

To be Argued by:  
LAUREN R. GOLDMAN

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**New York Supreme Court**  
**Appellate Division – First Department**

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BLUEBIRD PARTNERS, L.P.,

*Plaintiff-Respondent,*

– against –

FIRST FIDELITY BANK, N.A., NEW JERSEY,

*Defendant-Appellant,*

MIDLANTIC NATIONAL BANK; UNITED JERSEY BANK;  
NATIONSBANK OF TENNESSEE, N.A.; CONSTELLATION BANK;  
CORESTATES NEW JERSEY NATIONAL BANK; WILENTZ,  
GOLDMAN & SPITZER, P.C. and KELLEY DRYE & WARREN,

*Defendants.*

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**REPLY BRIEF FOR DEFENDANT-APPELLANT**

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## TABLE OF CONTENTS

	<b>Page</b>
INTRODUCTION .....	1
I. BLUEBIRD DOES NOT CONFRONT OUR ARGUMENTS .....	2
A. First Fidelity Had A Right To Have The Trial Court Decide Its New-Trial Motion In The First Instance.....	2
B. No Court Has Ever Decided First Fidelity’s Motion .....	4
C. This Court Had No Power To Decide First Fidelity’s New Trial Motion On Bluebird’s Earlier Appeal .....	6
II. BLUEBIRD ADDRESSES ARGUMENTS THAT FIRST FIDELITY IS NOT MAKING .....	9
A. First Fidelity Never Argued That The Appellate Division May Never Correct Trial Errors .....	9
B. Bluebird’s Half-Hearted “Estoppel” And “Waiver” Arguments Are Unsound.....	10
III. LAW OF THE CASE DOES NOT PRECLUDE FURTHER REVIEW IN THIS COURT .....	13
CONCLUSION.....	15

## TABLE OF AUTHORITIES

Page

### Cases:

<i>511 W. 232nd Owners Corp. v. Jennifer Realty Co.</i> , 98 N.Y.2d 144 (2002) .....	8
<i>Bellevue South Associates v. HRH Construction Corporation</i> , 78 N.Y.2d 282 (1991) .....	7, 8
<i>Elbert v. Village of N. Hills</i> , 262 A.D. 470 (2d Dep't 1941) .....	5
<i>Hecht v City of New York</i> , 60 N.Y.2d 57 (1983) .....	8
<i>Merl v. Adler</i> , 207 A.D.2d 323 (1 <sup>st</sup> Dep't 1994) .....	2
<i>Nestor v. Britt</i> , 270 A.D.2d 192 (1st Dep't 2000) .....	12
<i>Nicastro v. Park</i> , 113 A.D.2d 129 (2d Dep't 1985) .....	2
<i>Parochial Bus Systems, Inc. v. Board of Education</i> , 60 N.Y.2d 539 (1983) .....	6, 7, 8
<i>Sharp v. Stavisky</i> , 221 A.D.2d 216 (1st Dep't 1995) .....	8
<i>Trapp v. Am. Trading &amp; Production Corp.</i> , 66 A.D.2d 515 (1st Dep't 1979) .....	2
<i>Weitzenberg v. Nassau Cty. Dep't of Recreation and Parks</i> , 249 A.D.2d 538 (2d Dep't 1998) .....	5

## TABLE OF AUTHORITIES

	<b>Page</b>
<b>Statutes and Rules:</b>	
N.Y. CPLR § 2201 .....	11
N.Y. CPLR § 4404.....	2, 4
N.Y. CPLR § 4406.....	4
N.Y. CPLR § 4017.....	11
N.Y. CPLR § 5501.....	14
 <b>Other Sources:</b>	
57 N.Y. JUR.2D § 54 (2d ed. 2005) .....	12
DAVID D. SIEGEL, NEW YORK PRACTICE (3d ed. 1999) .....	11

## INTRODUCTION

Bluebird begins its brief by mocking First Fidelity for allegedly seeking a “third bite at the apple.” In fact, First Fidelity is still seeking to vindicate its statutory right to its “first bite.” New York law gives a party the right to request a new trial when a verdict is against the weight of the evidence or not in the interest of justice. Because of the unusual circumstances of this case, First Fidelity was *never* able to obtain a ruling on its new-trial arguments from the court best equipped to hear them – and whose decision is entitled to the most deference on review. Throughout the process, First Fidelity has consistently asked to have the trial court address its request for this relief. Although there have been many rulings in this long-running case, First Fidelity has never obtained the ruling to which it has a statutory right, either for it or against it.

