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'Citibank v. Kerszko': A Trifecta of Novel Issues and Determinations, Part I

The majority opinion, in 'Citibank, N.A. v. Kerszko' is a discerning and masterful dissection of the junction where "a variety of" "unusual" legal issues, some of first impression, have converged.

By **Elliott Scheinberg** | February 16, 2022

The majority opinion, in *Citibank, N.A. v. Kerszko*, 2022 NY Slip Op 00032 (2d Dep't 2022) (Dillon, J.), is a discerning and masterful dissection of the junction where "a variety of" "unusual" legal issues, some of first impression, have converged. First, "for the first time," the Second Department examined "whether the presentment to a court of a proposed ex parte order to show cause for an order of reference, which is rejected by Supreme] Court for defects in the papers, qualifies as a 'taking of proceedings for the entry of judgment pursuant to CPLR 3215(c),' so as to avoid dismissal of the complaint as abandoned under 3215(c)."

Next it considered "whether the basis of a court's reasoning in determining a motion, when raised by the court sua sponte, self-preserves for an appeal" by an aggrieved party.

Finally, it examined the relevance of and the "certain limitations upon the application of the doctrine of *Bray v. Cox*, 38 N.Y.2d 350 (1976) as relevant to the unique circumstances of the appeal."

Facts. Citibank commenced an action, on March 5, 2009, to foreclose a residential mortgage and to accelerate the debt against Ryan Kerszko, who defaulted. His default extended throughout the appellate process. A mandatory CPLR 3408 settlement conference was

conducted on May 27, 2009, but, inexplicably, was unproductive.

On or about Nov. 12, 2009, Citibank presented a proposed ex parte order of reference, supported by an incomplete affidavit. The court refused to sign it. Although the proposed ex parte order was not in the record, the Supreme Court, in the order on appeal, acknowledged that it had been presented, and explained why it was not signed.

Fast forward five years, Citibank's renewed motion, Supreme Court sua sponte dismissed the complaint. Over five years later, in March 2015, Citibank again moved for an order of reference. Due to an administrative scheduling error, the motion was marked off the calendar of the Court's Centralized Motion Part without prejudice, in April 2015.

On Dec. 1, 2015, Citibank moved again for an order of reference "anticipatorily arguing that any dismissal of the complaint pursuant to CPLR 3215(c) would be unwarranted, for reasons that sought to excuse the lengthy delay in bringing the motion": "That argument placed the question of a CPLR 3215(c) dismissal squarely before [Supreme] Court. [Citibank's] moving papers made no reference to its presentment of the proposed ex parte order of reference in November 2009. The December 1, 2015 motion [] for an order of reference was unopposed."

In an order entered Feb. 10, 2016, the court denied Citibank's motion and, sua sponte, dismissed its complaint as abandoned pursuant to 3215(c) and canceled the notice of pendency for two reasons: It rejected Citibank's "good cause" argument for the lateness of its motion; and the presentation of the proposed ex parte order of reference in November 2009, which the court refused to sign, did not qualify as a "taking of proceedings" for the entry of judgment pursuant to CPLR 3215(c).

Citibank appealed. It also moved to *vacate* the February 10, 2016 order because "the presentment of the proposed ex parte order of reference in November 2009, within one year after Kerszko's default, rendered the abandonment provision of 3215(c) inapplicable." Supreme Court's order, entered January 18, 2017, denied Citibank's motion. Citibank appealed; the appeal was deemed dismissed for failure to perfect.

Dispositive and nondispositive grounds: 'Tirado' and 'Rosenblatt'. The majority reviewed and distinguished two landmark decisions from the Second Department, *Rosenblatt v. St. George Health & Racquetball Assoc.*, 119 A.D.3d 45 (2d Dep't 2014) (opinion by Leventhal, J.), and *Tirado v. Miller*, 75 A.D.3d 153 (2d Dep't 2010) (opinion by Dillon, J.), to establish that the sua sponte dismissal of the complaint was, indeed, appealable:

> "*Tirado* addressed the propriety of the Supreme Court's granting of a motion to quash a subpoena and for a protective order after the filing of a note of issue for reasons that were not argued by the parties in their papers but raised sua sponte by the court.

