COMMENTARY

Departmental Schism Re Post-Judgment Reviewability of Sua Sponte Orders Continues

"The statute and 'Sholes' impose an onerous time-consuming process upon the aggrieved party who may be in need of immediate relief from a sua sponte order," writes Elliott Scheinberg.

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Civil Appeals

By Elliott Scheinberg | August 06, 2024 at 02:00 PM

CPLR 5701(a)(2) authorizes an appeal as of right from an order “where the motion it decided was made upon notice.” Sua sponte orders, however, are not appealable as of right. *Sholes v. Meagher*, 100 N.Y.2d 333 [2003]; CPLR 5701(a)(3). An appeal may be sought by permission (CPLR 5701(c)). 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 Dept 2008]; *Chase Home Fin. v. Kornitzer*, 139 A.D.3d 784 [2d Dept 2016]. Similarly, “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 AD2d 639 [2d Dept 1995]. In *Sholes,* the Court of Appeals expressed concern that there may be an inadequate record for appellate review.

CPLR 5701(a)(3), not the most fluidly comprehensible legislative articulation, spells out the method by which to convert a nonappealble-as-of-right sua sponte or ex parte order into an order that becomes immediately 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 and *Sholes* impose an onerous time-consuming process upon the aggrieved party who may be in need of immediate relief from a sua sponte order: (1) to make a motion to the court that issued the sua sponte or ex parte order; (2) on notice to the other party; (3) for an order vacating or modifying the sua sponte/ex parte order; and (4) in the event that the motion is denied, that order becomes directly appealble. *Sholes* [at 335].

Appellate courts statewide universally reverse all sua sponte orders that dismissed complaints from motions that only sought compliance with discovery and not dispositional relief.

An erroneous direct appeal (notice of appeal) from a sua sponte order will be treated as a motion for leave to appeal (CPLR 5701(a)(3)) and will be granted where the order is “extraordinary” such as in the case of a sua sponte dismissal of a complaint. *All Craft Fabricators v ATC Assoc.*, 153 AD3d 1159 [1st Dept 2017]; *Blake v. Blake*, 156 A.D.3d 523 [1st Dept 2017]; *HSBC Bank USA, N.A. v Taher*, 104 AD3d 815 [2d Dept 2013]; *Wells Fargo Bank, N.A. v Pabon*, 138 AD3d 1217 [3d Dept 2016]; *Midfirst Bank v Eddy*, 125 AD3d 1458 [4th Dept 2015]. In point of fact, in a recent decision by Justice Mark C. Dillon, *Wells Fargo Bank, N.A. v. St. Louis,* 213 N.Y.S.3d 86 [2d Dept 2024], the Second Department underscored that appellate courts statewide remain unified in accepting and reversing all sua sponte orders that dismissed a complaint where the underlying motions only sought nondispositional relief for noncompliance with discovery. In the rarest and

strongest language of appellate remonstrance, the Second Department reprimanded the lower courts: “Despite the multiple dozens of Appellate Division decisions that have repeatedly and collectively advised [trial courts] against such [sua sponte] practice,” “our trial-level colleagues continue to do so” “without any brake applied” … “on a rolling basis, despite appellate case law defining the practice as error.”

The Second and Fourth Departments allow post-judgment appeals from sua sponte orders.

The Second and the Fourth Departments allow post-judgment appeals from sua sponte orders, provided, of course, that such orders “necessarily affect[ed] the final judgment” (CPLR 5501(a)(1)). These decisions are anchored in the broad application of the word “any” in CPLR 5501(a)(1):

“(a) Generally, from final judgment. An appeal from a final judgment brings up for review:

1. Any non-final judgment or order which necessarily affects the final judgment, including any which was adverse to the respondent on appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal, provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken.”

In *Shah v. Oral Cancer Prevention Int’l*, 138 A.D.3d 722 [2d Dep’t 2016], the Second Department held:

“The plaintiff contends that the determination striking the defendants’ answer is not reviewable as of right on appeal because the answer was stricken sua sponte, and not pursuant to a motion made on notice. This contention is without merit. CPLR 5701(a) states, in pertinent part, that appeals may be taken as of right from ‘any final or interlocutory judgment’ (CPLR 5701(a)(1)), as well as ‘an order … where the motion it decided was made upon notice’ (CPLR 5701(a)(2)). Here the appeal is from a judgment—which clearly is appealable as of right. An appeal from a final judgment brings up for review any order which necessarily affects the judgment, as well as rulings by the court (CPLR 5501(a)), and such orders are not limited to those which decided motions made on notice.”

