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Outside Counsel

## 'Sholes v. Meagher': the Appellate Imbalance of Sua Sponte Orders

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The absence of a statutory right to either a direct appeal from a sua sponte order or any form of immediate review therefrom, akin to CPLR 5704, constitutes a void in appellate jurisprudence that imposes onerous consequences, such as, enforcement, potential contempt, and escalated legal costs pending vacatur of the order, on the party who, perhaps due to no wrongdoing on his part, finds himself on the wrong side of the order. The first opportunity for appellate relief as of right from a sua sponte order becomes available at a distant time only after a full motion with opposing papers to vacate the sua sponte order has been denied [CPLR 5701(a)(3)].<sup>1</sup> Sua sponte orders have been reversed as a deprivation of due process where a party had no notice, and thus no opportunity to be heard, that such an order was under consideration.<sup>2</sup>

CPLR 5701 is the "main statutory source of the jurisdiction of the Appellate Division because it determines what is appealable."<sup>3</sup> CPLR 5701(a)(2) provides that an appeal may be taken as of right "from an order...where the motion was made *upon notice*." CPLR 5701(a)(3) addresses sua sponte orders. (Emphasis added.)

### 'Sholes v. Meagher'

*Sholes v. Meagher*<sup>4</sup> is the seminal decision which denies the direct right of appeal from a sua sponte order. The circumstances in *Sholes* arose from a punitive sanction aimed at disincentivizing attorneys from disrespectful conduct to a court.

Well into a personal injury jury trial, the trial court announced that the appellant-attorney had repeatedly made disrespectful facial expressions in response to adverse evidentiary rulings, even after being instructed, and promising, to stop. Citing the prejudicial effect of these expressions on the jury, the court declared a mistrial and required the attorney to submit an affidavit on why she should not be censured for her conduct, and her opponent to submit an affidavit detailing his costs and expenditures at trial.<sup>5</sup>

The appellant-attorney and her law firm (appellants) contested the order. The appellants argued that the procedure adopted by Supreme Court was in practical effect equivalent to a motion on notice and created a record sufficient for appellate review. Although the order did, in fact, affect a substantial right (CPLR 5701[a][2][v]), the court held that "[t]here is [] no right of appeal from...an order entered sua sponte."<sup>6</sup> The Appellate Division dismissed the appeal, holding the order not appealable as of right because it did not decide a motion made on notice (CPLR 5701[a][2]), and simultaneously declined to hear the appeal by permission (CPLR 5701[c]). The Court of Appeals granted leave to appeal and affirmed on the same grounds.

The court rejected the appellants' contention that they had no avenue of appeal and that, in effect, the ruling of the trial court was unreviewable. The appellants' avenue for appellate review, held the court, consisted of first moving to vacate the sua-sponte order and then appeal as of right in the event of a denial of the motion, pursuant to CPLR 5701(a)(3), which requires the motion to vacate the sua sponte order to be "made upon notice."<sup>7</sup> The Sholes court observed that "[t]his procedure ensures the appeal will be made upon a suitable record after counsel have had an opportunity to be heard"<sup>8</sup>:

We agree with the Appellate Division that the submissions ordered sua sponte by the trial court were not made pursuant to a motion on notice *as contemplated by CPLR 5701(a)(2)*.

While the procedure in this particular case may well have produced a record sufficient for appellate review, there is no guarantee that the same would be true in the next case. *Moreover, the amount of notice will vary from case to case, and its sufficiency may often be open to debate.* Adherence to the procedure specified by CPLR 5701(a) uniformly provides for certainty, while at the same time affording the parties a right of review by the Appellate Division. We are therefore *unwilling* to overwrite that statute.<sup>9</sup>

*Sholes* further added: "There is no right of appeal from an ex parte order, including an order entered sua sponte."<sup>10</sup> Professor David Siegel recast this statement as saying that a sua sponte order is a subset of an ex parte order: "The gist of the *Sholes* decision is that it puts the imprimatur of the Court of Appeals on the proposition that the ex parte order includes an order entered by a court sua sponte."<sup>11</sup>

The denial of an ex parte application for a stay of a sua sponte order contained in a motion to the original court may be reviewed by the full court [CPLR 5704(a)]. If the application for a stay is denied by the full court, and a motion for leave to appeal is denied, the aggrieved party is left to await a decision from the court below, however long that may be, during which time that would-be appellant remains exposed to enforcement and contempt.

