



**DEMAND FOR A JURY TRIAL, MADE ONE DAY LATE, SHOULD HAVE BEEN GRANTED, THE DENIAL OF THE ORAL APPLICATION FOR A JURY TRIAL IS PROPERLY CONSIDERED ON APPEAL FROM THE FINAL JUDGMENT, EVEN THOUGH NO FORMAL MOTION ON NOTICE WAS MADE (FOURTH DEPT).**

The Fourth Department, reversing Supreme Court, over an extensive dissent, determined (1) defendants' oral application requesting a jury trial, made one day late, should have been granted, and (2) the appeal from a final judgment allows an appeal of the denial of the late application for a jury trial, even though no formal motion on notice was made. The dissent argued the denial was not appealable because there was no formal motion on notice:

An appeal from a final judgment "brings up for review . . . any non-final judgment or order which necessarily affects the final judgment" (CPLR 5501 [a] [1]). The parties do not dispute that the order denying defendants' application for leave to file a late demand for a jury trial necessarily affected the final judgment. ...

... [T]he State Constitution provides for a right to a jury trial in civil cases (see NY Const, art I, § 2 ... ). Although that right may be waived through the failure to demand it in a timely fashion (see CPLR 4102 [a]), the court "may relieve a party from the effect" of such waiver "if no undue prejudice to the rights of another party would result" (CPLR 4102 [e]). While "[t]he decision . . . to relieve a party from failing to timely comply with CPLR 4102 (a) lies within the sound discretion of the trial court" ... , we conclude that the court's denial of defendants' application was an abuse of discretion. [Braun v Cesareo, 2019 NY Slip Op 01962, Fourth Dept 3-15-19](#)