Bluebird barely contests the two central arguments presented in our opening brief: (1) that First Fidelity had a right to have its new-trial motion decided in the first instance by the trial court; and (2) that no court, including this one, has ever actually decided First Fidelity’s motion. Instead, Bluebird spends most of its time attacking a straw man: It asserts repeatedly that First Fidelity is arguing that this Court erred in its October 7 Decision by ruling on assignments of error it had no power to address. That is *not* our argument.

First Fidelity was the respondent in the earlier appeal, not the appellant. First Fidelity never *asked* this court to rule on claims of trial error in the first instance, and this Court *did not do so* – and indeed could not have done so, because it lacks the power to grant affirmative relief to a non-appealing party. *This* Court did not err in its October 7 Decision. The *trial court* erred on remand by assuming that this Court’s decision addressed more than it actually did.

**I. BLUEBIRD DOES NOT CONFRONT OUR ARGUMENTS.**

**A. First Fidelity Had A Right To Have The Trial Court Decide Its New-Trial Motion In The First Instance.**

We began our opening brief by explaining that CPLR § 4404(a) creates a right to move for a new trial following a jury verdict *and* that a request for a new trial under that provision is supposed to be decided in the first instance by the trial judge, who is presumed to be “in the best position” to make determinations on such motions. Def. Br. at 9 (citing *Trapp v. Am. Trading & Prod. Corp.*, 66 A.D.2d 515, 519 (1st Dep’t 1979)). Bluebird does not dispute this proposition. Nor does it dispute the related proposition, based on the allocation of responsibility between trial court and appellate court, that the grant of a new trial, as a discretionary function, is “reviewed with great deference by the appellate division.” Def. Br. at 10 (citing, *e.g.*, *Merl v. Adler*, 207 A.D.2d 323 (1st Dep’t 1994)); *see also Nicastro v. Park*, 113 A.D.2d 129, 137 (2d Dep’t 1985) (“[T]he trial court’s decision to exercise its discretion and order a new trial must be accorded great respect \*\*\*.

That respect compels the appellate tribunal to view with liberality the trial court's disposition of a motion to set aside on evidentiary considerations \*\*\*.").

The established principle that the Appellate Division gives deference to the trial court's decision to grant a new trial means that the reviewing court may sustain such a decision, even if it might not have reached the same conclusion if it were deciding the motion in the first instance. That is why First Fidelity has been denied an important right – the right to the trial court's exercise of its discretion. Bluebird thus ignores the central argument on this appeal – that First Fidelity has been deprived of the opportunity to obtain the kind of “broad, discretionary relief” that the trial court is best equipped to provide.

Bluebird's only response is to note that “matters of discretion are reviewable by the Appellate Division,” which “is vested with the same discretionary power” as the trial court. Pl. Br. at 15. That misses the point. We have never disputed that the Appellate Division may properly review the trial court's discretionary grant or denial of a new-trial motion, once the trial court has *exercised* that discretion. Indeed, the Appellate Division may even grant such a motion on its own, if it has been asked to do so by an *appellant* – a party aggrieved by the trial court's decision to deny relief. But it is our position that (i) an aggrieved party has the right to invoke the considerable discretionary power of the trial court *first*, before seeking relief from this Court; (ii) the movant has a statutory right to a decision on

that motion by the trial court; (iii) the Appellate Division has no power to decide new-trial arguments raised in the alternative by a respondent in whose favor the trial court had entered judgment NOV without addressing the alternative request for a new trial; and (iv) the proper course, if the Appellate Division reverses the JNOV, is to have the trial court rule on the undecided request for discretionary relief in the first instance.