***

> [S]ince the Supreme Court's sua sponte reasoning for denying late discovery *was not dispositive to the action*, the court had the latitude to employ reasoning not argued by the parties, but which resolved the very branch of the motion that it was asked by the parties to decide [at 154].
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> *Rosenblatt* addressed the denial of a motion for summary judgment where Supreme Court sua sponte raised issues affecting the admissibility of the deposition transcripts proffered by the movant.
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> ***
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> Comparatively, *Rosenblatt* [held] that the Supreme Court's sua sponte reasoning, finding deposition transcripts inadmissible *for summary judgment purposes*, which had not been argued by any of the parties among other summary judgment issues, was inappropriate because, unlike *Tirado*, the motion [] was *dispositive to the action*."

'Tirado'. The facts in *Tirado* and *Rosenblatt* are instructive. The events in *Tirado* are summarized in *Rosenblatt.* In *Tirado*, plaintiff sued for damages for personal injuries against landowners following a trip-and-fall. Defendants were insured under a homeowner's policy by a nonparty insurance company. Plaintiff served a subpoena duces tecum and ad testificandum upon the insurance company seeking portions of the company's claim file and a deposition of a claim adjuster.

Defendants and the insurer moved to quash the subpoena and for a protective order as to the claim file and the requested deposition: The information sought by plaintiff was privileged as attorney work product and as material prepared in anticipation of litigation, and the information sought was not relevant or material to the issues of the litigation.

Supreme Court granted the motion on the ground that post-note-of-issue discovery in the form of a nonparty deposition was not permitted. Plaintiff appealed, asserting that the Supreme Court was without authority to decide the motion upon a ground that was not raised in the parties' submissions and upon which the plaintiff had no opportunity to be heard.

The Appellate Division affirmed on the grounds argued by plaintiff but noted: "*[A] court may decide a nondispositive discovery motion upon grounds other than those argued by the parties in their submissions where the court's grant or denial of relief is confined to the specific family of relief sought in the motion*. Significant to the determination was that the notice of motion of defendant and the insurer contained a general prayer for relief clause. Furthermore, the "critical distinction between sua sponte relief not requested by any party, and sua sponte reasoning in granting or denying nondispositive discovery relief that has been requested by a party" (id. at 160).

Importantly, Supreme Court had not "granted any unrequested relief, but rather, granted the specific relief sought by defendants and Travelers in their motion of quashing plaintiff's subpoena and, in effect, granting a protective order." Plaintiff's appeal was anchored on

Supreme Court's determination of the motion on a ground "unrelated to the privilege and relevance issues briefed by the parties": "In rendering decisions on motions, trial courts are not necessarily limited by the specific arguments raised by parties in their submissions ... A court typically lacks the jurisdiction to grant relief that is not requested in the moving papers."

With the admonition that trial courts "exercise caution in issuing nondispositive relief that is outside the scope of what is requested in a motion," *Tirado* underscored: "No statute within the CPLR generally, or article 31 specifically, restricts a trial court's reasoning on any discovery issue only to arguments specifically set forth by the parties, beyond the general notice requirements of CPLR 2214(b). *The reasoning of the court does not have dispositive import to this action, unlike a court's dismissal of a complaint.*"

Tirado's value extends beyond its holding in that it generously offers instances where courts may and may not grant sua sponte relief. Where sua sponte relief may not be granted:

