ANALYSIS

Second Department Seeks Termination of Sua Sponte Dismissals of Complaints

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By Elliott Scheinberg | July 12, 2024 at 10:00 AM

While it is very well settled law, one might even say indelibly engraved, in all four appellate departments that “A court’s power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal,” *HSBC Bank USA, N.A. v. Taher*, 104 A.D.3d 815, 817 [2d Dept 2013], trial courts continue to disregard this stentorian directive with no end in sight. *Wells Fargo Bank, N.A. v. St. Louis*, 2024 NY Slip Op 02948 [2d Dept 2024] calls out these repeating transgressors.

In a honed, didactic decision by Justice Mark C. Dillon, the Second Department noted that the appeal presented no “novel legal question”; rather, it “presented us with an opportunity to emphasize to trial courts the due process importance of not directing the dismissal of a complaint absent notice and an opportunity to be heard, which has been occurring with unwarrantable frequency.” The court stressed that “[d]espite *the multiple dozens* of Appellate Division decisions that have repeatedly and collectively advised [trial courts] against such practice,” “our trial-level colleagues” continue to do so “without any brake applied”: the terms “sparingly” and “extraordinary circumstances” “should not be taken lightly” (emphasis provided).

The Second Department observed that it ranked disproportionately highest statewide among the appellate divisions in the high number of “improper sua sponte dismissals” in its lower courts for which reason it reviews every filing, with all due speed, no exceptions, where lower courts have so sinned:

> A survey of the case law in this area reveals that improper sua sponte dismissals have been occurring consistently from 2011 to the present, on a rolling basis, despite appellate case law defining the practice as error.” With one exception, *Kwang Bok Yi v. Open Karaoke*, 161 AD3d 971 [2d Dept 2018], “Almost no case is found where this Court has declined to review a sua sponte dismissal on the ground that it was not properly appealable, either by motion or by deeming the parties’ notice of appeal to be an application for leave to appeal”—that “all appellate courts” grant appeals from such sua sponte dismissals.
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> Of the 91 instances in the Second Department where orders have been reversed on appeal for violating this principle from 2011 onward, the bulk of them—76 of the cases—involve residential mortgage foreclosure actions. The remaining 15 cases are spread among a wide variety of other actions (e.g. *CRC Ins. Servs. v. Kullman*, 211 AD3d at 903 [breach of contract]; *Matter of Hersh*, 198 AD3d 773 [estate]; Aguilar v Feygin, 151 AD3d 798 [medical malpractice]; *Wallace v. BSD-M Realty,* 142 AD3d 701 [fraud]; Maynard v Maynard, 138 AD3d 794 [matrimonial]; *Menardy v. Gladstone Props.*, 100 AD3d 840 [personal injury]).

The court lamented that “upon remittal, parties and trial courts necessarily revert to square one, which is not in the interests of judicial economy because of the time lost and attorneys’ fees incurred in the interim.”

‘Sholes v. Meagher’: The Nonappealability of Sua Sponte Orders

In *Sholes v. Meagher*, 100 NY2d 333, 334 [2003], the trial court sua sponte imposed sanctions on counsel and her law firm to pay costs and fees for conduct the court deemed frivolous pursuant to 22 NYCRR 130, specifically:

> On the sixth day of a personal injury jury trial in Suffolk County, the trial court…announced from the bench that 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 announced it was declaring a mistrial and scheduled submissions, requiring 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.

Underscoring CPLR 5701[a][3], the Court of Appeals ruled that sua sponte orders are not appealable as of right, as they do not result from motions made on notice (CPLR 5701(a)(2).

Extraordinary circumstances and due process: “It is not the role of the court to seize upon an issue not raised by any party in a motion and to unilaterally dismiss an action on the basis of that discrete issue without providing the party whose claim is dismissed so much as notice of the issue and an opportunity for all parties to be heard on it.”

Wells Fargo elucidated that “the lack of opportunity for aggrieved parties to have been heard *on the dispositive issue* at the trial level” has been the reason why “the Second Department [has] typically grant[ed] discretionary applications for leave to appeal (CPLR 5701[c]), or relatedly, to deem notices of appeal to be applications for leave to appeal, which have been liberally granted.”

Dillon points out how various statutes of Article 22 of the CPLR include “built-in safeguards for due process, notice, and the opportunity for parties to be heard” emphasizing that “[o]ther provisions of the CPLR ensure that the dismissal of complaints comports with due process notice and the opportunity to be heard”:

> Dismissals for want of prosecution require that a 90-day notice first be served upon the recalcitrant party by registered or certified mail (§ 3216[b][3];…) or be provided in open court…and in the event that a note of issue is not filed, a motion for dismissal based upon a party’s unreasonable neglect to proceed must also be made on notice (CPLR 3216[b][3]…The striking of a party’s pleading under CPLR 3126(3) as a penalty for the willful nondisclosure of discovery, which is tantamount to the dismissal of a claim or defense, emanates from a motion made on notice…A sua sponte order striking or ‘marking off’ a post-note of issue action from a trial calendar under CPLR 3404 for a plaintiff’s failure to prosecute assumes that the nonappearing party had notice of the date of trial, and the action is automatically restored upon a motion made within one year…before a case is deemed abandoned.

Quoting its own precedent, *Misicki v. Caradonna*, 12 NY3d 511, 519 [2009], the Court of Appeals, in *Deutsche Bank National Trust Co., Trustee for Harborview Management Loan Trust v. Flagstar Capital Markets*, 32 N.Y.3d 139, 154-55 [2018], stated:

> This court generally refrains from addressing issues not argued by the parties, as we have recognized that, to do otherwise, would be unfair to the litigants, ‘who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made.’