**B. No Court Has Ever Decided First Fidelity’s Motion.**

1. As we noted in our opening brief, First Fidelity’s post-trial motion comprised two distinct branches – a request for judgment and a request for a new trial. Even though these are separate claims for relief under CPLR § 4404(a), CPLR § 4406 requires that they be raised together in a consolidated motion. *See* Def. Br. at 20. Such consolidation, however, does not relieve the trial court of its obligation to rule on each distinct claim, unless the grant of relief on one request effectively moots the other.

Here, the trial court never addressed the new-trial branch of our motion, because the court granted broader relief – JNOV. The new-trial request was thus left undecided. Citing four cases spanning over fifty years of precedent, we explained in our opening brief in this appeal that “[w]here an order decides only one discrete aspect of a motion that contains more than one request for relief, the remaining branch of the motion remains undecided and, therefore, requires a

decision by the trial court before review by this Court.” Def. Br. at 20. The case law is clear: When a single motion raises separate claims for separate relief the trial court is supposed to resolve each branch. If the trial court’s ruling on one branch moots a different branch, that second branch is still pending, if the trial court’s decision on the first branch is overruled.<sup>1</sup> Bluebird does not address this argument or even attempt to distinguish the cases we cited in support of it.

2. Bluebird has also failed to refute our argument that this Court’s October 7 Decision did not resolve the new-trial motion. Bluebird dismisses our claims as “pure semantics” (Pl. Br. at 13), but it is careful not to deny what it cannot: that the decretal paragraph of this Court’s October 7 Decision purports only to reverse the “judgment” in favor of First Fidelity and to deny “the motion,” which was identified as one “to set aside the \$54 million jury verdict and dismiss the complaint.” Def. Br. at 22 (quoting R-81).

This limited focus of the Court’s decision is hardly surprising. Bluebird, not First Fidelity, was the appellant, and its appeal sought only relief from the JNOV dismissing the complaint. Since First Fidelity had secured a judgment in its favor,

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<sup>1</sup> See, e.g., *Weitzenberg v. Nassau Cty. Dep’t of Recreation & Parks*, 249 A.D.2d 538, 539 (2d Dep’t 1998) (“Lastly, the appeal by the plaintiffs from so much of the order as failed to decide that branch of their motion which was for reinstatement is dismissed. Inasmuch as the court did not grant or deny that branch of the motion, it is pending and undecided.”); *Elbert v. Village of N. Hills*, 262 A.D. 470, 471 (2d Dep’t 1941) (where trial court granted motion to dismiss complaint and Appellate Division reversed and remanded, the defendants “were entitled to have decided those portions of their motion [for dismissal] not passed upon in the original decision of the [trial court]”).

it did not cross-appeal on the new-trial alternatives and had no standing to do so. Thus, this Court decided only what it had the power to decide: Bluebird's attack on the JNOV. This Court's decree was limited to a reinstatement of the verdict against First Fidelity, putting the parties and the trial court back in the positions they would have occupied if JNOV had never been granted. That posture required the trial court to consider the pending, alternative request for a new trial. Bluebird offers no reason to believe that this Court's order contemplated any different result. As we explained in our opening brief, the cryptic, unadorned statement that this Court had "considered and rejected First Fidelity's remaining arguments" does not change the language of the decree. First Fidelity never *asked* this Court to decide its motion without first presenting an opportunity for full briefing, and there is no reason to believe this Court intended to do so.

**C. This Court Had No Power To Decide First Fidelity's New Trial Motion On Bluebird's Earlier Appeal.**

Indeed, this Court would not have had the *power* to grant a request by First Fidelity, which was the *respondent* in the prior appeal, for a new trial. Bluebird asserts that *Parochial Bus Systems, Inc. v. Board of Education*, 60 N.Y.2d 539 (1983), grants a non-aggrieved party in whose favor judgment was entered the right to raise in the Appellate Division any argument it wishes, including arguments that, if successful, would result in the grant of a new trial. That is not so. The holding in *Parochial Bus* is different:

“[T]he successful party, who is not aggrieved by the judgment appealed from and who, therefore, has no right to bring an appeal, is entitled to raise an error made below, for review by the appellate court, as long as that error has been properly preserved and would, if corrected, *support a judgment in his favor.*” 60 N.Y.2d at 545-46 (emphasis added).

