

Expert Opinion

Solutions ‘Rogowski, Ruisch’; and CPLR 2215 on Appeal

June 27, 2025 By Elliott Scheinberg



Elliott Scheinberg. Courtesy photo

This column addresses two thorny issues previously discussed in two separate articles: (1) who must effect service of the order or judgment with notice of entry in order to start the 30-day clock running when there are multiple parties?, CPLR 5513: *Ruisch, W. Rogowski Farm, LLC* Redux, April 23, 2025; and (2) how to secure an appeal as of right from an adverse ruling arising from relief

sought in opposition papers to a motion but which omitted “the formal cross motion”?

–“Noncompliance with CPLR 2215: Is Denied Relief Appealable?,” Dec. 29, 2023.

These issues were troublesome and I was adamant to find solutions—solutions had to be there; although I was charting uncharted waters it was inconceivable to me that there couldn’t or wouldn’t be any solutions until after much ponderance I realized that the solutions had been hiding in plain sight all along. I respectfully present what I believe to be the solutions for your consideration.

CPLR 5513, *Rogowski* and *Ruisech*

Q. How does one give effect to the ruling in *Ruisech v Structure Tone Inc.*, 42 NY3d 1061 [2024] in the NYSCEF era where an electronic filing by one party appears in the files of all parties to the case?

CPLR 5513[a] provides, in pertinent part: “An appeal as of right must be taken within thirty days after service by *a party* upon the appellant of a copy of the judgment or order appealed from and written notice of its entry.” However, the statute provides no direction as to who must affect service. The prevailing party(ies)? The appealing party? Any party? The party seeking to limit an adversary’s appellate time?

Before examining the divergent outcomes between *W. Rogowski Farm, LLC v. County of Orange*, 171 A.D.3d 79 [2d Dept 2019], a very well reasoned decision from the Second Department, firmly anchored in the canons of statutory construction, Justice Mark Dillon writing for the court, and *Ruisech*, which is anchored in CPLR 2103[e], the article studied: the applicability of the canons of statutory construction to the legislative intent in accordance with the plain language of the CPLR 5513; the historic construction of CPLR 5513; and how the purpose of the 1997 amendment to 5513 was understood by the bar as reflected in The Bill Sponsor’s Memorandum and in the New York State Bar Association’s Legislative Report, Committee on Civil Practice Law and Rules.

Now, to each case. *Rogowski* emphasized:

“The amendment to CPLR 5513[a] expressly provides for the commencement of the time to appeal as running from service of the order or with written notice of entry by ‘*a*’ party. In interpreting statutes, courts look first to the statutory text as the clearest indicator of legislative intent . . . Where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning.

“[T]he language of CPLR 5513[a] as to who serves notice of entry is not limited to the ‘prevailing party,’ or to ‘the appealing party,’ or to ‘the party seeking to limit an adversary’s appellate time.’ Rather, ‘*a*’ party, which is unrestricted, necessarily refers to ‘any’ party to an action. As a result, the

service of an order or judgment with written notice of entry commences the 30-day time to appeal as to not only the party performing the service, but as to all other parties as well.”

Ruisech [at 1063] reversed *Rogowski* in two sentences: “To be effective to start CPLR 5513[b]’s 30–day clock, service must comply with CPLR 2103 ... *We evaluate timeliness for purposes of CPLR 5513(b) on a party-by-party basis.*” Reference to CPLR 2103 can only refer to subsection [e] thereof which provides in pertinent part: “Each paper served on any party shall be served on every other party who has appeared, except as otherwise may be provided by court order or as provided in section 3012 or in subdivision (f) of section 3215.”

Notably, *Ruisech*’s reversal did not mention *Rogowski* by name, which is puzzling because, as observed in the previous article, the Court of Appeals knew about *Rogowski* because it had been cited in at least two appellate briefs and by counsel during oral argument.

Ruisech presents uncertainty in future litigation because counsel and even court attorneys shepardizing *Rogowski* will thus never find any indication of its reversal in any legal search engine. Inconsistent decisions are not unlikely.

