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'Braun v. Cesareo': When CPLR 5701(a)(2) Intersects With CPLR 5501(a)(1)

Which statute governs following final judgment where a motion was not made upon notice, such as ex parte or sua sponte interlocutory orders?

By **Elliott Scheinberg** | September 13, 2019

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CPLR 5701(a)(2) provides, inter alia, that before an interlocutory order may be appealable as of right is that it was the result of a motion "made upon notice."

CPLR 5501(a)(1), scope of review, provides, in pertinent part: "An appeal from a final

judgment brings up for review: 1. *any* non-final judgment or order which necessarily affects the final judgment ..."

Which statute governs following final judgment where a motion was not made upon notice, such as ex parte or sua sponte interlocutory orders? Must an order have resulted from a motion made upon notice (CPLR 5701(a)(2)) before it may be brought up for review following the final judgment (CPLR 5501(a)(1)), notwithstanding the statute's use of the word "any" in 5501(a)(1)? Or does CPLR 5501(a)(1) contemplate all orders, including ex parte and sua sponte orders? The latter argument is supported by the unequivocal, broad language drafted by the Legislature, which, unlike 5701(a)(2), imposes no limitations or restrictions as to how an order may have arisen before consideration following final judgment.

In *Braun v. Cesareo*, 170 A.D.3d 1540 (4th Dept. 2019), CPLR 5701(a)(2) and CPLR 5501(a)(1) clashed in just this manner. The majority held that 5501(a) permits such review.

Background

The plaintiff, by note of issue, elected to proceed to a nonjury trial. Pursuant to CPLR 4102(a), defendants could have demanded a trial by jury by so filing within the statutory deadline, but they did not. Nevertheless, as established by the majority and the dissent, until the eve of trial, plaintiff led the court and defendants to believe that the trial would be by jury.

The parties appeared for trial one day after the deadline for demanding a trial by jury had expired. Defendants informed the court that they had learned just that morning that plaintiff had not requested a jury trial in the note of issue. They acknowledged that the §4102(a) deadline for filing a jury demand had expired 16 hours earlier and asked the court to excuse their inadvertent failure to make a timely demand. After "extensive discussion off the record" in chambers, the court determined that the parties waived their right to a jury trial and denied defendants oral application on the grounds that plaintiff would be prejudiced by the filing of a late demand.

Defendants placed their objection on the record and made an oral application for leave to file a late demand for a jury trial. After additional extensive arguments, the court adhered to its determination and denied the application. Defendants indicated

that they could make a formal motion, but plaintiff objected, arguing that the court "has already decided the issue." The court let it be known that any such motion would be denied.

After trial of the liability phase, defendants submitted an "order" to the court memorializing the denial of their application. Plaintiff objected to entry of the order because "[a] party must make a motion to the court before an order may be issued." Defendants' appeal from the interlocutory order was dismissed as it was not appealable as of right because it did not decide a motion "made upon notice" (CPLR 5701[a][2]). Defendants never moved to vacate the order the denial of which they could have appealed as of right (CPLR 5701[a][3]).

Appellate Decision

Defendants appealed from the final judgment. The parties did not dispute that the subject order necessarily affected the final judgment. 170 A.D.3d at 1541. The issue on appeal was whether the order was brought up for review from the final judgment, under 5501(a)(1). The Appellate Division reversed the judgment, granted the application and granted a new trial.

The majority held that "CPLR 5501(a)(1) neither expressly nor impliedly places [] a limitation upon our review of orders that affect the judgment." 170 A.D.3d at 1541. Otherwise stated, the word "order" in 5501(a)(1) does not confine orders to those resulting from motions made upon notice. The majority further underscored that courts routinely review orders upon an appeal from a final judgment that would not have been appealable as of right, such as ex parte orders. 170 A.D.3d at 1541.

The Dissent

Justice John M. Curran wrote a strong dissenting opinion, enrobed in equity and in a whisper of due process, which opinion continues and extends judicial concern over appeals from nonuniform notice and insufficient records that may vary from case to case. The opinion, that the "order" is not an "order" that can be reviewed on appeal under CPLR 5501(a)(1), is anchored in legislatively enacted procedures intended to ensure fairness by giving parties sufficient notice and opportunity to be heard by way of evidentiary submissions, rather than be blind sided by "spur-of-the-moment oral arguments, without any attempt by defendants to provide a reviewable record on

appeal." 170 A.D.3d at 1548. In sum, the opinion laments the "prejudice" that plaintiff will now "suffer by being required to suddenly change course and try the case before a jury" (id.); "that the procedural rules in article 22 provide a minimum level of substantive fairness, which was absent here" (id.).

Justice Curran argues that the procedural schemes in articles 22, 55 and 57 of the CPLR function coterminously to promote a common purpose: "[W]hat constitutes a reviewable 'order' for purposes of CPLR 5501(a)(1) should be consistent with the other definitions of 'order' found in CPLR articles 22 and 57." 170 A.D.3d at 1544. Specifically, CPLR 2212(a) and (b) and CPLR Article 57 bifurcate motions into motions on notice and ex parte motions. Article 22 defines an "order" as something procured as a result of a written motion on notice. CPLR 2211, 2214. Accordingly, because the order was "not a product of a motion made on notice (CPLR 2211, 2212[a]; 5512[a])" "this Court has been deprived of a sufficient record, rendering the 'order' unreviewable. 170 A.D.3d at 1543. The majority's "interpretation [] effectively render[s] meaningless the procedure in article 22." 170 A.D.3d at 1548. Otherwise stated, CPLR 5701(a)(2) overarches the nonrestrictive, nonlimiting word "any" in CPLR 5501(a)(1).

