

SCAN

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**RICHARD HERB & NATALIE HERB,**

**TRIAL/IAS, PART 11  
NASSAU COUNTY**

**Plaintiffs,**

**MOTION DATE: 08-23-06**

**-against-**

**INDEX NO.: 011953/05**

**THEODORE ECONOMOU, CHRIS ECONOMOU,  
FRANK S. PATRUNO, ECONOMOU PATRUNO  
& ECONOMOU ESQS., LAW OFFICES OF  
ECONOMOU & PATRUNO and THE LAW  
OFFICES OF FRANK S. PATRUNO,**

**MOTION SEQ # 003, 004**

**Defendant(s).**

**The following papers having been read on the motion: [numbered 1-3]**

**Notice of Motion, Affirmation & Exhibits.....1**  
**Notice of Cross Motion, Affirmation in Support of**  
**Cross Motion and Opposition to Motion & Exhibits..2**  
**Reply Statement.....3**

Motion (seq. No. 4) by the attorneys for the plaintiffs for an order vacating the stay contained in the order of Hon. F. Dana Winslow dated June 6, 2006; vacating the stipulation which the attorneys for plaintiffs and defendants executed pursuant to the said order dated June 6, 2006; placing the motions and cross-motions which were before the Court and which were denied without prejudice to renewal on the motion calendar for decision; and cross motion (seq. No. 5) by the attorneys for the defendants for an order pursuant to Part 130 of the Uniform Rules of Trial Courts, imposing sanctions against plaintiffs' counsel for the filing of a frivolous motion and awarding costs, disbursements and reasonable attorney's fees to the defendants are both **denied**.

This is an action for legal malpractice. Plaintiffs moved for summary judgment, and defendants cross-moved to dismiss and for other relief. By order dated June 6, 2006,

this Court denied all motions without prejudice and stayed the within action. The parties were directed to execute a stipulation to file a notice of appeal in the underlying action, and "diligently and expeditiously perfect the appeal." The stipulation was executed. Defendants served and filed a notice of appeal dated July 31, 2006 in the underlying action. By letter dated August 8, 2006, plaintiff's attorney requested that defendants serve and file a brief by no later than August 31, 2006, or a motion would be made to vacate the stipulation and the stay contained in this Court dated June 6, 2006. The attorneys for defendants declined to comply with the request that the appeal be perfected by August 31, 2006. The attorneys for the plaintiff are incorrect in concluding that this Court's direction to "diligently and expeditiously perfect the appeal in any way abrogates the Rules of the Appellate Division.

CPLR 5503(c) (effective September 1, 1963) which states: "The appellate division in each department may by rule applicable in the department prescribe other limitations of time different from those prescribed in subdivisions (a) and (b) for filing and serving records on appeal, or statements in lieu of records, and briefs in appeals taken therein."

McKinney's Practice Commentaries for CPLR 5530 by David D. Siegel states, "The [appellate division] rules usually provide more time than CPLR 5530 allows in its first two subdivisions. By any standard, the time allowed by the CPLR is inadequate. The CPLR's assumption here appears to be that the brief is the only piece of business the lawyer has at the moment."

The subject appeal is being taken from a Dutchess County decision and order. § 670.8(e)(1) of The Rules of the Appellate Division, Second Department states: "Notwithstanding any of the provisions of this Part, a civil appeal, action, or proceeding shall be deemed abandoned unless perfected within six months after the date of the notice of appeal . . ."

The time to perfect an appeal in the underlying action has not expired. The time to perfect the appeal in that action will expire on January 31, 2006.

There is no basis in law or fact to grant the relief requested by the attorneys for the

plaintiff.

The cross-motion for sanctions is **denied** without prejudice. The cross-motion is dated August 21, 2006 and was received by fax on August 22, 2006. The cross-motion is a nullity in that it must be made on three days' notice plus five days if served by mail. See CPLR 2215.

This decision is the order of the Court.

Dated:

*12/12/06*

ENTER:

*[Handwritten signature]*  
J.S.C.

**ENTERED**

JAN 08 2007

NASSAU COUNTY  
COUNTY CLERK'S OFFICE