

Expert Opinion

Appeals from Letter Applications, Letter Orders, Conferences, Statutory Compliance, Part II

Part II continues with the review of cases that have treated nonappealable papers as appealable. This section also compares the Court of Appeals' treatment of statutory compliance flexibly in *Mashreqbank PSC v. Ahmed Hamad A1 Gosaibi & Bros. Co.*, 23 N.Y.3d 129 [2014] and inflexibly in *Sholes v. Meagher*, 100 N.Y.2d 333 [2003].

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Elliott Scheinberg. Courtesy photo

“Tremendously Protracted Litigation” Trumps CPLR 5701(a)(2) and the Court of Appeals

In *Maisto v. State*, 221 AD3d 1141 [3d Dept 2023], the court, following remittal, issued a letter order which was “the product of letter briefs submitted in response to the court's request.” Although the Appellate Division correctly set forth the rule of law in CPLR 5701(a)(2), that a motion must have been made upon notice to be appealable as of right, it, nevertheless, considered “the circumstances of this tremendously protracted litigation and granted plaintiffs’ belated request to treat the notice of appeal as an application for leave to appeal and further grant the application”:

“Although not initially raised by the parties, we must address a threshold issue of appealability. Apart from limited exceptions not applicable here (CPLR 5701[b]), an appeal may be taken to this court as of right ‘from an order... where the motion it decided was made upon notice’ and one of eight, broad statutory circumstances exists (CPLR 5701[a][2]). Here, there was no noticed motion made following remittal (generally CPLR 2214[a]).

The subject order was instead the product of letter briefs submitted in response to Supreme Court's request. Although this procedure was arguably the functional equivalent of a noticed motion, the Court of Appeals has rejected such a subjective evaluation in favor of the certainty that the notice of motion procedure affords (*Sholes v. Meagher*, 100 N.Y.2d 333, 335, 763 N.Y.S.2d 522, 794 N.E.2d 664 [2003]). We therefore must conclude that the order before us is not appealable as of right... Nevertheless, considering the circumstances of this tremendously protracted litigation, we grant plaintiffs’ belated request to treat the notice of appeal as an application for leave to appeal and further grant the application (CPLR 5701[c]).” The appellate wand.

Sholes and Mashreqbank PSC v. Ahmed Hamad A1 Gosaibi & Bros. Co., two Court of Appeals decisions that treated the absence of statutory compliance very differently

Maisto properly relied on *Sholes v. Meagher* insisting on strict compliance with CPLR 5701(a)(2) and CPLR 5701(a)(3) with respect to sua sponte and ex parte orders. Maisto is, however, noteworthy in light of the Court of Appeals’ decision, *Mashreqbank PSC v. Ahmed Hamad A1 Gosaibi & Bros. Co.*, 23 N.Y.3d 129 [2014], which revolved around CPLR 327(a), how to procedurally seek inconvenient forum relief:

“When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just.” (internal emphasis.)

The Court of Appeals noted: “We said in *VSL [VSL Corp. v. Dunes Hotels & Casinos]*, 70 N.Y.2d 948 (1988)] that under this statute a court may stay or dismiss an action in whole or in part on forum non conveniens grounds only upon the motion of a party; a court does not have the authority to

invoke the doctrine on its own motion... Our opinion in VSL is a one sentence memorandum, but the rationale for it seems evident: there is an obvious potential for unfairness when an appellate court dismisses a case on the basis of an issue that no party has raised or addressed.” (emphasis provided.) *Mashreqbank* [at 136]. (See, *Misicki v. Caradonna*, 12 N.Y.3d 511, 519–20 [2009]; *Tabchouri v. Hard Eight Rest. Co., LLC*, 219 A.D.3d 528 [2d Dept 2023].

The Court of Appeals, however, went on to distinguish VSL in emphasizing that the [*Mashreqbank*] Supreme Court had requested the parties to brief the issue of forum non conveniens, which was thereafter argued—plainly stating that all was good and well, even though the issue originated with the judge and not by motion as statutorily required, as long as the argument was argued:

“While the idea of dismissing the main complaint on forum non conveniens grounds was first mentioned by the Supreme Court Justice, he gave the parties a full opportunity to address the issue—indeed, he asked them to do so... We see no reason to read CPLR 327(a) as prohibiting a forum non conveniens dismissal where only the formality of a document labeled “notice of motion” was lacking, and where AHAB, the only party opposed to dismissal, neither objected to nor was prejudiced by the omission of that formality. *Mashreqbank* [at 136].

Sholes v. Meagher, 100 NY2d 333 [2003] is the seminal decision which sets forth the reason behind the unavailability of a direct right of appeal from sua sponte and *ex parte* orders. The circumstances in *Sholes* arose from a punitive sanction aimed at deterring attorneys from disrespectful conduct to a court.

