New York Law Journal

Appellate Review of Ex Parte and Sua Sponte Orders

This article discusses various CPLR provisions and decisions pertaining to appealability of ex parte and sua sponte orders.

By **Elliott Scheinberg** | June 27, 2019

CPLR 5701(a)(2) authorizes an appeal as of right from an order "where the motion it decided was made upon notice." "Ex parte applications are generally disfavored by the courts, unless expressly authorized by statute because of the attendant due process implications caused by proceeding without notice." *Essex v. Newman*, 220 A.D.2d 639 (2d Dep't 1995). Similarly, "sua sponte orders are deemed 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." *Eggleston v. Gloria N.*, 55 A.D.3d 309 (1st

Dep't 2008); *Chase Home Fin. v. Kornitzer*, 139 A.D.3d 784 (2d Dep't 2016).

CPLR 5701(a)(3), not the most fluidly comprehensible legislative articulation, spells out the method by which to convert a nonappealable ex parte order into an order that is appealable as of right:

> from an order, where the motion it decided was made upon notice, refusing to vacate or modify a prior order, if the prior order would have been appealable as of right under paragraph two had it decided a motion made upon notice.

In simplified language, the statute directs the aggrieved party: (1) to make a motion to the court that issued the ex parte order; (2) on notice to the other party; (3) for an order vacating or modifying the ex parte order; and (4) if the motion is denied, it becomes directly appealable. The same procedure applies for relief from default (CPLR 5511) and sua sponte orders (*Sholes v. Meagher*, 100 N.Y.2d 333 (2003)), which are also not appealable as of right.

CPLR 5704(a) provides an opportunity for immediate appellate review of ex parte orders thereby dramatically truncating the time associated with the steps in 5701(a)(3):

> The appellate division or a justice thereof may vacate or modify any order granted without notice to the adverse party by any court or a judge thereof from which an appeal would lie to such appellate division; and the appellate division may grant any order or provisional remedy applied for without notice to the adverse party and refused by any court or a judge thereof from which an appeal would lie to such appellate division.

CPLR 5701(c) provides another avenue of accelerated review from ex parte orders, permission from the Appellate Division:

> An appeal may be taken to the appellate division from any order which is not appealable as of right in an action originating in the supreme court or a county court by permission of a judge who made the order granted before application to a justice of the appellate division; or by permission of a justice of the appellate division in the department to which the appeal could be taken, upon refusal by the judge who made the order or upon direct application.

The language in 5701(c) notwithstanding, the rules of the appellate courts do not allow one appellate justice to grant permission to appeal.

An erroneous direct appeal may be treated as an application for review from ex parte and sua sponte orders. Appeals from sua sponte orders are treated as applications for review where the sua sponte relief was "extraordinary" such as the dismissal of a complaint. *All Craft Fabricators v. ATC Assoc.*, 153 A.D.3d 1159 (1st Dep't 2017); *Blake v. Blake*, 156 A.D.3d 523 (1st Dep't 2017); *HSBC Bank USA, N.A. v. Taher*, 104 A.D.3d 815 (2d Dep't 2013); *Wells Fargo Bank, N.A. v. Pabon*, 138 A.D.3d 1217 (3d Dep't 2016); *Midfirst Bank v. Eddy*, 125 A.D.3d 1458 (4th Dep't 2015).

Courts have also done so without use of the word "extraordinary" where the issues were stark. See *Anostario v. Anostario*, 249 A.D.2d 612 (3d Dep't 1998) (defendant's appeal was treated as an application for review pursuant to CPLR 5704(a) because the "matter involve[d] questions of law, i.e., interpretation of CPLR 5242(b) and the propriety of the Supreme Court's issuance of the ex parte order"); see also *Citimortgage v. Gill,* 165 A.D.3d 623 (2d Dep't 2018) (In a mortgage foreclose action, the defendant failed to appear or answer or move to vacate his default. The plaintiff appealed from an order denying its ex parte motion for an order of reference, which appeal as treated as an application pursuant to CPLR 5704(a) to vacate the order and to grant the plaintiff's ex parte motion. These cases are not exhaustive.

Judicial refusal to sign an order to show cause. "[A]n order to show cause is in the first instance a species of ex parte order. [I]f the judge refuses to sign it, an application for it can be made to the appellate court under CPLR 5704." Siegel, N.Y. Prac. §248 (6th ed.), Patrick M. Connors.

"The failure to give a party proper notice of a motion deprives the court of jurisdiction to entertain the motion and renders the resulting order void." *Citimortgage v. Reese*, 162 A.D.3d 847 (2d Dep't 2018); *Wells Fargo Bank, N.A. v. Whitelock*, 154 A.D.3d 906 (2d Dep't 2017). Plainly, when a court has refused to sign an order to show cause, there could not have been any notice.

No appeal lies from a decision, even by motion for leave to appeal (*God Kundalini Isa Allah v. Scheinman*, 61 N.Y.2d 755 (1984)) or from an order (*Sitbon-Robson v. Robson*, 95 N.Y.S.3d 797 (1st Dep't 2019)) that denied an application for an order to show

cause.

There are the tiniest number of decisions, none of which this writer found from the First Department, wherein an appellate court treated a notice of appeal from a refusal to sign an order to show cause as an application for review pursuant to CPLR 5704(a). *Citimortgage v. Gill*, 165 A.D.3d 623 (2d Dep't 2018); *Bridget PP. v. Richard QQ.*, 101 A.D.3d 1186 (3d Dep't 2012).

In *St. Lawrence County Support Collection Unit ex rel. Bowman v. Bowman*, 152 A.D.3d 899 (3d Dep't 2017), the respondent appealed from an order denying his ex parte motion to issue an order to show cause. The Appellate Division declined to treat his notice of appeal as an application for review pursuant to CPLR 5704(a) because the respondent failed to articulate any argument that would entitle him to relief on the merits of the appeal.