Also, *Ahmed v. Ahmed*, 175 A.D.3d 1363 [2d Dep’t 2019] (“sua sponte orders which necessarily affect the final determination are reviewable on appeal from the final judgment”); *Roesch v. State,* 187 A.D.3d 1651 [4th Dep’t 2020] (“despite the fact that the judgment was entered sua sponte, the appeal from the judgment is properly before us inasmuch as “[a]n appeal may be taken to the appellate division as of right in an action, originating in the [S]upreme [C]ourt or any [C]ounty [C]ourt … from any final or interlocutory judgment”). *Braun v. Cesareo*, 170 A.D.3d 1540 [4th Dep’t 2019] held:

“Defendants now appeal, however, from the final judgment rendered in this action. An appeal from a final judgment ‘brings up for review … any non-final judgment or order which necessarily affects the final judgment’ (CPLR 5501[a][1]). The parties do not dispute that the order denying defendants’ application for leave to file a late demand for a jury trial necessarily affected the final judgment. Our dissenting colleague, however, construes the word ‘order’ in CPLR 5501(a)(1) to mean only orders that result from motions made upon notice. In other words, in his view, only orders that are appealable as of right are reviewable upon an appeal from the final judgment. We conclude that CPLR 5501(a)(1) does not expressly or impliedly place such a limitation upon our review of orders that affect the judgment. 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.”

In *Ritchey v Ritchey*, 218 AD3d 617 [2d Dept 2023], the parties were divorced by judgment. The plaintiff appealed from, inter alia, an order that denied the plaintiff’s motion to enforce the child support provisions of a so-ordered stipulation, finding that it had personal jurisdiction as the defendant appeared and opposed the motion. Ritchie noted [at 618-619]:

“Under the circumstances of this case, the court had continuing jurisdiction to enforce its support order … To the extent that the court’s denial of the plaintiff’s motion was based upon the doctrine of forum non conveniens, it was improper for the court to apply that doctrine sua sponte, without the parties having had an opportunity to brief the issue (CPLR

327[a]; *Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros.*, 23 N.Y.3d 129 …)."

The First Department disallows postjudgment appeals from sua sponte orders.

Without any reference to the word "any" in CPLR 5501(a)(1), as did the Second and the Fourth Departments, the First Department, in *Guzman v City of New York*, 228 AD3d 558 [1st Dept 2024], citing *Livathinos v. Vaughan,* 147 A.D.3d 441 [1st Dept. 2017] and *Hladun–Goldmann v. Rentsch Assoc.,* 8 A.D.3d 73 [1st Dept. 2004], denied reviewability of a sua sponte order in a postjudgment appeal:

"Plaintiff's assertion that the appeal from the judgment brings up for review Supreme Court's sua sponte order dismissing the complaint as against Cabrera is meritless. There is no right of appeal from a judgment that is based on a sua sponte order."

Livathinos involved an appeal from a judgment [at 441-42]: "There is no right to appeal from a judgment that is based upon a sua sponte order; nor is there a right to appeal from the sua sponte order itself. We decline to treat plaintiff's notice of appeal as an application for leave to appeal (CPLR 5701 [c])." *Hladun–Goldmann*, citing *Diaz v New York Mercantile Exch.*, 1 AD3d 242, 243 [1st Dept 2003], held: "There is no right of appeal from a judgment based upon a sua sponte order."

"The appeal as of right, taken from a sua sponte order not made upon notice, must be dismissed (CPLR 5701[a][2]; *Sholes v. Meagher*, 100 N.Y.2d 333, 763 N.Y.S.2d 522, 794 N.E.2d 664). This is true, notwithstanding that the judgment eventually was entered 'on motion' of counsel for defendants New York Mercantile Exchange and Turner Construction Co. and that the court entertained brief oral argument." Also see *Reyes v Sequeira*, 64 AD3d 500, 507 [1st Dept 2009].

Third Department has not yet weighed in.

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