> [T]here are circumstances, which we acknowledge, where trial courts may not order certain forms of relief without giving the parties an opportunity to be heard on the specifics. These circumstances are typically identified in statutes. For instance, a court may not treat a motion to dismiss as one for summary judgment without giving the parties adequate notice of its intention to do so (CPLR 3211[c]; *Mihlovan v. Grozavu*, 72 N.Y.2d 506, 507; *Brabender v. Incorporated Vil. of Northport*, 222 A.D.2d 477, 478; *Matter of Ward v. Bennett*, 214 A.D.2d 741, 742-743). Moreover, sua sponte orders are not permitted under many circumstances, including the dismissal of complaints on the ground of forum non conveniens under CPLR 327(a) (*VSL Corp. v. Dunes Hotels & Casinos*, 70 N.Y.2d 948, 949), the appointment of a temporary receiver under CPLR 6401(a) (*Natoli v. Milazzo*, 35 A.D.3d 823), the recall and vacatur of a court's own order or judgment except under the special circumstances set forth in CPLR 5019(a) (*Adams v. Fellingham*, 52 A.D.3d 443, 444; *Osamwonyi v. Grigorian*, 220 A.D.2d 400, 401), the appointment of a private attorney discovery referee under CPLR 3104(b) (*Ploski v. Riverwood Owners Corp.*, 255 A.D.2d 24, 27-28; also *Llorente v. City of New York*, 60 A.D.3d 1003, 1004), the imposition of monetary sanctions for frivolous conduct under 22 NYCRR 130-1.1 (*Walker v. Weinstock*, 213 A.D.2d 631, *Breslaw v. Breslaw*, 209 A.D.2d 662, 662-663), granting leave to add additional parties to an action under CPLR 3025(b) (accord *LaSalle Bank Natl. Assn. v. Ahearn*, 59 A.D.3d 911, 912), changing venue under CPLR 511 (*Fisher v. Finnegan-Curtis*, 8 A.D.3d 527, 528; *Bank of N.Y. v. Elance, Inc.*, 309 A.D.2d 725, 725-26), modifying an in-court stipulation of parties enforceable under CPLR 2104 (*Dwyer v. De La Torre*, 252 A.D.2d 695, 696), consolidating related actions under CPLR 602(a) (*Lazich v. Vittoria & Parker*, 196 A.D.2d 526, 530; *New York Annual Conference of Methodist Church v. Nam Un Cho*, 156 A.D.2d 511, 514), or declaring a mistrial under CPLR 4402 (*Muka v. Cohn*, 146 A.D.2d 826, 827).

Trial courts may act sua sponte when:

> By contrast, circumstances where a trial court may act sua sponte include a court reconsidering its own prior interlocutory orders during the pendency of an action under CPLR 5019(a) (*Liss v. Trans Auto Sys.*, 68 N.Y.2d 15, 20; *Kleinser v. Astarita*, 61 A.D.3d 597), issuing a so-called "90 day notice" to a party neglecting its prosecution of an action under CPLR 3216(a) and dismissing the action upon the failure to file a note of issue (*Vinikour v. Jamaica Hosp.*, 2 A.D.3d 518), appointing a receiver of matrimonial property (*Trezza v. Trezza*, 32 A.D.3d 1016, 1017; *Stern v. Stern*, 282 A.D.2d 667, 668), issuing Family Court orders of protection under Family Court Act §656 (*Matter of Bronson v. Bronson*, 23 A.D.3d 932, 933; *Matter of Morse v. Brown*, 298 A.D.2d 656, 657), ordering an accounting in an estate proceeding under SCPA 2205(1) (*Matter of Morrison*, 268 A.D.2d 435, 436), and taking judicial notice of certain facts or of the public law of sister states (*Matter of Meyer*, 93 Misc.2d 1051, 1055).
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> ... The telltale sign of the difference[s], for many but not all circumstances, is the enabling language of the relevant statutory provision pursuant to which the court acts.

'Rosenblatt': *Rosenblatt* involved a motion for summary judgment, dispositive relief. St. George Health and Racquetball Associates, doing business as Eastern Athletic Club (Eastern), operated a fitness center. Plaintiff, 72 years old, attended a body sculpting class wherein the instructor gave her an exercise ball to sit on and use. Plaintiff fell off the ball and sustained injuries.

Although Eastern had complied with CPLR 3116(a), Supreme Court, sua sponte, denied Eastern's motion for summary judgment on the ground that plaintiff's uncertified deposition transcript was inadmissible pursuant to CPLR 3116(b). The Second Department reversed holding that plaintiff's unsigned transcript had no effect on its inadmissibility because plaintiff did not challenge the accuracy of her transcript. Notwithstanding Eastern's compliance with CPLR 3116(a), Supreme Court determined that plaintiff's deposition transcript was inadmissible because it was uncertified (CPLR 3116(b)). However, in. In opposition to Eastern's motion for summary judgment, plaintiff argued only that her transcript was inadmissible pursuant to CPLR 3116(a) because it was unsigned and "unverified," and made no reference to the certification requirement of CPLR 3116(b).