Well into a personal injury jury trial, the trial court announced that the 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 declared a mistrial and required 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

The appellant-attorney and her law firm contested the order arguing that “the procedure adopted by Supreme Court was in practical effect equivalent to a motion on notice and created a record sufficient for appellate review.” Although the order did, in fact, affect a substantial right (CPLR 5701[a][2][v]), the Appellate Division dismissed the appeal because “[t]here is [] no right of appeal from... an order entered sua sponte” [at 335] not having been made on notice (CPLR 5701[a][2]); the court also declined to grant leave to appeal (CPLR 5701[c]). The Court of Appeals granted leave to appeal and affirmed on the same grounds.

The Court of Appeals rejected the appellants’ contention that they had no avenue of appeal and that, in effect, the ruling of the trial court was unreviewable because appellate review was

available as of right after first moving on notice to vacate the order and then appealing as of right in the event of a denial of the motion, pursuant to CPLR 5701(a)(3). Sholes observed that “[t]his procedure ensures the appeal will be made upon a suitable record after counsel have had an opportunity to be heard” [at 335]:

“We agree with the Appellate Division that the submissions ordered sua sponte by the trial court were not made pursuant to a motion on notice as contemplated by CPLR 5701(a)(2). While the procedure in this particular case may well have produced a record sufficient for appellate review, there is no guarantee that the same would be true in the next case. Moreover, the amount of notice will vary from case to case, and its sufficiency may often be open to debate. Adherence to the procedure specified by CPLR 5701(a) uniformly provides for certainty, while at the same time affording the parties a right of review by the Appellate Division. We are therefore unwilling to overwrite that statute.” [at 336].

The high court thus treated the absence of statutory procedural compliance flexibly in *Mashreqbank* but not in *Sholes*.

Despite Some Liberalization of the Statutory Requirements in CPLR 2215 Appellate Courts Have Also Refused to Hear Appeals Where Relief was Requested Without the Formal Notice of Cross Motion

This article also dovetails with the discussion as to the liberalization of statutory compliance where a party seeks relief in opposition to a motion without having filed a formal cross-motion. *Mashreqbank* looms large in this study. (E. Scheinberg, Letter Ruled Appealable, a Further Relaxation of CPLR 5512, NYLJ, June 12, 2024, some of the segments merit repetition).

Nomenclature of the Paper is not Determinative, ‘Hallmarks of an Order’ Where the Parties Were Informed That They had a Right to Appeal

The nomenclature “decision” is not necessarily dispositive as to whether a paper is an appealable paper or not: *Monfort v. Alden Cent. School Dist.*, 249 AD3d 1479, 1480 [4th Dept 2026] (“A document does not become an order simply because it has been denominated as such... Although the paper contains the words “Decision and Order,” it does not meet the essential elements of an order inasmuch as it does not “recite the papers used on the motion” (CPLR 2219 [a]), and furthermore “that document did not actually order anything.”); *Prevost v. Associated Materials, LLC*, 239 AD3d 1235, 1236 [4th Dept 2025].

In *Matter of Samantha F.* [Edwin F], 169 A.D.3d 549 [1st Dept 2019], the First Department held: “Although denominated a decision, the paper bears the standard language advising that any appeal from the “order” must be taken within 30 days (Family Ct Act §1113), and is, in substance,

an order finding that the children have been abused/neglected (Family Ct Act § 1051 [a]), which is appealable as of right (Family Ct Act §1112 [a]).” See, *Spectrum News NY1 v. New York City Police Department*, 179 A.D.3d 578 [1st Dept 2020]: “[T]here are instances where this court has deemed a paper denominated as a ‘decision’ to nonetheless be appealable because it contained all the hallmarks of an order (e.g. *Matter of Samantha F.* [Edwin F], 169 A.D.3d 549, 549, 95 N.Y.S.3d 31 [1st Dept. 2019]) appeal dismissed 33 N.Y.3d 1042, 103 N.Y.S.3d 15, 126 N.E.3d 1055 [2019] ...].”

In *Louka v. Shehatou*, 67 AD3d 1476 [4th Dept 2009], the father appealed from an “order” of the Family Court that denied his motion to vacate an amended order entered upon his default, which order granted the mother sole legal and physical custody of the children and permanently terminated all of the father’s prior custodial and visitation rights.

The Fourth Department began by emphasizing that “although the determination of the father’s motion was contained in a letter, no order [had been] entered thereon”: We further note however, that the referee filed the letter with the Family Court Clerk and that the letter resolved the motion and advised the father that he had a right to appeal. Thus, by an order of this court...in connection with the mother’s motion to dismiss this appeal, we determined that the letter would be treated as an order.

Where a Decision ‘Meets the Essential Requirements of an Order’ Standard

In *Nicol v. Nicol*, 179 A.D.3d 1472 [4th Dept 2020], the plaintiff “appealed from a decision denying his motion [for] a downward modification of his child support obligation, enforcement of certain terms of the parties’ separation and settlement agreement, and attorney’s fees.” Specifically, the appealed from document was denominated only as a decision without any ordering paragraphs. The majority, citing *Matter of Louka v. Shehatou*, 67 A.D.3d 1476 [4th Dept. 2009], noted that “Although not raised by the parties and although ‘no appeal lies from a mere decision’... we conclude that the paper appealed from meets the essential requirements of an order, and we therefore treat it as such.”