Thus, *Parochial Bus* stands for the much narrower proposition that the prevailing party may offer additional arguments to support the relief already obtained – here, JNOV. Neither *Parochial Bus* nor any other case suggests that a prevailing respondent may seek and obtain a different form of relief on a motion not yet resolved by the trial court.

The Court of Appeals explained this distinction in *Bellevue South Associates v. HRH Construction Corporation*, 78 N.Y.2d 282 (1991). One of the defendants in that case appealed from a jury verdict against it of just over \$1 million, asserting that the plaintiff’s design defect claim should have been dismissed as a matter of law. The Court of Appeals agreed, reversing the judgment and dismissing the claim. The plaintiff (who was defending the judgment as respondent in the appeal) had argued in its brief that, even if the Court of Appeals were to hold that the plaintiff could not recover on a design defect theory, the Court could affirm the judgment either by allowing the plaintiff to recover on a theory of breach of implied warranty or by holding the appealing defendant liable on a theory of joint and several liability – two claims that had been dismissed by the trial court as a matter of law and, therefore, had not gone to the jury. Citing *Parochial Bus*, the

Court of Appeals declined to reach the asserted claims, because acceptance of either argument would have resulted in the grant of a new trial and not in the affirmance of the judgment in the plaintiff's favor:

“[P]laintiff's present requests, which if meritorious would require reversal of the trial court's rulings and a new trial, go beyond affirmance of the judgment and cannot be awarded to a nonappealing party (*see, Parochial Bus Sys. v Board of Educ.*, 60 NY2d 539, 545-546; *Hecht v City of New York*, 60 NY2d 57).” 78 N.Y.2d at 299 n.5.<sup>2</sup>

Similarly, First Fidelity's new-trial arguments could not have supported the *judgment* in its favor, which dismissed the complaint. First Fidelity did not note these arguments to defend the trial court's grant of JNOV. The new-trial arguments were not “alternative ground[s] for affirming [the] decision below.” Pl. Br. at 16. Instead, First Fidelity listed the arguments – without briefing them in any detail – simply to show that, if this Court reversed the JNOV, the motion for a new trial would have to be decided. First Fidelity made clear its position that it was the trial court on remand that properly would have to address these issues in the first instance.

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<sup>2</sup> In *Hecht*, the Court of Appeals addressed the “scope of review of a judgment rendered against multiple parties but appealed by only one.” 60 N.Y.2d at 60. It concluded that “[g]enerally, an appellate court cannot grant affirmative relief to a nonappealing party unless it is necessary to do so in order to accord full relief to a party who has appealed.” *Id.* See also, e.g., *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151 (2002) (“We will generally deny affirmative relief to a nonmoving party.”); *Sharp v. Stavisky*, 221 A.D.2d 216, 217 (1st Dep't 1995) (“[T]his Court is without power to grant affirmative relief to a nonappealing party.”).

As we explained in our opening brief (at 24-25), there is no reason to believe that this Court would take the extraordinary step of denying a previously undecided request for a new trial – a step it had not been asked to take and that it had no power to take – without even so much as saying so.

## **II. BLUEBIRD ADDRESSES ARGUMENTS THAT FIRST FIDELITY IS NOT MAKING.**

### **A. First Fidelity Never Argued That The Appellate Division May Never Correct Trial Errors.**

Bluebird devotes most of its brief to the refutation of a sweeping argument we never made – that “appellate courts lack the power to address legal arguments that are raised in support of a request for a new trial.” Pl. Br. at 14. We have not contended that this Court may never address trial errors when asked to do so by an appellant, particularly in the circumstances Bluebird outlines in its brief – where “a plain injustice was done” but “appropriate objections” were not made. *Id.* Certainly, this Court, in its discretion, may address an appellant’s claims of trial error, even if (as Bluebird notes, irrelevantly) those claims of error were “unpreserved.” *Id.* at 15. This is the unremarkable proposition supported by the authorities Bluebird cites on pages 14 and 15 of its brief.

