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ANALYSIS

Noncompliance with CPLR 2215: Is Denied Relief Appealable?

May a motion court grant relief to a cross movant who requested relief only in its opposition papers to a motion without having filed the formal notice of cross motion prescribed in CPLR 2215? If the motion court denies the sought relief, is that denial appealable as of right, by leave?

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Civil Procedure

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May a motion court grant relief to a cross movant who requested relief only in its opposition papers to a motion without having filed the formal notice of cross motion prescribed in CPLR 2215? If the motion court denies the sought relief, is that denial appealable as of right, by leave?

This question may seem trivial in light of case law that “[t]he failure to give proper notice of a motion deprives the court of jurisdiction to entertain the motion and renders the resulting order void,” *Citimortgage v. Reese*, 162 AD3d 847, 848 (2d Dept 2018); *Amaral v. Smithtown News*, 172 AD3d 1287 [2d Dept 2019] (the failure to provide proper notice for motions “is a jurisdictional defect that deprives the court of the authority to entertain a motion for leave to enter a default judgment”); “this well-settled rule [of notice requirement] ensures that the opposing party has an opportunity to respond with admissible evidence and pertinent legal argument and precludes appellate consideration of issues ‘if proof might have been offered to refute them had they been presented in the [trial] court.’” *Arthur Brundage v. Morris*, 174 AD3d 1088 [3d Dept 2019].

However, the permutation of answers will surprise many.

CPLR 5701

CPLR 5701(a)(2) provides that an order is appealable as of right only if “the motion it decided was made upon notice.” CPLR 5701(a)(3) allows appeals by permission “from any order which is not appealable as of right”:

“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.”

Parenthetically, although the second part of 5701(a)(3) states that permission may be granted by “a justice of the Appellate Division,” a single justice, internal rules in every department preclude such an event; permission must be granted by a full panel.

CPLR 2215, Notice of Cross Motion

CPLR 2215 provides that a party seeking affirmative relief against the moving party must make a proper demand “pursuant to CPLR 2214(b) [and] may serve upon the moving party a notice of cross-motion demanding relief, with or without supporting papers.” “[T]he most reasonable interpretation of [CPLR 2215] is that a party seeking relief in connection with another party’s motion is, as a general rule, required to do so by way of a cross motion, *at least to have a right that the request be determined on the merits.*” *Fried v. Jacob Holding*, 110 AD3d 56, 64-65 [2d Dept 2013] (emphasis provided).

“The notice of cross-motion should conform essentially to the requirements of an original notice of motion [CPLR 2214(a)], except that it sets no different time of return. CPLR 2214(a) provides that 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.’ ” Patrick M. Connors, Practice Commentaries, C2215:1D. A notice of cross motion must also “sufficiently specify the relief sought, against whom it was sought, and the grounds therefor (CPLR 2214[a]).” Connors, C2215:1D. “The party making a cross-motion can rely on the papers submitted with the main motion, assuming they are sufficient, to support the relief sought.” Connors, C2215:1.

In essence, irrespective of whether supporting papers are submitted to the court, there must be a notice of cross motion. Or must there be?

Court of Appeals, Appellate Courts Liberalized CPLR 2215 To Allow Motion Court To Consider Relief Sought in Opposition Papers Unaccompanied by Formal Notice

The Court of Appeals and at least three appellate courts have liberalized CPLR 2215 to allow motion courts, in their discretion, to grant affirmative relief to the opponent notwithstanding the absence of the formal cross motion:

Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co., 23 N.Y.3d 129, 134 [2014]:

“During oral argument on another motion, Supreme Court suggested that, if the forum non conveniens argument had merit, it would require dismissal of the whole case. The court directed the parties to brief and argue the forum non conveniens issue, which they did.” The Court affirmed on the merits holding that “though no party formally moved [for that relief] the issue was briefed and argued at Supreme Court.” The Court emphasized the absence of a “risk of unfairness” because both “parties [had] a full opportunity to address the issue.”

In *Kelly G. v Circe H.*, 178 A.D.3d 533 [1st Dept 2019], the First Department, citing *Mashreqbank*, held that petitioner’s argument that the court’s articulation of 11 estoppel factors to be considered at the child custody trial was appealable “although no formal motion” had been made. Critically, as in *Mashreqbank*, “the issue was argued and briefed before the court, with counsel submitting legal memoranda regarding the appropriate factors. Under these circumstances, we determine that the estoppel factors were not issued by sua sponte order.”

In *Smulczeski v. Smulczeski*, 128 A.D.3d 671,672 [2d Dep’t 2015], the Second Department, on its own motion, treated appellant’s notice of appeal as an application for leave to appeal, and granted leave, citing (CPLR 5701[c]):

“To the extent the Supreme Court concluded that it lacked discretion to consider the plaintiff’s request for affirmative relief, which was not presented in a proper cross motion pursuant to CPLR 2215, its conclusion was erroneous. Although “a party seeking relief in connection with another party’s motion is, as a general rule, required to do so by way of a cross motion,” courts “retain discretion to entertain requests for affirmative relief that do not meet the requirements of CPLR 2215” (Fried v Jacob Holding, Inc., 110 AD3d 56, 64, 65 [2013]).”

