Mashreqbank Adds a Layer of Confusion to "Notice of Motion"

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In *Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, --- N.E.3d ---- 2014 N.Y. Slip Op. 02381 (2014), decided April 8, 2014, the Court of Appeals has just added a new layer of uncertainty and litigation.

Mashreqbank invites the question whether language in the CPLR providing that a "notice of motion" is the "formal" procedural predicate for relief has any continued viability or has it been written out, contrary to the principles of statutory construction? Otherwise stated, are post *Mashreqbank* applications for relief during litigation made by way of briefing and/or oral argument the procedural equivalent of a "formal" "notice of motion" notwithstanding that the Legislature prescribed a "notice of motion" as the procedural predicate for the application?

Mashreqbank involves, section (a) of CPLR 327, "inconvenient forum", which provides, in pertinent part:

> When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, *on the motion of any party*, may stay or dismiss the action in whole or in part on any conditions that may be just (emphasis provided).

Mashreqbank held that, its holding in *VSL Corp. v. Dunes Hotels & Casinos, Inc*., 70 N.Y.2d 948 (1988) notwithstanding, "it was error for the Appellate Division to dismiss a complaint sua sponte on forum non conveniens grounds, adding that such a dismissal may occur 'only upon the motion of a party'...Here, though no party formally moved to dismiss plaintiff's complaint because of the inconvenience of the forum, the issue was briefed and argued at Supreme Court."

The Court further held: "We see no reason to read CPLR 327(a) as prohibiting a forum non conveniens dismissal where only the formality of a document labeled 'notice of motion' was lacking, and where AHAB, the only party opposed to dismissal, neither objected to nor was prejudiced by the omission of that formality." There is huge void as to how the Court reached the conclusion that there was "no reason" to construe the CPLR other than as written.

What is the implication of there being "no reason" to adhere to the "notice of motion" requirement in other statutes? It has significant consequences to appellate practitioners. CPLR 5701(a)(2) provides that appeals may be taken as of right "from an order not specified in subdivision (b), where *the motion it decided was made upon notice*..." (emphasis provided). Lest there be any doubt, none other than Prof. David Siegel, in his Practice Commentaries to CPLR 5701, teaches and assures that "on notice" means "notice of motion".

Mashreqbank can now assume a venerable position of uncertainty alongside giants, such as, *Burke v. Crosson*, 85 N.Y.2d 10 (1995) [CPLR 5501(a)(1) "finality"], *Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 20 N.Y.3d 37 (2012) [CPLR 5501(a)(1) "necessarily affects the final

judgment"],and *Oakes v. Patel*, 20 N.Y.3d 633 (2013), and [CPLR 5501(a)(1) "necessarily affects the final judgment"]. Also see *Fried v. Jacob Holding, Inc.*, 970 N.Y.S.2d 260 (2nd Dept. 2013):

> A request for relief made in the absence of a notice of cross motion is not a "motion made upon notice" (CPLR 5701[a][2]), so an order granting or denying the request is not appealable as of right, and permission to appeal is necessary (CPLR 5701[c]; Blam v. Netcher, 17 A.D.3d 495, 496). By contrast, generally, a party may appeal as of right to challenge the disposition of a motion or cross motion made on notice (CPLR 5701[a]).