The Second Department emphasized that "a certification and a verification are not synonymous and, therefore, plaintiff's assertion that her deposition transcript was unverified was not equivalent to a claim that her transcript was uncertified." It was, therefore, error for Supreme Court to, sua sponte, rule that plaintiff's EBT transcript was inadmissible on the ground of absence of certification, pursuant to CPLR 3116(b), without granting Eastern any opportunity to correct the defect.

"It is a fundamental precept that '[a] motion for summary judgment will not be granted if it depends on proof that would be inadmissible at the trial under some exclusionary rule of evidence' ... A court, however, is generally limited to the issues or defenses that are the

subject of the motion (*Dunham v. Hilco Constr. Co.*, 89 N.Y.2d 425, 429 ... *Quizhpe v. Luvin Constr.*, 70 A.D.3d 912, 914 [Supreme Court erred in essentially searching the record and awarding relief based upon arguments that were not raised]; *Baseball Off. of Commr. v. Marsh & McLennan*, 295 A.D.2d 73, 82 [a motion for summary judgment on one claim or defense does not provide a basis for searching the record and awarding summary judgment on an unrelated claim or defense ...]"

Supreme Court thus improperly denied Eastern's motion for summary judgment on a ground that the parties did not litigate; they had no opportunity to address the issue relating to the certification of plaintiff's EBT transcript, which Supreme Court relied upon in denying Eastern's dispositive motion.

"The lack of notice and opportunity to be heard implicates the fundamental issue of fairness that is the cornerstone of due process. It is significant that, in *Misicki v. Caradonna*, 12 N.Y.3d 511, 519, the Court of Appeals cautioned the judiciary that '[w]e are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made.'"

Notably, plaintiff's EBT transcript recited that she had been duly sworn: "in civil cases, "inadmissible hearsay admitted without objection may be considered and given such probative value as, under the circumstances, it may possess ... (*Matter of Findlay*, 253 N.Y. 1, 11 ...)"

"Had plaintiff argued in opposition to Eastern's motion that her deposition transcript was inadmissible because it was uncertified, Eastern could have submitted a certification in its reply papers and, if the plaintiff were not prejudiced, the Supreme Court may have considered it (CPLR 2001 ...). Eastern's failure to submit to the Supreme Court a certified copy of plaintiff's deposition was an irregularity and, as no substantial right of a party was prejudiced, the court should have ignored the defect."

The majority underscored that its ruling was not to be construed that "a court may never examine the admissibility of the proof submitted on a motion for summary judgment"; that if a court determines that a key piece of evidence is inadmissible, it should, "in the interest of fairness and judicial economy," call the parties' attention to the defect, and give the movant an opportunity to correct it, rather than deny the motion outright. Plaintiff's uncertified EBT transcript amounted to only an irregularity, which should have been disregarded by Supreme Court and the motion resolved on the merits.

In his Practice Commentaries, C3212:21, Justice Dillon offers additional guidance: "The role of a judge is not to step into the shoes of an attorney and self-identify a non-argued issue or objection, and then decide the motion on the strength of the judge's own brilliant issue-spotting (*Midfirst Bank v. Agho*, 121 A.D.3d 343 (2d Dep't. 2014) (opinion by Dillon, J.))."

Part II continues with: The reasoning in *Kerszko*; Supreme Court's ruling was self-preserved; "taking proceedings for the entry of judgment"; plaintiff's intent; the breadth of 3215(c); it is the inferable intent of the mortgagor's application that counts; a court's rejection based on "a

technicality is irrelevant"; the *Bray v. Cox* doctrine; Citibank's motion denominated as one to vacate the Feb. 10, 2016 order was actually a motion for leave to reargue its unopposed motion for an order of reference; "the distinction between a motion to vacate and a motion for leave to reargue is not esoteric"; post-*Kerszko* thoughts:

- "An appellate court may decide a case solely with reference to the arguments actually made by the party"; an appellate court may not "winkle out" "a distinct ground" on its own;
- The Appellate Division is neither bound by nor limited to the legal theories proffered by parties but rather retains independent power to identify and apply the proper *construction* of governing law;
- The Appellate Division is neither bound by nor limited to the legal theories proffered by parties but rather retains independent power to identify and apply the proper construction of governing law;
- The Appellate Division may *affirm* on theories and grounds other than those asserted by nisi prius or argued by parties; and
- Might *Kerszko* have taken judicial notice of the court generated record that the appeal was dismissed without informing the parties?

