Monday, March 16, 2015

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Civil LITIGATION

Obtaining appellate review of a sua sponte order

Where there's a will, there's a way

Of the numerous challenges that trial counsel face, appealing an adverse order issued sua sponte can be one of the most difficult to resolve, particularly when the decision is made on the eve of trial and time is of the essence.

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Sua sponte, a Latin term meaning "of one's own accord," refers to a decision by the court addressing an issue that has not been presented for consideration by the litigants. As such, the concept of "sua sponte" is an important exception to two basic principles of our judicial system: 1) that the parties will direct the litigation, and 2) that the decision maker will remain neutral and passive.

In the context of judicial decision making, a court deviates from this passive role when it considers an issue not raised by the parties but which it nevertheless deems relevant to the controversy.

Raising issues sua sponte is not an uncommon practice. A court may, sua sponte, dismiss an action by determining that jurisdiction is not proper even though both parties have agreed to appear in the court. A court might also declare a mistrial even though no motion has been made by any of the parties. A court could decide, sua sponte, to proceed with a bifurcated trial against the wishes of the parties who prefer unified trial of all the issues.

Such a situation may also arise, for example, where a judge imposes sanctions on a party for failure to comply with discovery deadlines established by court order or by stipulation of the parties. Sanctions could take the form of the imposition of costs upon the offending party, or even, in some extreme cases, the dismissal of a claim or striking a defendant's answer.

Obtaining appellate review of an adverse sua sponte decision can be difficult, but not impossible. It is well-established under New York law that there is no right to appeal a sua sponte order. This rule follows from CPLR § 5701(a)(2) which indicates that a party has a right to appeal from an order "where the motion it decided was made upon notice." Accordingly, because a sua sponte order is not the result of a motion made on notice there is no right to appeal the order, and because there is no appeal as of right from an order made sua sponte, such an order is subject to dismissal.

This does not mean, however, that there is no way to obtain appellate review of an adverse decision. The proper procedure is to move to vacate the order. An appeal may then be taken from a denial of the motion to vacate.

This subject was addressed by the Court of Appeals in 2003 in *Sholes v. Meagher*, 100 N.Y.2d 333 [2003], where the issue was the appealability of a sua sponte order imposing sanctions on counsel. The Appellate Division dismissed, holding that there was no appeal as of right and declined to grant leave to appeal. The Court of Appeals added that the purpose of requiring a motion to vacate is to ensure that the appeal is made on a full record.

If a court were so inclined, it could still put up substantial roadblocks to timely appellate review of its sua sponte decision by refusing to sign an order to show cause, or issue a written order on the motion to vacate or by characterizing the motion as a motion to reargue, the denial of which may not be appealed.

Where a party is left without a written order denying the motion to vacate the party must then seek a Writ of Mandamus via an Article 78 proceeding before the Appellate Division, naming the judge as a party, directing and compelling the judge to sign the order to vacate his or her sua sponte order. A request for a stay of proceedings may also be appropriate.

Obtaining appellate review of an adverse order issued sua sponte in the method described above may be time consuming, but in the absence of any right to appeal, a more circuitous route is necessary.

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