Justice Brian F. DeJoseph’s dissent rejected “this ‘essential requirements’ standard’ as violative of the “clear [statutory] directive” which “defines [an appealable paper] either as an order or a judgment, not a decision that has some elements of an order”, a “settled principle” “in all of the other departments, as well as in the Court of Appeals.” Specifically, the record included a decision that was denominated only as a decision without any ordering paragraphs.

Justice DeJoseph further noted that the plaintiff’s notice of appeal explicitly appealed “from the decision”: [T]he majority believe[s] that the decision is an appealable paper because it meets “the essential requirements of an order”...[T]he majority relies on *Matter of Louka v. Shehatou*, 67 A.D.3d 1476 (4th Dept. 2009)), wherein this court determined that a letter would be treated as an

order inasmuch as “the referee filed the letter with the Family Court clerk and...the letter resolved the motion and advised the father that he had a right to appeal”... Although the decision here was filed and resolved the motion, there was no directive in the decision that plaintiff had the right to appeal from it. [I] submit that almost all written decisions at least attempt to resolve the issues presented by the parties and many of those decisions are also filed.

In *Geer v. Collazo*, 221 A.D.3d 1571 [4th Dept 2023] the father appealed from a decision that denied his petition seeking visitation with the child following his release from prison. The Fourth Department held: “Although no appeal lies from a mere decision... the paper appealed from ‘meets the essential requirements of an order’... inasmuch as it was filed ‘with the Court Clerk and... [it] resolved the [proceeding] and advised the father that he had a right to appeal... We therefore treat it as an order.”

Does a Letter Order Necessarily Affect the Final Judgment?

Two decisions, from two Departments, *Banker v. Banker*, 56 A.D.3d 1105 [3d Dept 2008] and *Hageman v. Santasiero*, 277 A.D.2d 1049 [4th Dept 2000], addressed whether letter orders necessarily affected the final order or judgment [CPLR 5501(a)(1)]. *Banker* upheld the appeal from the “nonfinal letter orders [as it] necessarily affected the... final order appealed.” *Hageman* did not. CPLR 5501(a)(1), scope of review, provides, in pertinent part: “An appeal from a final judgment brings up for review: 1. any non-final judgment or order which necessarily affects the final judgment ...”

Banker v. Banker

The judgment of divorce, in *Banker*, incorporated but did not merge an oral stipulation of settlement which provided that the parties would subdivide a parcel of property. The plaintiff moved to enforce the stipulation. The Supreme Court ordered the defendant to obtain subdivision approval from the Town Planning Board. The Planning Board denied the defendant’s subdivision application upon discovering that the property was encumbered by a restrictive covenant against further subdivision.

The Appellate Division noted that, although the Planning Board later reversed its denial of the application on the basis that the Town should not enforce a private covenant, it was undisputed that the landowners who benefited from the covenant were unwilling to waive it, thereby rendering subdivision infeasible as it would subject the parties to suit.

The defendant moved to reargue and/or renew the order that directed him to obtain subdivision approval and for a hearing to determine equitable distribution. The Supreme Court did not rule on the defendant’s motion but reserved decision on all pending matters until an appraisal of the

property was completed. It subsequently appointed an appraiser and ordered a hearing to permit the parties to cross-examine the appraiser but made it clear that no other testimony or evidence of valuation would be permitted.

Following the hearing, the court determined the interests of the parties in the property to be 83% for plaintiff and 17% for defendant. The Appellate Division held: “[T]he issues that defendant raises on appeal are properly reviewable as they were issues decided by nonfinal letter orders which necessarily affected the final order appealed from (CPLR 5501[a][1]...).”

Hageman v. Santasiero

Hageman was a medical malpractice action. Prior to trial, defendant Health Care Plan Inc. (HCP) moved for summary judgment pursuant to Public Health Law §4410.

Judgment was entered in favor of defendant-physicians upon a jury verdict of no cause of action. Thereafter, the court ruled by letter order that the summary judgment motion was moot. The plaintiff appealed from the judgment entered upon the jury verdict: “[P]laintiff’s contention concerning the court’s letter order is not properly before us. The only notice of appeal in the record is from the judgment, and the order does not ‘necessarily affect[] the final judgment’ entered against defendant physicians (CPLR 5501[a][1]...).”

A Judgment was Held Appealable but Limited to the Subject of Contest Where After the Inquest but Prior to Judgment the Defendant Contested the Proposed Judgment by Letter

The defendant, in *Nutkiewicz v. Nutkiewicz*, 123 A.D.2d 378 [2d Dept 1986)], argued that although the parties had consented that the inquest would be limited to matters within the settlement agreement, the plaintiff, nevertheless, improperly interjected additional allegations in contravention of the stipulation.

The Appellate Division noted that although “[n]o appeal lies from a judgment entered on consent or default and the proper procedure to challenge such a judgment is a motion to vacate... After the inquest but prior to judgment, the defendant vigorously contested the then proposed judgment by letter... Under these circumstances, an appeal will lie from such a final judgment, but review is limited to matters which were the subject of contest before Special Term.”

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