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The majority analogized *Kreszko* to *Rosenblatt* in that Supreme Court, in *Kreszko*, applied a 3215(c) reasoning never argued by either party, to decide a 3215(c) motion just as in *Rosenblatt*, where the court employed reasoning under CPLR 3212, which was never argued by the parties, to decide a dispositive 3212 summary judgment motion.

Pursuant to either *Rosenblatt* or *Tirado*, the reasoning behind the sua sponte dismissal of Citibank's complaint self-preserved the issues for appellate review because it was pursuant to the same CPLR section within which Citibank's motion was based *and* was dispositive to the action:

"It is only where a court acts wholly outside the parameters of the CPLR basis of a noticed motion, unlike here, where a sua sponte order or ruling is not subject to appeal as of right (CPLR 5701(a][2][v], which specifically confers the right to appeal from orders arising from noticed motions that affect a substantial right). Citibank's noticed motion directly implicated CPLR 3215 which it actually argued in its papers, and resulted in an appealable order, as that order affected the most substantial right of all—the dismissal of its complaint (... *Rosenblatt*)."

The Supreme Court's sua sponte order was unlike the sua sponte order in *Sholes v. Meagher*, 100 N.Y.2d 333 (2003), which had not been the product of a noticed motion.

Furthermore, since Citibank's motion was dispositive in nature, *Rosenblatt*, and not *Tirado*, controlled the appeal.

Supreme Court's ruling was self-preserved. Moving forward from the analysis that Supreme Court's reasoning regarding the dismissal of the complaint was self-preserved and appealable under *Rosenblatt*, the majority reasoned that Citibank's subsequent motion "to correct the court was necessarily in the nature of reargument (§2221(d)) rather than vacatur (§5015)." The significance of this difference became relevant during the majority's discussion of the *Bray v. Cox* Doctrine, below.

'Taking a proceeding for the entry of judgment', plaintiff's intent governs. Citibank's ex parte order to show cause, which Supreme Court refused to sign, qualified as a "taking of proceedings for the entry of judgment" within one year pursuant to CPLR 3215(c), which section provides, in pertinent part: "If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court *shall* [mandatory language] not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed."

The one-year begins not from the commencement of the action but from when the defaulting party's answer or responsive motion becomes due, measured from when service is completed. The one-year deadline is tolled in residential mortgage foreclosure actions during the pendency of mandatory CPLR 3408 settlement conferences: "the one-year period may potentially be many weeks, and perhaps months, longer than a year after default, depending on the circumstances of the action. The one-year period includes any tolling occasioned by CPLR 3408."

The statute also provides that mandatory dismissal is subject to the exception where "sufficient cause is shown" why the complaint should not be dismissed, which is satisfied by a reasonable excuse for the delay in 'taking proceedings' for the entry of judgment within one year of the default and of a potentially meritorious claim. The presentment of a proposed order of reference during the year is deemed a 'taking of proceedings.' " "Any delays occasioned in the prosecution of the action beyond that year are irrelevant to 3215(c)."

The breadth of 3215(c). Citibank's one-year window had closed in or about April 2010, not including any toll pursuant to the CPLR-3408 settlement conference. Citibank presented its proposed ex parte order of reference in November 2009, months before the one-year expiration. Applying principles of statutory construction and decisional authority regarding the intent of the mortgagee, the majority emphasized the breadth of the "unique" term "take proceedings," which appears nowhere else in the CPLR:

> "If the legislature had intended for the taking of proceedings to strictly require the 'filing' or the 'service' of a motion or order to show cause, it could have easily and cleanly written such language into the statute but did not do so. Indeed, it would

> have made no sense for the legislature to define the taking of proceedings as the 'service' of a motion (CPLR 2211), as motions for leave to enter a default judgment in residential mortgage foreclosure actions pursuant to RPAPL 1321(1) may be made ex parte ... Similarly, if the legislature had intended to restrict 'taking proceedings' to formal motion practice only, it could have said so as well. To take proceedings is a broader and more encompassing concept than a more tightly defined 'filing' or 'service' of a motion for leave to enter a default judgment or other type of motion."