In *Komanicky v. Contractor*, 146 AD3d 1042 [3d Dept 2017], the Third Department considered the appeal notwithstanding that plaintiff's request had not been sought by way of a cross motion on notice; also, *Arthur Brundage v. Morris*, 174 AD3d 1088, 1089 [3d Dept 2019] ("In support of its motion, plaintiff argued, among other things, that the defamation counterclaim must be dismissed because it failed to set forth the particular words alleged to be defamatory as required by CPLR 3016 (a).

Although Supreme Court initially noted that defendant's failure to specifically oppose the motion seeking dismissal of the defamation counterclaim may have been a sufficient basis to warrant dismissal, it proceeded to consider that issue on the merits. Thus, notwithstanding defendant's lack of opposition, the issue was raised in and determined by Supreme Court."); *Town of Brookhaven v. MMCCAS Holdings*, 137 A.D.3d 1258, 1258–59, 29 N.Y.S.3d 389 [2d Dep't 2016].

'Fried v. Jacob Holding': 'Fareful, Forthright Practice, Judicial Economy, Opportunity To [Respond] to the Request,' Appeals

In *Fried v. Jacob Holding*, 110 A.D.3d 56 [2d Dept 2013], the Second Department noted that its decisions had been "unsettled" regarding the issue whether the Supreme Court may consider an application made without the formal notice of a cross motion [at 58].

Fried held: "[C]ourts retain discretion to entertain requests for affirmative relief that do not meet the requirements of CPLR 2215" [at 65]:

"As with most matters addressed to a court's discretion, more than one factor is relevant, including the need to encourage careful, forthright practice. Other relevant factors include the interrelatedness of the relief requested by the nonmoving party and the relief requested in the main motion . . . the prominence in the opposition papers of the affirmative request for relief and the movant's opportunity to address that request . . . and the interest of judicial economy (emphasis provided)."

Also, *Silvering v. Sunrise Family Medical, P.C.*, 161 AD3d 1021, 1022 [2d Dept 2018].

The relaxation of CPLR 2215 notwithstanding, *Fried* was simultaneously generous and admonishing. On the one hand, it affirmed that Supreme Court may discretionarily grant affirmative relief notwithstanding the absence of a formal notice of cross motion, on the other, it firmly stressed the "important distinction" as it implicates appellate review:

"[A] party in compliance with CPLR 2215 is entitled to have its cross motion considered [whereas] a party not in compliance with the statute must hope that the court opts, in the exercise of its discretion, to entertain the request" [at 65].

"Another consideration for careful practitioners is the availability of appellate review. 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] ...). 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])" [at 65].

First, Second Departments Held Supreme Court Should Have Granted Relief Despite Absence of Formal Notice of Cross Motion

The First and Second Departments have gone farther still ruling in stronger language, that "the IAS court should have considered the merits of the opposition to plaintiff's motion."

Elbayoumi v. TD Bank, N.A., 185 A.D.3d 786 [2d Dept 2020]:

“Contrary to the plaintiff’s contention, the Supreme Court providently exercised its discretion in entertaining the bank’s application for affirmative relief, even though the bank did not meet the requirements of CPLR 2215 (Fried v Jacob Holding, Inc., 110 AD3d 56, 65). Furthermore, the court should have granted that branch of the bank’s application which was for summary judgment dismissing the cause of action alleging negligence insofar as asserted against it.”

Also, *Baron v. Grant*, 48 A.D.3d 608, 609 [2d Dept 2008]; *PM-OK Association v. Britz*, 256 A.D.2d 151 [1st Dept 1998].

Potential Prejudice as a Factor, Opportunity To Respond to the Request

Prejudice is a judicial concern in 2215 deficient applications. The foundation in *Mashreqbank* and in the other decisions was that each party had an opportunity to respond.

The First Department

Steinhardt Group v. Citicorp, 303 A.D.2d 326 [1st Dept 2003]:

“[N]otwithstanding that the relief in the order was sua sponte, the basis for the relief was fully litigated in the context of plaintiffs’ motion.”

Marx v. Marx, 258 A.D.2d 366, 367 [1st Dept 1999]:

“The absence of a notice of cross motion is not fatal where the opposing party ‘was fully apprised’ of the relief sought.”

National Union Fire Insurance Company of Pittsburgh, Pa. v. Mirman, 269 A.D.2d 174, 17 [1st Dept 2000]:

“In view of defendant’s opportunity to respond to plaintiff’s request [] in plaintiff’s opposition papers, plaintiff’s failure, under these circumstances, to serve a notice of cross-motion was not fatal to that relief, the arguments and documents submitted in that connection satisfied plaintiff’s burden.”

The Second Department

Rappel v. Wincoma Homeowners Association, 125 A.D.3d 833, 834 (2d Dept 2015):

“Ambrosio was aware of Wincoma’s request for relief, opposed that request, and was not otherwise prejudiced by Wincoma’s failure to serve a notice of motion.”

Fugazy v. Fugazy, 44 A.D.3d 613 [2d Dept 2007]:

Plaintiff opposed the cross motion and was not unduly prejudiced by the lack of service of a notice of cross motion.