That, however, has nothing to do with what happened here. In this case, First Fidelity was the *respondent* in the appeal, and as such was permitted only to defend the judgment in its favor and to raise alternative grounds for affirmance of

that judgment – not to argue for this Court to award a new trial instead. In addition to defending the judgment (unsuccessfully), First Fidelity explained to this Court why, if it lost on its arguments supporting the judgment, it had different arguments to present to the trial court in supporting its alternative request for a new trial. Whether and under what circumstances this Court has the power to address trial-error arguments raised by *appellants* is irrelevant.

**B. Bluebird’s Half-Hearted “Estoppel” And “Waiver” Arguments Are Unsound.**

Bluebird begins its brief by asserting, incorrectly, that First Fidelity filed a “dilatory and defective motion” for consideration of its new-trial arguments on remand only “*after* the trial court had already entered judgment.” Pl. Br. at 1 (emphasis in original). Bluebird also devotes considerable energy to poking fun at First Fidelity for having waited a few weeks before making its motion in the trial court, and for having asserted, prior to bringing the motion, that “[t]he only step left is to enter judgment, for this Court.” Pl. Br. at 8. One assumes that Bluebird’s goal is to suggest that First Fidelity waived its current position by waiting too long to assert it, or that First Fidelity is estopped from pressing the argument because it previously took a contrary position. The problem with these arguments – if indeed Bluebird intended to make them – is that they are belied by the very procedural history Bluebird’s brief recounts.

As Bluebird’s own timeline reveals, First Fidelity’s motion was neither “dilatory” nor “defective,” and it was *not* “submitted after the trial court had already entered judgment.” Pl. Br. at 1. First Fidelity submitted its motion, along with the supporting memorandum, on January 7, 2005. *Id.* at 8. Bluebird responded on January 12. R-217. The trial court did not enter judgment until January 13. Pl. Br. at 9. As Bluebird is no doubt aware (and as our merits brief in this case explains in detail at 77-79), a party may waive its right to press an argument on appeal only if it fails to raise that argument before “a ruling or order of the court is requested *or made*.” CPLR § 4017. In other words, First Fidelity was free to object to the trial court’s entry of judgment on any ground it wished up to the day the trial court entered judgment. First Fidelity’s motion, which was filed a week before entry of judgment, was timely.<sup>3</sup>

Equally meritless is Bluebird’s suggestion that First Fidelity’s argument is somehow barred by an off-hand remark made by one of its attorneys. Under the doctrine of “judicial estoppel, or estoppel against inconsistent positions,” a party is

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<sup>3</sup> Bluebird’s suggestion that the motion’s return date is somehow relevant to this analysis is not correct. “A motion on notice is made when a notice of the motion or an order to show cause is served.” CPLR § 2201. As soon as the motion papers are served, “the movant has ‘made’ the motion even though the motion is not returnable in court until a number of days later.” DAVID D. SIEGEL, *NEW YORK PRACTICE* § 243 at 390 (3d ed. 1999). It does not matter what the return date was on First Fidelity’s motion, or that First Fidelity “never sought to have Justice Moskowitz delay entry of judgment” until after the motion was decided. First Fidelity had already opposed entry of judgment, without any success. By filing its motion and memorandum before judgment was entered, First Fidelity provided the court with timely notice that it opposed the entry judgment on an additional ground.

only precluded from “adopting a position directly contrary to or inconsistent with an earlier assumed position.” *Nestor v. Britt*, 270 A.D.2d 192, 193 (1st Dep’t 2000). An “assumed position” means that “the prior inconsistent position *must have been adopted by the court in some manner.*” 57 N.Y. JUR.2D § 54 & n.27 (2d ed. 2005) (collecting cases) (emphasis added).