'Sholes v. Meagher'

The dissent also relied on that branch of *Sholes v. Meagher*, 100 N.Y.2d 333 (2003), wherein the Court of Appeals held there is no right of appeal from an ex parte or sua sponte orders because the record may not always be sufficient for appellate review [at 335-36]. Justice Curran stated (*Braun*, 170 A.D.3d at 1540):

> [B]y affording appellate review to defendants on such a scant record on appeal —i.e., the 37-page transcript of the [] oral argument—the majority has improperly disregarded the requirements of CPLR articles 22 and 55 (CPLR 2214, 2219, 2220, 5501[a][1]; 5526). Because defendants made no pretense of trying to comply with those requirements, which are intended to ensure fairness to both sides, I would hold that the "order" is unreviewable, despite defendants' appeal from a final judgment. I dissent because we do not have the authority to overwrite those statutes.

The majority countered by pointing out that "Courts routinely review orders upon an

appeal from a final judgment that would not have been appealable as of right, such as ex parte orders." 170 A.D.3d at 1541.

Unlike *Braun*, *Sholes* did not involve CPLR 5501(a)(1). In other words, while the court, in *Sholes*, expressed concern over direct appeals from orders unsupported by adequate records, it was not confronted with the overshadowing issue whether CPLR 5501(a)(1) brings up for review oral orders that necessarily affect the final judgment. Moreover, the appeal in *Sholes* was taken by a nonparty.

The facts in *Sholes* are instructive. The trial court declared a mistrial because "appellant attorney had repeatedly made disrespectful facial expressions in response to adverse evidentiary rulings, even after being instructed—and promising—to stop"; that "these expressions" had a "prejudicial effect" on the jury. 100 N.Y.2d at 334. The court also sanctioned the attorney sua sponte. The attorney and her law firm, as nonparty-appellants, took a direct appeal. The Appellate Division dismissed the appeal because the order did not result from a motion made upon notice (CPLR 5701[a][2]) and also declined to grant leave to appeal (CPLR 5701[c]).

The Court of Appeals held that the only way to obtain appellate review as of right is for the aggrieved party to move to vacate the order and then appeal as of right to the Appellate Division if that motion is denied. An appeal will thereby be made upon a suitable record with an opportunity to be heard.

Notably, the mistrial foreclosed the possibility of a final judgment and concomitantly any applicability of CPLR 5501(a)(1). Furthermore, the appeal was on a collateral issue taken by a nonparty, who had no interest in the outcome of the case.

Plaintiff Was Not Deserving of Equity or Sympathy

As noted, the dissent commiserated with plaintiff who must now suffer from the reversal of the final judgment and face a trial by jury. However, the facts presented by both the majority and the dissent strongly militate against this plaintiff's deservedness of any equity because, although his note of issue did not demand a jury trial, he misled the court and defendants into believing that the trial would be by jury. 170 A.D.3d at 1543. The dissent notes: "After the filing of the note of issue and until the eve of trial, the parties and Supreme Court implied that they expected to proceed to a jury trial." 170 A.D.3d at 1543.

The majority deflated plaintiff's argument of prejudice: "Prejudice requires 'some indication that the [party] has been hindered in the preparation of his [or her] case or has been prevented from taking some measure in support of his [or her] position'" (quoting *Loomis v. Civetta Corinno Constr.*, 54 N.Y.2d 18, 23 (1981). Plaintiff could not have been prejudiced on the day of trial because there was a jury panel present in response to plaintiff's post-note-of-issue rumblings about a jury trial: "Indeed, plaintiff's attorneys had made post-note of issue references to a jury, thus showing that they were certainly prepared for a trial by jury and had not strategized only for a bench trial, as they argued." 170 A.D.3d at 1542.

Conclusion

The majority ruling was correct based on principles of statutory construction and the equities of the case. CPLR 5501(a)(1) does no more than say that "*any* non-final judgment or order which necessarily affects the final judgment" is brought up *for review*, it does not assure reversal, which requires intense scrutiny based, no doubt, on the sufficiency of the record. In *Kaiser v. J & S Realty*, 173 A.D.2d 920, 921 (3d Dept. 1991), the Third Department, citing *Matter of Shanty Hollow v. Poladian*, 23 A.D.2d 132, 133-34 (3d Dept. 1965), affd. 17 N.Y.2d 536 (1966), and Siegel, NY Prac. §243, at 363-64 [2d ed.], ruled: "While there appears to be no per se rule against oral motions (...), a movant must, nonetheless, present affidavits or other competent evidence in support of its factual assertions." See also *Inzer v. W. Brighton Fire Dept.*, 173 A.D.3d 1826, 1826-27 (4th Dept. 2019) ("It is well settled that oral motions [] are not prohibited ... Here, petitioners 'present[ed] affidavits or other competent evidence in support of [their]'" application); *LaGuardia v. City of New York*, 237 A.D.2d 257 (2d Dept. 1997).

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