The Third Department

Fox Wander W. Neighborhood Association v. Luther Forest Community Association, 178 A.D.2d 871 [3d Dept 1991]:

“Although CPLR 2215 [] does require that an explicit ‘notice of cross-motion’ be served with cross motion papers [], Supreme Court is not prohibited by CPLR 2215 from entertaining the motion in the absence of the explicit notice. [T]he opposing party was aware of and responded to the cross motion and the procedure was fair to the parties.”

The Fourth Department

Osterling v. Osterling, 126 A.D.2d 965 [4th Dept 1987], citing *Matter of Shanty Hollow Corp. v. Poladian*, 23 A.D.2d 132 [3d Dept 1965], affd 17 N.Y.2d 536 [1966]; upheld, based on the *absence of prejudice*, the denial of plaintiff's motion to vacate an order because of procedural irregularities:

“Although neither party served motion papers on the first motion, the order entered thereon recites that the review undertaken by the court was requested by the parties. Plaintiff does not contend that her attorney was not empowered to act on her behalf, and since counsel for both parties voluntarily appeared and argued, it was within the court’s discretionary power under CPLR 2214(c) to resolve the issues presented. Plaintiff must be deemed to have waived any claim of error arising from the informal nature of the proceedings.”

‘Beauvoir v. City of New York’

While not precisely on point regarding CPLR 2214, 2215, *Beauvoir v. City of New York*, 176 AD3d 437, 438 [1st Dept 2019] is also instructive as to the extent that the Appellate Division *may* go to help a party that has stumbled procedurally in failing to formally spell out matters in initiating papers:

As to plaintiff Beauvoir’s federal claim based on his testimony that he was subjected to a visual cavity search at the precinct following his arrest on misdemeanor charges, such claims, while not formally pled, may be entertained as they were raised before the motion court, addressed, and as such, this Court may nostra sponte conform the pleadings to the proof (CPLR 3025 [c]; O’Neill v New York Univ., 97 AD3d 199, 209 [1st Dept 2012]).

Conclusion: Appellate Courts Still Decline To Hear Appeals From Determinations Where Cross Movant Failed To Attach Formal Notice of Cross Motion

Despite the liberalization of CPLR 2215, there should be no expectation that appellate courts have evermore abandoned compliance with CPLR 2215. *Abizadeh v. Abizadeh*, 159 AD3d 856, 857 [2d Dept 2018] is such a clarion call to proper practice. In affirming “the Supreme Court[’s] provident[] exercise[] [of] discretion in denying the plaintiff’s cross motion on the ground that the plaintiff’s notice of cross motion was deficient [CPLR 2214(a); 2215],” the Appellate Division held and warned:

*CPLR 2214(a) provides that 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” ... Here, the Supreme Court providently exercised its discretion in denying the plaintiff’s cross motion on the ground that the plaintiff’s notice of cross motion was deficient (CPLR 2214[a]; 2215). The plaintiff’s notice of cross motion failed to sufficiently specify the relief sought, against whom it was sought, and the grounds therefor (CPLR 2214[a]). Although the plaintiff’s supporting papers supplied the missing information, a court is not required to comb through a litigant’s papers to find information that is required to be set forth in the notice of motion (Jud. Conf. and Chief Admin. of the Cts. of the State of N.Y., Rep. to the 1980 Legis. in Relat. to Civ. Pract. in the Cts., Rep. of Chief Admin., at 137; generally *Fried v. Jacob Holding, Inc.*, 110 A.D.3d 56, 61–62, 970 N.Y.S.2d 260).*

Kavanaugh v. Kavanaugh, 200 A.D.3d 1568, 161 N.Y.S.3d 558 (4th Dep’t 2021):

Neil’s belated attempt, following oral argument of the motions, to orally “join in” CBI’s and Kavcon’s cross motion was ineffective in light of his failure to “formally” join that cross motion in compliance with CPLR 2215 . . .

Free In Christ Pentecostal Church v. Julian, 64 A.D.3d 1153, 881 N.Y.S.2d 773 (4th Dept 2009):

Plaintiff commenced this action to recover damages based on alleged violations of its constitutional rights, and Supreme Court thereafter granted the motion of certain defendants seeking dismissal of the amended complaint against them and the cross motion of the remaining defendants seeking summary judgment dismissing the amended complaint against them. Plaintiff's papers submitted in opposition included the affidavit of plaintiff's attorney in which he sought, inter alia, to disqualify the Justice who had been assigned to the case. Although plaintiff purported to cross-move for that relief by way of its attorney's affidavit, plaintiff failed to comply with CPLR 2215 by filing a notice of cross motion. Because "the plaintiff merely requested [that] relief in its opposition papers, and did not make a motion on notice as defined in CPLR 2211, the plaintiff is not entitled to appeal as of right from the order denying its request" for disqualification of the Justice assigned to the case . . .). Additionally, we did not grant plaintiff leave to appeal pursuant to CPLR 5701(c). Thus, that part of the appeal with respect to the request for disqualification of the Justice assigned to the case must be dismissed.

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