Therefore, even if First Fidelity’s attorney’s remark that “the only step left is to enter judgment” were inconsistent with its current position, the inconsistency would be of no moment. Well before the court could have *acted* on that statement, First Fidelity filed its motion requesting a decision on its pending new-trial motion. Neither Bluebird nor the trial court relied to its detriment on any contrary position taken by First Fidelity.

Bluebird’s final half-hearted waiver argument is that First Fidelity somehow forfeited its current position by failing to move for reconsideration of this Court’s October 7 Decision or to claim this error in its Leave Application to the Court of Appeals. Pl. Br. at 17-18. This argument relies on the same mischaracterization of our argument that pervades Bluebird’s brief. We are *not* claiming here that this Court erred by deciding trial-error issues it was not permitted to decide. Instead, the clear decretal language of this Court’s order indicates that there *was* no decision on those issues. The *trial judge* erred by assuming that this Court’s order prevented her from deciding First Fidelity’s new-trial motion, and that error is the

subject of this appeal. Indeed, both of First Fidelity's applications for leave to appeal to the Court of Appeals – filed in this Court and in the Court of Appeals – stated that the trial court had not yet had an opportunity to consider the new-trial motion. Neither Leave Application claimed that this Court had decided the new-trial issues; indeed, the trial errors alleged were all explicitly attributed to the trial court.

First Fidelity could not raise this error earlier before this Court or the Court of Appeals, because there *was* no error until the trial court issued its ruling following the remand. First Fidelity was not asking the trial court to *overrule* this Court's decision; it was asking the trial court to *interpret* and *apply* the holding of a higher court. The trial court erred in its interpretation of that holding, and this appeal is the result.

### **III. LAW OF THE CASE DOES NOT PRECLUDE FURTHER REVIEW IN THIS COURT.**

Finally, it is worth reviewing the difference between this appeal and the companion. In this appeal, First Fidelity is claiming that the trial court erred by refusing to consider its new-trial motion. The relief requested is (1) a remand to the trial court with instructions to consider claims of trial error in the first instance, and (2) an order vacating the judgment in favor of Bluebird, which should not have been entered until the trial court decided the new-trial motion on the merits. If

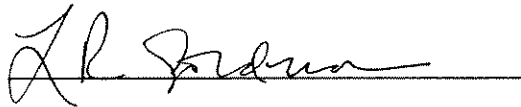
First Fidelity prevails in this appeal, the companion appeal, which was taken from the final judgment, will be mooted.

We note, however, that even if First Fidelity *loses* this appeal, *this* Court is still free to review the various claims of error raised in the companion appeal. At a minimum, as we discuss in detail in our companion brief, the CPLR is clear that this Court may consider claims of erroneous jury instructions *even if it has considered those same claims previously*. Appeals claiming erroneous denials of proposed instructions fall within CPLR § 5501(a)(3), which provides that an appeal from final judgment brings up for review “any charge to the jury, or failure or refusal to charge as requested by the appellant, to which he objected.” Although subparagraphs (a)(1) and (2) of CPLR § 5501 may limit appellate jurisdiction over certain interlocutory orders that have “previously been reviewed by the court to which the appeal is taken,” subparagraph (3) contains no such limitation. Accordingly, this Court is free to consider arguments regarding jury instructions regardless of the outcome of this appeal. Moreover, there is no question that the trial court’s failure to instruct the jury on First Fidelity’s affirmative defense of consent was not raised in any prior appeal, and this Court is therefore free to review it even if it disagrees with our position here.

## CONCLUSION

For all of the foregoing reasons, the judgment of the trial court should be reversed and the case remanded for consideration of First Fidelity's motion for a new trial.

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## **Printing Specifications Statement**

I, Lauren R. Goldman, attorney for the defendant-appellant First Fidelity Bank, N.A., New Jersey, hereby certify that this brief is in compliance with § 600.10(d)(1)(v). The brief was prepared using Microsoft Word 2002. The typeface is Times New Roman. The main body of the brief is in 14 point. Footnotes and Point Headings are in compliance with § 600.10(d)(1)(i). The brief contains 3833 words counted by the word-processing program.

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