Citing *Misicki, Wells Fargo* stated:

> The importance that courts not dismiss actions sua sponte absent extraordinary circumstances is grounded in a fundamental concept that lawyers and judges know well—that due process requires parties to be given notice and an opportunity to be heard about litigation issues…Courts are to be bastions of due process. It is not the role of the court, within the moat of that bastion, to seize upon an issue not raised by any party in a motion and to unilaterally dismiss an action on the basis of that discrete issue, without providing the party whose claim is dismissed so much as notice of the issue and an opportunity for all parties to be heard on it. The Court of Appeals has cautioned the judiciary that "[w]e are not in the business of blindsiding litigants, who expect us to decide [matters] on rationales advanced by the parties, not arguments their adversaries never made" (*Misicki v. Caradonna*, 12 NY3d 511, 519).

In his Practice Commentaries, Dillon, C3212:30 states:

> 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, 991 N.Y.S.2d 623 (2d Dept 2014] [opinion by Dillon, J.)
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> *Rosenblatt v. St. George Health and Racquetball Associates*, 119 A.D.2d 45, 984 N.Y.S.3d 401 (2d Dep't. 2014) ... involved a plaintiff who sought damages for personal injuries sustained at a gymnasium and the defendant moved for summary judgment on the ground that the plaintiff had assumed the risks. In reviewing the submissions, the trial court, on its own, determined that a transcript of deposition testimony was not admissible because inter alia it was not signed by the witness. In fact, the trial court was incorrect, as the transcript had been provided to the witness for signature, more than 60 days passed without its execution, and the transcript was deemed signed by application of CPLR 3116(a). The Second Department reversed the denial of summary judgment, finding that it was error for the trial court to sua sponte raise an evidentiary issue not raised by the opposing party. Thus, if the proponent of summary judgment provides evidence that is inadmissible at trial, the party opposing the motion is under the affirmative obligation to object to its admissibility in order to properly knock the proffered evidence out of consideration."

The Applicability of the Above Rules to the Facts in 'Wells Fargo'

The defendant, in *Wells Fargo,* moved pursuant to CPLR 3126 to impose discovery sanctions against the plaintiff or, in the alternative, pursuant to CPLR 3124 to compel the plaintiff to comply with certain discovery demands, for an extension of time to make any dispositive motions once discovery had been completed and for other and further relief. The plaintiff cross-moved pursuant to CPLR 3126 to impose discovery sanctions against the defendant, for an award of costs and attorneys' fees pursuant to 22 NYCRR 130-1.1 for frivolous conduct, and for other and further relief:

> The quintessential issues before the Supreme Court were related to the parties' discovery obligations [non-dispositive]. The scope of the court's order therefore should have been limited to issues of discovery and any spillover issues involving the note of issue and the parties' trial readiness. The court's attention should not have extended to any dispositive issue, not raised or argued by either party, regarding the viability of the plaintiff's 2016 letter purportedly de-accelerating the balance due on the note and the effect of that determination on the applicable statute of limitations (*Citibank, N.A. v. Kerszko*, 203 AD3d at 47; *Bowman v. Bowman*, 130 AD3d at 663-664; *Rosenblatt v. St. George Health & Racquetball Assoc.*, 119 AD3d at 54). By addressing and determining this issue, that it viewed to be *dispositive*, the court deprived the plaintiff of notice of the issue and an opportunity to be heard on it.

The 'General Relief Clause' and Sua Sponte Dismissal of Complaints

Wells Fargo emphasized that courts may not rely upon general relief clauses in the notice of motion— "for such other and further relief the court deems just and proper"—to justify a sua sponte dismissal of a complaint:

> The phrase ‘for such other and further relief’ “is not recognized in either the CPLR or in its pre-1962 predecessor, the Civil Practice Act. It instead appears to be an invention of the practicing bar to provide flexibility to courts in fashioning potential remedies. But the phrase has its limits. In [] 2009, this court explained that the Supreme Court may not unilaterally raise and decide issues not put forward by the parties, where doing so would grant dispositive relief against a party…Contrastingly, courts may properly rely upon a general prayers for ‘such other and further relief’ in rendering non-dispositive orders, on issues not specifically argued by parties but which fall within the family of relief contained in the notice of motion, or relief that is not unlike that which is actually sought and argued.

Extraordinary Circumstances

Wells Fargo underscored that it did “not present an extraordinary circumstance as would warrant a sua sponte dismissal of the complaint…That these issues had been previously adjudicated by a prior assigned justice of the court, in finding the existence of triable issues of fact, undermines any argument that extraordinary circumstances existed for later directing dismissal of the action on the same basis.”

Defendant Asserted the Defense of CPLR 5019(a)

Puzzlingly, the defendant contended that, “under CPLR 5019(a), the Supreme Court had the authority to ‘correct’ the prior order of the previously-assigned justice which had found issues of fact as to the validity of” of a certain letter. However, CPLR 5019(a) permits a court to do no more than to unilaterally cure any mistake, defect, or irregularity in papers, but only those “*not affecting a substantial right of a party*” (internal emphasis)”:

> The statute is intended to allow courts to correct clerical-type errors that may be contained in orders and judgments, such as mathematical errors in calculations, corrections to the statutory rate of interest, and the proper spelling of names…The statute does not permit a court to sua sponte correct perceived errors that involve new exercises of discretion or fact-finding…or that reconsider the merits of summary judge…The Supreme Court’s dismissal of the complaint here [*Wells Fargo*], in substitution of the prior justice’s order finding issues of fact for trial on the same issue, affected a substantial right of the plaintiff and therefore falls outside the ambit of CPLR 5019(a).

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