It is conceptually inconsistent and fundamentally unfair that an ex parte order, made without notice, is granted immediate access to appellate review (CPLR 5704(a)) while its kinfolk, the sua sponte order, made without "formal notice" (a notice of motion)<sup>12</sup> but generally made in the presence of the adverse party who had an opportunity to rebut, is accorded stepchild status; the inability to a direct appeal as of right when a sua sponte order was made without notice to the other party<sup>13</sup> further magnifies the unfairness.

## CPLR 2211, CPLR 2214(a)

The Court of Appeals, in *Sholes*, stated that the sua sponte order by the trial court was "not made pursuant to a motion on notice as contemplated by CPLR 5701(a)(2)."<sup>14</sup> This is an extremely significant statement which militates against the ruling in *Sholes*.

CPLR 2211 is styled as "an application for an order": "A *motion on notice* is made when a notice of the motion or an order to show cause is served." (Emphasis added.) CPLR 2214(a) itemizes the requisite elements of a notice of motion: "A notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor." The purpose of requiring that a notice of motion be given before an order is appealed is to assure that all sides will be heard on the matter. This in turn assures that a record will be made, adequate for appellate review.<sup>15</sup>

Plainly, a judge is incapable of making a motion "on notice" pursuant to CPLR 2211 and 2214(a), as both statutes address motions initiated by parties. Judges issue orders, they do not make applications for orders. *Sholes* underscored this point: Sua sponte orders are "not made pursuant to a motion on notice as contemplated by CPLR 5701(a)(2)." (Emphasis added.) Nevertheless, there are sua sponte orders that are authorized by the Legislature where courts may act "on [their] own initiative,"<sup>16</sup> as in 22 NYCRR 130-1.1, the subject statute in *Sholes*. The same unfair void thus remains regarding orders "on a court's own initiative," where the court must be presumptively deemed to have made an adequate record in support of its initiative.

## Adequacy of the Record

The *Sholes* court expressed concern over the adequacy of "a record sufficient for appellate review" in future cases and that "the amount of notice will vary from case to case, and its sufficiency may often be open to debate."<sup>17</sup> That the Legislature did not share this worry is clear from the statutes that sanction courts to make orders "on their own initiative." Further evidence that lawmakers have full confidence in the state's jurists to make proper situation-sensitive records and notice is reflected in 22 NYCRR 130-1.1(d), the statute at the heart of *Sholes*, which statute contradicts the court's concern; hence the presumption that courts make proper records:

An award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.

The built-in direction for "a reasonable opportunity to be heard" is the Legislature's failsafe against the concern in *Sholes*. Barring exigent circumstances, it is highly improbable that a court would make a sua sponte order without first having given both sides an opportunity to be heard, which arguments would then be set forth in the appeal. Moreover, concern over the infrequent event does not drive the legislative engine. In *Sweeting v. Am. Knife Co.*,<sup>18</sup> Justice Benjamin Cardozo wrote: "Lawmakers framing legislation must deal with general tendencies. The average and not the exceptional case determines the fitness of the remedy."

## 'Park East Corp. v. Whalen'

The court in *Sholes* made a further surprising statement: that it was "*unwilling to overwrite that statute* [CPLR 5701(a)],"<sup>19</sup> which immediately raises eyebrows because of the canons of statutory construction: "The intent of the Legislature is controlling and must be given force and effect, regardless of the circumstance that inconvenience, hardship, or injustice may result."<sup>20</sup> Nevertheless, the fact remains that, the canons of statutory construction to the contrary notwithstanding, the Court of Appeals has, in another matter involving appellate jurisprudence, intervened to overwrite a statute in order to rectify a perceived harm.

In *Park East Corp. v. Whalen*, 38 N.Y.2d 559 [1976], the court interpreted CPLR 5514(a) in a manner wholly inconsistent with the statutory language so as to, in part, rescue counsel from "unnecessary procedural traps for the unwary."<sup>21</sup> CPLR 5514(a) provides that when an appeal has been pursued by the incorrect method "the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise." (Emphasis added.)