The majority noted that the Second Department "has consistently held" that there is no abandonment of an action by a plaintiff if, within one year after defendant's default, plaintiff has manifested an intent not to abandon the case, but "took steps" to seek judgment; actually obtaining a judgment within one year after defendant's default is not necessary to avoid a 3215(c) dismissal of plaintiff's action. Proceedings are deemed taken even if plaintiff's timely motion for an order of reference is later withdrawn. Nor does the denial of a plaintiff's motion for leave to enter a default judgment have any adverse consequences.

The mortgagor's inferable intent from the application counts, judicial rejection based on 'a technicality is irrelevant'. Citibank presented a proposed ex parte order of reference within the one-year statutory period. Neither the form of the application nor the result following its submission to the court matters—even if it is rejected on a technicality. The simple act of presentment sufficiently established *an inference* of Citibank's intent not to abandon its claim. Supreme Court was, therefore, without authority to sua sponte dismiss Citibank's complaint. Similarly, consistent with the First Department, a court's refusal to sign an order to show cause for leave to enter a default judgment is also irrelevant – plaintiff's intent will have been established.

The 'Bray v. Cox' doctrine, judicial notice. The doctrine of *Bray v. Cox*, 38 N.Y.2d 350 (1976) precludes a party from raising any issue in a subsequent appeal where the first appeal was dismissed for failure to prosecute (CPLR 5501(a)(1]; *Rubeo v. National Grange Mut. Ins. Co.*, 93 N.Y.2d 750 (1999)). While the dismissal is deemed on the merits, a court may "exercise discretion to review th[ose] issue[s on the [subsequent] appeal." *Budoff v. City of New York*, 164 A.D.3d 737 (2d Dep't 2018].

The majority keenly mined a procedural nugget based on *Kerszko*'s procedural history in Supreme Court.

First, the record on appeal made no mention that after Supreme Court dismissed the complaint from the order on appeal, entered Feb. 10, 2016, *Citibank made a motion to 'vacate' that order.* The denial of that motion, entered Jan. 18, 2017, was not on appeal. Although a notice of appeal was filed as to the order entered Jan. 18, 2017, the appeal was deemed dismissed for failure to perfect. None of those additional facts were part of [the] appellate record. The majority added: "While these facts were outside of the record, they are mentioned, reluctantly, only because they are raised by our dissenting colleagues. Nevertheless, the instant appeal is not barred by application of the *Bray v. Cox* doctrine."

For the dismissal of the appeal from the order entered Jan. 18, 2017, which was dehors the record, to be considered, it was necessary for the majority to take judicial notice of it. CPLR 4511, which governs judicial notice, identifies when judicial notice may be taken sua sponte and when notice to the parties is required for an opportunity to be heard.

The majority observed that any dismissal of Citibank's appeal from the Jan. 18, 2017 order is reflected by a court-generated document and that the Second Department has held that "*a court should not take judicial notice of any court-generated document without affording the parties an opportunity to be heard on whether notice should be taken, and, if so, the significance of its content*" (*Caffrey v. North Arrow Abstract & Settlement Servs.*, 160 A.D.3d 121, 127 (emphasis in original).

The majority further concluded, that even if judicial notice were to taken of the dismissal of the appeal from the order entered January 18, 2017, "the current appeal is not subject to dismissal under *Bray v. Cox*."

Citibank's motion 'to vacate' the Feb. 10, 2016 order was actually a motion for leave to reargue its unopposed motion for an order of reference. The designation assigned to a motion by an attorney is meaningless; critical is what "the motion actually is in substance." After Supreme Court issued the order entered Feb. 10, 2016, dismissing the complaint, Citibank moved "*to vacate' the February 10, 2016 order, [which] was actually a motion seeking leave to reargue its unopposed motion [] for an order of reference. The denial of a motion for leave to reargue is not appealable*."