Supreme Court may give reasons for refusing to sign. "No appeal lies from a *writing* declining to sign an order to show cause." *USA Recycling v. Baldwin Endico Realty Assoc.*, 147 A.D.3d 697 (1st Dep't 2017). An *order* declining to sign an order to show cause is not appealable. *Azeem v. Murphy*, 139 A.D.3d 610 (1st Dep't 2016); *Wells Fargo Bank, N.A. v. Whitelock*, 154 A.D.3d 906 (2d Dep't 2017); see also *Sitbon-Robson,* above, court issued a "decision and order" refusing to sign, and *God Kundalini*, above, where the court wrote a decision.

Mandamus. Since the granting of an order to show cause is discretionary (CPLR 2214(d)), mandamus does not lie to compel a court to sign an order to show cause. *Rosenthal v. Agate,* 29 A.D.3d 809 (2d Dep't 2006)). However, in *Tepper v. Lonschein*, 253 A.D.2d 435 (2d Dep't 1998), an Article 78 proceeding sought "the extraordinary remedy of prohibition" against a justice of the Supreme Court from enforcing a temporary restraining order contained in an order to show cause signed by that justice. Noting that the petitioner had an adequate remedy pursuant to CPLR 5704(a), the Second Department converted the proceeding into a 5704(a) application and vacated the order.

Res judicata, collateral estoppel, law of the case. Full disclosure, an issue, during oral argument in *Sitbon-Robson*, devolved about the Supreme Court's three-page explanation, which ended in "Decision and Order", for refusing to sign an order to

show cause. I was pressed by two Justices regarding whether the explanation had res judicata value and whether the Supreme Court could even write a reason for its refusal in the first place.

Res judicata (claim preclusion) requires "a valid final judgment deciding the merits" in a prior proceeding. *Landau, P.C. v. LaRossa, Mitchell & Ross*, 11 N.Y.3d 8 (2008). The underlying rationale is that a party who had a full and fair opportunity to litigate a claim should be precluded from relitigating the claim. *In re Hunter*, 4 N.Y.3d 260 (2005). Similarly, collateral estoppel (issue preclusion) is "only given to matters 'actually litigated and determined' in a prior action.'" *Kaufman v. Eli Lilly and Co.*, 65 N.Y.2d 449 (1985), where the party "enjoyed a full and fair opportunity to contest the issue." *Jeffreys v. Griffin*, 1 N.Y.3d 34 (2003).

The refusal to sign an order to show cause does "not constitute a ruling on the merits of [the] petition"; it does no more than signal a court's "disinclination" to grant the sought after relief and there is no decision "entitled to res judicata". *People ex rel. David NN. v. Hogan*, 53 A.D.3d 841 (3d Dep't 2008). A refusal to sign does not amount to actual litigation and determination, *Astoria Equities 200 v. Halletts A Dev. Co.*, 47 Misc.3d 171 (NY Sup. 2014), and cannot have either res judicata or collateral estoppel effect, *Art. 70 of CPLR for a Writ of Habeas Corpus, The Nonhuman Rights Project, Inc. ex rel. Hercules and Leo v. Stanley*, 49 Misc.3d 746 (Sup. Ct. 2015). "A court's reasons on the order to show cause [] for refusing to sign it is no less summary and no more on the merits, than had [it] withheld [its] reasoning." *Nonhuman Rights Project,* at 761.

Similarly, the refusal by one justice to sign an order to show cause does not constitute a court order, and does not create law of the case. *Lanzot v. Blecher*, 7 A.D.3d 408 (1st Dep't 2004).

Appeals When There Is No Adverse Party. Albeit most unusual in litigation, there are instances where an appellant has no adversary on appeal. In *Matter of Joint Diseases N. Gen. Hosp.*, 148 A.D.2d 873 (3d Dep't 1989), the Hospital became persistently remiss in paying taxes and other obligations. The Department of Taxation and Finance initiated efforts to bring the hospital into compliance with respect to a past due withholding tax liability. To stave off bankruptcy, North General, pursuant to

Tax Law §171(15), offered to compromise its debt, which the Commissioner of Taxation and Finance accepted. As required by statute, the Commissioner sought approval of the compromise from a Supreme Court Justice. The Supreme Court rejected the compromise. The Commissioner appealed. The Appellate Division treated the appeal as an application for review pursuant to CPLR 5704(a).

Name Changes. An appeal from the denial of a petition for a name change also presents a unique procedural challenge as such applications are often not adversarial, except when notice is required pursuant to statute—even if those parties did not object. "The immediate impediment to the appeal was the absence of any procedural mechanisms by which to produce an appealable order." *Matter of Washington*, 216 A.D.2d 781 (3d Dep't 1995). While earlier case law declined to extend 5704(a) review to appeals from denials of name change petitions, *Matter of Cooperman*, 59 A.D.2d 749 (2d Dep't 1977), review eventually became available pursuant to CPLR 5704(a). *In re Austin*, 295 A.D.2d 721 (3d Dep't 2002).

The Fourth Department, without citing CPLR 5704(a), hears appeals from denied petitions for name changes. *In re Jackson*, 144 A.D.3d 1539 (4th Dep't 2016); *Anonymous v. Monroe County Dist. Attorney's Off.*, 106 A.D.3d 1503 (4th Dep't 2013).

Plainly, where notice of the petition for a name change is statutorily required (Civil Rights Law §62(2)), a direct appeal is available. *In re Powell*, 95 A.D.3d 1631, n. (3d Dep't 2012).

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