The court, nevertheless, infused and imputed otherwise unfound legislative intent into the statute by "interpreting"<sup>22</sup> it to mean that the calculation of the limitations period following an improper method of appeal, should be "uniform" with the time frame in CPLR 5513(a), "to require computation of the time allowed to begin upon service of a copy of the order terminating the first attempted appeal with written notice of its entry."<sup>23</sup> The court, in *Sholes*, might have declined to pursue that course because of the underlying facts.

## Conclusion

The party aggrieved by a sua sponte order is unfairly procedurally hamstrung before seeing the dimmest flicker of the appellate courthouse. An amendment to CPLR 5701(a)(3) should rectify this inequity or, at least, provide for a stay akin to CPLR 5519(e) with a failsafe exception for good cause shown, in which case the court shall be required to make a record, a requirement which shall be nonwaivable.<sup>24</sup>

### Endnotes:

1. The rarest glimmer of hope for immediate review of the sua sponte order is by way of a granting of a motion for leave to appeal.

2. *Eggleston v. Gloria N.*, 55 AD3d 309 [1st Dept. 2008]; *Chase Home Fin., LLC v. Kornitzer*, 139 AD3d 784 [2d Dept. 2016] ["The sua sponte dismissal of the complaint...without affording the plaintiff any notice and opportunity to be heard, was improper...and amounted to a denial of the plaintiff's due process rights."]; *Brody v. Brody*, 98 AD2d 702 [2d Dept. 1983]; ["[The] sua sponte stay was in violation of plaintiff's due process rights, as she was never notified that such an order was under consideration."]; *Leibowits v. Leibowits*, 93 AD2d 535 [2d Dept. 1983] ["Special Term erred in its sua sponte restraint of the husband's disposition of marital property. Due process requires written notice from the moving spouse that he or she seeks possession of marital assets or a restraint on their disposition."], *Mathews v. Eldridge*, 424 US 319, 333 [1976] ["The fundamental requirement of due process

is the opportunity to be heard at a meaningful time and in a meaningful manner."]

3. Prof. David Siegel, Practice Commentaries, C5701:1.

4. 100 NY2d 333 [2003].

5. *Sholes*, at 334.

6. *Id.*, at 335.

7. The issue of whether "made upon notice" is absolute was discussed following *Mashreqbank PSC v. Ahmed Hamad A1 Gosaibi & Bros. Co.*, 23 N.Y.3d 129 [2014], E. Scheinberg, NYLJ, April 11, 2014.

8. *Sholes* at 335.

9. *Id.* at 336 (emphasis added).

10. *Id.* at 335.

11. Siegel, Practice Commentaries, C5701:5. Ex Parte Orders.

12. See *Mashreqbank PSC v. Ahmed Hamad A1 Gosaibi & Bros. Co.*, 23 N.Y.3d 129 [2014].

13. See note 3.

14. At 336 (emphasis added).

15. Practice Commentaries, C5701:5. Ex Parte Orders.

16. CPLR 3103(a): "The court may at any time *on its own initiative*, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device." (Emphasis added.)

CPLR 4404(a): "After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or *on its own initiative*, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court." (Emphasis added.)

CPLR 3216(a): "Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, *on its own initiative* or upon motion, with notice to the parties, may dismiss the party's pleading on terms." (Emphasis added.)

Surrogate's Court Procedure Act §502(6): "The court may submit any issue of fact to an advisory jury as provided in the CPLR. Upon the motion of any party *or on its own initiative*

the court may confirm or reject in whole or in part the verdict of an advisory jury; may make new findings with or without taking additional testimony and may order a new trial." (Emphasis added.)

Surrogate's Court Procedure Act §503(1): "At any time during trial the court upon motion of any party *or on its own initiative* may direct judgment on one or more issues whenever it determines as a matter of law that the evidence is insufficient to create an issue of fact for a jury on such issue." (Emphasis added.)

CPLR 5240: "The court may at any time, *on its own initiative* or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure." (Emphasis added.)

17. *Sholes*, at 336.

18. 226 NY 199, 201 (1919) *affd sub nom. New York Cent. R. Co. v. Blanc*, 250 US 596 (1919).

19. At 336 (emphasis added).

20. McKinney's Statutes Law §92.

21. At 560.

22. At 560.

23. See, E. Scheinberg, CPLR 5514(a): "The Uncertain Limitations Period Following Appeals By Improper Method," NYLJ, Aug. 15, 2012.

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