> "[S]pecifically, the order that is not on appeal, entered January 18, 2017 ... summarized Citibank's argument, "that Citibank did not abandon the action, and CPLR 3215(c) is inapplicable, because it initiated the preliminary step in taking proceedings for the entry of a default judgment within one year of the default by submitting a proposed ex parte order of reference in 2009." Supreme Court denied Citibank's motion: "[t]his [c]ourt refers counsel to its [Feb. 10, 2016] order in this regard." Based on the court's description of the moving papers, it is clear that Citibank's argument, for all intents and purposes, was that the court had earlier misapprehended the relevant facts and misapplied controlling principles of law in directing dismissal of the action pursuant to CPLR 3215(c)—an argument that is quintessentially in the nature of a CPLR 2221(d) motion for leave to reargue. The court's terse referral of Citibank to the reasoning contained in its earlier order is an unquestionable denial of leave to reargue."

'Kerszko': 'The distinction between a motion to vacate and a motion for leave to reargue is not esoteric'. The majority stressed that "*the distinction between a motion to vacate and a motion for leave to reargue is not esoteric, but important, because orders denying motions for leave to reargue are not appealable*":

> "It is logical, *no Bray v. Cox issue can arise from the dismissal of an appeal where the related order was not itself appealable in the first instance* ... Citibank could not have obtained in the prior appeal any appellate review of the Court's [] dismissal of the

> complaint because the order denying a motion for leave to reargue, from which that particular appeal arose, is not appealable.
>
> ... This is all the more reason that it is inappropriate for our Court to take judicial notice of the dismissal of the prior appeal, where Citibank was deprived of its due process right to even be heard on the question of whether we should."

Conclusion. The majority reversed the order on the law and granted Citibank's motion for an order of reference.

Post-'Kerszko' thoughts. "An appellate court may decide a case solely with reference to the arguments actually made by the party"; an appellate court may not "winkle out" "a distinct ground" on its own.

This segment is included due to its importance in the comprehension of appellate determinations. It was not inserted after the discussion on *Rosenblatt* and *Tirado* so as not to disrupt the analytical flow of the case.

Misicki v. Caradonna, 12 N.Y.3d 511, 519-20 (2009): "For us now to decide this appeal on a distinct ground that we winkled out wholly on our own would pose an obvious problem of fair play. We are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made. ***

While appellate judges surely do not "'sit as automatons'" (Smith, J., dissenting at 525, 882 N.Y.S.2d at 385, quoting Karger §17:1 ...), they are not freelance lawyers either. Our system depends in large part on adversary presentation; our role in that system "is best accomplished when [we] determine[] legal issues of statewide significance that have first been considered by both the trial and the intermediate appellate court" (*People v. Hawkins,* 11 N.Y.3d 484, 493 ... (2008, Kaye, Chief Judge.))."

See also *Deutsche Bank Natl. Tr. Co. Tr. for Harborview Mtge. Loan Tr. v Flagstar Capital Markets*, 32 N.Y.3d 139 (2018).

Kaufman v. Kaufman, 189 A.D.3d 31, 69 (2d Dep't 2020): "It would not be appropriate for us to decide this appeal on a distinct ground that we winkled out wholly on our own, without affording the parties notice and an opportunity to be heard."

Nationstar Mtge. v. Einhorn, 185 A.D.3d 945 (2d Dep't 2020): "Defendant moved [] to vacate the judgment [of foreclosure and sale] and [] to dismiss the complaint for lack of personal jurisdiction. Supreme Court denied his motion.

The Supreme Court should not have denied defendant's motion on the ground that [he] "is no longer the owner of the property and cannot raise jurisdictional defenses." Since that ground was never raised by the parties, defendant had no opportunity to address the issue, and this "lack of notice and opportunity to be heard implicates the fundamental issue of fairness that is the cornerstone of due process."

Daimler Chrysler Ins. Co. v. Keller, 164 A.D.3d 1209, 1210 (2d Dep't 2018): "The Supreme Court erred in essentially searching the record and granting relief based upon arguments that were not raised ... A motion for summary judgment on one claim or defense does not provide a basis for searching the record and granting summary judgment on an unrelated claim or defense."