Now, back to our question that has been gnawing at me for a solution since first reading *Ruisech*: how does one affect the ruling in *Ruisech* in the NYSCEF era where a one-time electronic filing serves all parties?

First, it is fully logical within the universe of the canons of statutory construction that the Legislature intended different methods of service at the trial level and at the appellate level, nothing indicates otherwise meaning that *Rogowski* is solid law.

Second, the solution is actually hiding in plain sight. While papers must be filed electronically, compliance with *Ruisech* should also be done like “in the good ole days”: add the additional layer of security by serving every party by way of the mail box – paper service with affidavits/affirmations of service.

Noncompliance with CPLR 2215: the path to an appeal as of right for the aggrieved party

The Dec. 2023 column revisited both bodies of law regarding whether a motion court may grant relief to a cross movant who requested relief only in its opposition papers without including “the formal notice” of cross motion prescribed in CPLR 2215.

That this weighty question may even arise ab initio is counterintuitive because, as noted in the prior article, “[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, Inc. v Reese*, 162 AD3d 847, 848 (2d Dept 2018); *Amaral v Smithtown News, Inc.*, 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”); *Arthur Brundage Inc. v Morris*, 174 AD3d 1088 [3d Dept 2019] (“this well-settled rule [the notice cross 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.’”)

That conundrum notwithstanding, the prior article noted that decisional authority allows the motion court to discretionarily grant or deny relief requested without “the formal notice” of cross motion.

The stunning ruling by the Court of Appeals in *Mashreqbank PSC* that does away with CPLR 5701(a)(2), the “upon notice” requirement – does the fact that both parties “had a full opportunity to address the issue” supplant the “upon notice” requirement or is it a supplementary method

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.

In *Mashreqbank PSC v. Ahmed Hamad A1 Gosaibi & Bros. Co.*, 23 N.Y.3d 129, 134 [2014], the Court of Appeals not only upheld the motion court’s consideration of the cross movant’s application for relief without a notice of motion but it also, puzzlingly, upheld the ruling notwithstanding that: (1) the movant had not served a notice of motion either; and (2) the issue was argued “during oral argument on another motion,” presumably an unrelated matter to which “the general relief” clause did not apply:

“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.”

The implication is that the motion court’s order could have been appealed as of right by either party. It would seem that under *Mashreqbank* all you need is a willing judge and two happy-to-cooperate counsel. Interestingly this argument has not been seized upon again in the appellate universe.

Fried v. Jacob Holding, Inc.

While the other cases relevant to this issue are interesting and important, the most important on this issue is *Fried v. Jacob Holding, Inc.*, 110 A.D.3d 56 [2d Dept 2013], wherein 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 was simultaneously generous and admonishing. On the one hand, it allowed the Supreme Court to discretionarily grant affirmative relief notwithstanding the absence of a “formal notice” of cross motion while, on the other, it firmly stressed the “important distinction” as it implicates appellate review [at 65]:

“[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.”

“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]).”

Fried added a potential solution for the aggrieved party [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]).”

Fried went no further regarding how to secure an appeal of right. Needing to make a motion for permission to appeal leaves the aggrieved party treading water, relegated to the uncertainty if he or she will be saved by a passing boat called “permission.”

If the Appellate Court declines to grant leave to appeal, this otherwise would-have-been appellant will be left with an adverse determination while simultaneously having been denied access to New York’s generous appellate review policy although he or she had done nothing wrong but rather was the victim of the other party’s sloppy practice.

This miserable-wanna-be appellant’s precarious path to guaranteed appellate review as of right may be analogized to the appellant who is at the tail end of an adverse ex parte or sua sponte order. CPLR 5701(a)(3) and *Sholes v. Meagher*, 100 N.Y.2d 333 [2003] state that in order to be

eligible for appellate review as of right of the such orders, the aggrieved party must make a motion on notice to vacate the sua sponte or the ex parte order and, should that motion be denied, the aggrieved party may appeal as of right from the denial of that motion.

This aggrieved party in a *Fried* situation should consider making a motion on notice to vacate the adverse order. Should that motion to vacate be denied the aggrieved party ought to now have a direct path to the Appellate Division as of right.

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