
LAW AND THE FAMILY

"Motion Practice Renewed"

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IT IS NOT USUAL in matrimonial actions for the court to grant ex parte restraining orders by order to show cause. However, since the enactment of the matrimonial calendar control rules (22 NYCRR 202.16), it appears to be an ever-increasing practice for some courts to make sua sponte [FN1] orders and to make orders, upon oral application, without prior notice of motion. In many instances this practice may be improper and prejudicial to the client, and it would serve the matrimonial practitioner to review the fine points of civil motion practice, as part of one's fulfillment of the mandatory continuing legal education requirements.

Civil Practice Law and Rules 2211(a) provides that a motion is an application for an order. A motion on notice is made when a notice of motion or order to show cause is served. CPLR 2211(b), entitled "ex parte motions," inferentially defines an ex parte motion as one that "may be made without notice."

Ex Parte Motions

Not all motions are required to be made on notice. For example, a motion pursuant to CPLR 308(5), for permission to serve a summons by an alternative method, is an ex parte motion. An ex parte motion is made by submitting an order to the court with supporting papers demonstrating why the order should be signed. CPLR 2217 requires that it be accompanied by an affidavit stating the result of any prior motion for similar relief. An ex parte motion is "made" when the proposed order and papers in support of the motion are submitted to the court for signature. Some ex parte motions are specifically authorized by statute. [FN2] Ex parte applications that are not authorized by statute are disfavored by the courts [FN3] because of

the attendant Due Process implications caused by proceeding without notice.

An ex parte order may be not be appealed. The remedy is to move to vacate or modify it and, if denied, appeal from the denial of the motion.

The requirement of giving a notice of motion, unless an ex parte motion is authorized, is jurisdictional. It is an error of law and a denial of due process for the court to grant an oral application on a substantive matter absent a notice of motion and an opportunity to be heard, as required by CPLR 2214 (b). [FN4] Failure to give a timely notice of motion, as required by CPLR 2214, deprives the court of jurisdiction and renders the order granting the motion jurisdictionally void. [FN5]

Absent statutory or other authority to grant relief on its own motion, [FN6] a court may not grant sua sponte relief that substantially prejudices a party. In *Liebowits v. Liebowits*, [FN7] the husband sought an order directing his wife to account for and turn over to him the contents of a safe deposit box under her sole control. The box contained securities and property inherited by the husband from his mother, which were clearly separate property; it also contained marital assets.

The trial court ordered the wife to account for the assets in the box and to give her husband his inherited assets, but it denied the motion insofar as it related to marital property, provided the that wife did not dispose of the property during the litigation. Although the wife did not move for affirmative relief, the lower court, sua sponte, issued an order restraining the husband from disposing of marital property within his control.

The Second Department held that the trial court erred in its sua sponte restraint of the husband's disposition of marital property. It stated that due process required written notice from the moving spouse that he or she seeks possession of the marital assets or a restraint on their disposition. Absent such written notice, a court is powerless to act.

In *Brody v. Brody*, [FN8] another matrimonial action, plaintiff-wife appealed from so much of an order of the Supreme Court which, among other things, sua sponte restrained her from transferring any marital property, except in the ordinary course of business. The Appellate Division deleted the provision restraining plaintiff from transferring marital property. It held that with regard to Special Term's restraint of plaintiff's transfer of marital assets, such sua sponte stay was in violation of plaintiff's due process rights, as she was never notified that such an order was under consideration.

A court may grant undemanded relief only if there is no substantial prejudice to the adverse party. [FN9]

A sua sponte order may or may not be an ex parte order, depending upon whether the parties are present at the time the order is made.

Question of Appeals

An ex parte order is not appealable. [FN10] However, relief should be available under CPLR 5704(a), which provides that the Appellate Division or a justice of the Appellate Division may vacate or modify any order granted without notice to the adverse party by any court or a judge thereof from which an appeal would lie to such Appellate Division. It may also grant any order or provisional remedy applied for without notice to the adverse party and refused by any court or a judge thereof from which an appeal would lie to such Appellate Division.

An appeal may be taken to the Appellate Division from any order that is not appealable as of right in an action originating in the Supreme Court by permission of the judge who made the order or by permission of a justice of the Appellate Division from such order. Nevertheless, in *Everitt v. Health Maintenance Center*, [FN11] the Appellate Division held that a pre-calendar conference order not made on notice of motion and without supporting papers was not appealable, and suggested that in such cases appellate review could be had, if otherwise available, if the party hurt by the order formally moved to vacate or modify it. The determination of that motion would then be appealable.

There is no per se rule against making an oral motion. However, motions are governed by the notice requirements of CPLR 2214 and the Uniform Rules. Moreover, a movant must present affidavits or other competent evidence in support of his factual assertions and the court rules require that a specific form notice of motion be used. [FN12] In *Matter of Shanty Hollow Corp. v. Poladian*, [FN13] the court considered an oral motion to dismiss and the affidavits in support of the motion, although no notice of motion was served.

The Appellate Division found that the Supreme Court properly considered the oral motion and the affidavits in support of the motion, in pursuance of the discretion conferred upon it by CPLR 2214 [c]. In *Kaiser v. J & S Realty*, [FN14] the defendant made an oral application to vacate a default judgment, apparently on the ground that defendant was never served with the summons and complaint. The Supreme Court granted the motion to vacate and plaintiffs appealed.

The Appellate Division reversed. It held that "While there appears to be no per se rule against oral motions, [FN15] a movant must, nonetheless, present affidavits or other competent evidence in support of its factual assertions *** ." Defendant made no evidentiary showing. The record on appeal contained no affidavits, sworn testimony or other competent evidence in support of defendant's motion. Therefore, the Supreme Court's determination could not be sustained.