Modugno v. Bovis Lend Lease Interiors, 184 A.D.3d 820, 821-22 (2d Dep't 2020): "Supreme Court should not have denied those branches of [plaintiff's] motion on the ground that the deposition transcripts submitted in support of the motion were inadmissible, as plaintiff did not raise this issue in opposition to the motion and the court determined it sua sponte."

See also *B.Z. Chiropractic, P.C. v. Allstate Ins. Co.*, 197 A.D.3d 144 (2d Dep't 2021); *Matter of Cassini*, 182 A.D.3d 13 (2d Dep't 2020).

The Appellate Division is neither bound by nor limited to the legal theories proffered by parties but rather retains independent power to identify and apply the proper construction of governing law

Knavel v. West Seneca Cent. Sch. Dist., 149 A.D.3d 1614 (4th Dep't 2017): "The Appellate Division is not bound by an erroneous concession of counsel or the parties with respect to a legal principle and such concession does not ... relieve [the Appellate Division] from the performance of [its] judicial function and does not require [it] to adopt the proposal urged upon [it]." *People v. Berrios*, 28 N.Y.2d 361.

"[The Appellate Division] is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law" (*Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99). We simply cannot turn a blind eye to the unsubstantiated and patently erroneous legal conclusion offered by the parties on this record (generally *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 77).

The Appellate Division may *affirm* on theories and grounds other than those asserted by nisi prius or argued by parties.

State of New York v. Peerless Ins. Co., 117 A.D.2d 370, 373 (3d Dep't 1986): "[T]his court may affirm on a theory different from the one previously argued or relied upon by Special Term."

Falk v. Falk, 74 A.D.3d 1841 (4th Dep't 2010): "We affirm the order denying defendant's motion to vacate the economic provisions of the judgment of divorce; our reasoning differs from that of Supreme Court. The judgment of divorce incorporated but did not merge the stipulation and, because the motion sought to revise the stipulation, the court erred in denying the motion on the merits. The court instead should have denied the motion on the ground that 'a motion is not the proper vehicle for challenging a [stipulation] incorporated but not merged in [] a divorce judgment, and defendant should have commenced a plenary action seeking rescission or reformation of the stipulation."

Sanders v. Grenadier Realty, 102 A.D.3d 460 (1st Dep't 2013): Plaintiffs' state law claims were properly dismissed, but not for the reason stated by the motion court, i.e., res judicata. [T]hose claims were barred by [] collateral estoppel, since in dismissing plaintiffs' federal claims, the Federal District Court addressed issues identical to those raised by plaintiffs' state claims, despite having declined to exercise jurisdiction over the state claims.

'Caffrey' notwithstanding, could 'Kerszko' have taken judicial notice of the court generated record that the appeal was dismissed without informing the parties?

A court may take judicial notice of its own records and of other courts:

Casson v. Casson, 107 A.D.2d 342, 344 (1st Dep't 1985): "It is hornbook law that a court may take judicial notice of its own records." See also *People v. Comfort*, 278 A.D.2d 872, 873 (4th Dep't 2000).

MJD Const. v. Woodstock Lawn & Home Maintenance, 293 A.D.2d 516, 517 (2d Dep't 2002): "Supreme Court was entitled to take judicial notice of the record and judgment in the related bankruptcy proceeding."

Grady v. Utica Mut. Ins. Co., 69 A.D.2d 668, 671 n.1 (2d Dep't 1979): "We have examined the papers in the foreclosure action on file in the office of the County Clerk of Queens County [] and we take judicial notice of the contents."

Tron v. Thime, 201 Misc. 88, 89 (Sup. Ct., Westchester Co. 1951), aff'd, 279 A.D. 917 (2d Dep't 1952): "[Plaintiff's] record on the appeal from the judgment [] should [] have already been on file in the Westchester County Clerk's office [] as should have been all the papers in the action. The filed record book was not submitted to the court, together with the papers on the motion, but a copy was submitted. Technically, of course, the entire record in the clerk's office is available to the court on any motion since the court has control of its own records and may look into them at any time in the interest of justice."

Musco v. Pares, 2 A.D.2d 689 (2d Dep't 1956): "[S]pecial Term had the undoubted power to consult the records of the court ... (citing *Tron* ...)."

Plainly, there can be nothing more authentic of a court's own record than a computer generated document from its own data base.

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