 586, 404 N.Y.S.2d 635 (1st Dep’t 1978). (Special Term found the papers submitted in support of a motion for summary judgment palpably insufficient and denied the motion with leave to renew upon submission of proper papers. The appropriate remedy is not to appeal to this Court from the exercise of such discretion, but rather to move at Special Term supported by the necessary and proper papers found to be lacking upon the original application.)

⁴ [Marasco v. Kaplan](#), 177 A.D.2d 933, 577 N.Y.S.2d 977 (4th Dep’t 1991) (The court ... denied, ... defendant's motion for indemnification for reasonable attorney's fees in defense of the action without prejudice to renew. “Defendant's cross appeal from that part of the order denying defendant's motion for indemnification for reasonable attorney's fees with leave to renew is not appealable and must be dismissed (see, 10 Carmody-Wait 2d, NY Prac §70:25, at 43). Here the remedy is not to appeal but to renew the motion upon a showing of the reasonable amount of attorney's fees incurred (see, [Walden v Nowinski](#), 63 AD2d 586).”