Re-argument, Renewal

The provisions of the CPLR were amended in 1999, [FN16] in relation to motions to renew and motions to re-argue, to clarify the case law. The law governing motions to re-argue and renew has been based primarily on court decisions, which address the area piecemeal and do not provide a coherent structure for treatment of these motions. They do clearly distinguish between motions for leave to re-argue and leave to renew and specify time limits for the making of these motions and rights of appeal.

Rule 2221 of the CPLR requires that a motion for leave to re-argue must be identified specifically as such; must be based on matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but may not include any matters of fact not offered on the prior motion; and must be made within 30 days after service of a copy of the order determining the prior motion and written notice of its entry. This rule does not apply to motions to re-argue a decision made by the Appellate Division or the Court of Appeals.

A motion for leave to renew must be identified specifically as such; must be based upon new facts not offered on the prior motion that would change the prior determination or must demonstrate that there has been a change in the law that would change the prior determination; and must contain reasonable justification for the failure to present such facts in the prior motion.

A combined motion for leave to re-argue and leave to renew must identify separately and support separately each item of relief sought.

In determining a combined motion for leave to re-argue and leave to renew, the court is required to decide each part of the motion as if it were separately made.

If a motion for leave to re-argue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination.

Charting Own Course

Procedural irregularities are overlooked where the parties chart their own course for litigation. In *Osterling v. Osterling*, [FN17] both parties requested the trial court to construe the meaning of part of a stipulation entered upon the record disposing of their marital property in plaintiff's action for divorce. Plaintiff's motion to vacate the order determining the request because of, among other things, procedural irregularities, was denied.

The Appellate Division held that the trial court properly denied plaintiff's motion because, although neither party served motion papers, the original order recited that the review undertaken by the court was requested by the parties. 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, and plaintiff was deemed to have waived any claim of error arising from the informal nature of the proceedings.

FN(1) The court may make an order: on the "court's own motion" - See CPLR 902 [Class Action]; "on its own initiative" - See CPLR 214-d(4); 1003 [joinder], 3101 (h) [disclosure], 3103(a) [protective orders], 3104 (a)* and (c) [Supervision of Disclosure]* without notice, 3126 (a) [want of prosecution], 4212 [Advisory Jury], 4314 [Successor Referee], 4317 [Referee to Determine], 4404 (a) and (b) [Post Trial Motion for Judgment and New Trial], 5240 [Modification of Protective Order], 6405 [Removal of Receiver], 7002(a) [Habeas Corpus petition], 7805 [stay], 8301(d) [Taxable Disbursements] "upon its own initiative" - CPLR 1202(a) [appoint guardian ad litem]; CPLR 1342 and 6405 [remove receiver]; CPLR 4212 [refer issues to advisory jury or referee to report]; CPLR 4404 [set aside verdict, decision or judgment and render judgment notwithstanding verdict]; CPLR 7805 [stay proceedings or enforcement] "upon its own motion" - See CPLR 1311 [forfeiture], 3036(5), 7559 [call Neutral Expert Witness] "ex parte" - See CPLR 1311, 1311-a [forfeiture] and 3215(d) [default judgment].

FN(2) The court may make an order: "without notice" - See CPLR 315, 408 (disclosure) 1317 (attachment), 1336, 5237 [Failure of Title], 5250 [arrest of judgment debtor], 5704 (a) and (b) [Review of Ex Parte Orders], 6210 [Orders of Attachment], 6211 [Order of Attachment], 6313(a) [Temporary Restraining Order], 6314 [Vacate or Modify Temporary Restraining Order], 7002 (a) [Habeas Corpus Petition], 7102 (d)(2) [Seizure of Chattel], 8403 [Taxation without Notice], 8501 [Security for Costs]; "with or without notice" - See CPLR 3106(b) [Priority of Deposition], 5233(c) [Sale of Personal Property]; See also DRL 114(1) and 233.

FN(3) *Deloitte, Haskins (Newson)* 146 Misc2d 884 [Sup, 1990]; *Fosmire v. Nicoleau* 144 AD2d 8 [2d Dept. 1989].

FN(4) See Phoenix Enterprises Ltd. v. Insurance Co. of North America, 130 AD2d 406 (1st Dept., 1987); Kantor v. Pavelchak, 134 AD2d 352.

FN(5) Golden v. Golden, 128 AD2d 672. Beck v. Gooday, 24 AD2d 1016 (2d Dept., 1965).

FN(6) See Note 1, *infra*.

FN(7) 93 AD2d 535 (2d Dept., 1983).

FN(8) 98 AD2d 702 (2d Dept, 1983).

FN(9) Ressis v. Mactye, 98 AD2d 836 (3d Dept, 1983).

FN(10) Katz v. Katz, 68 AD2d 536.

FN(11) 86 AD2d 224 (1st Dept, 1982).

FN(12) See also 22 NYCRR 202.7.

FN(13) 23 AD2d 132 (3d Dept, 1965) *aff'd* 17 NY2d 536.

FN(14) 173 AD2d 920 (3d Dept, 1991).

FN(15) Citing Matter of Shanty Hollow Corp. v. Poladian, 23 AD2d 132, 133- 134, *aff'd* 17 NY2d 536; Siegel, NY Prac 243, at 363-364 [2d ed.].

FN(16) Laws of 1999, Ch 281, Effective July 20, 1999.

FN(17) 126 AD2D 965 (4TH DEPT. 1987).

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