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How Much (or Little) is Enough? Notice of Cross-Motions Under CPLR 2215

Lawyers are, generally speaking, rule-followers. After all, there are a myriad of statutes, rules, regulations, and guidelines that lawyers must be familiar with and, more importantly, follow to effectively advocate for their clients. Sometimes, the failure to follow a rule can have devastating, preclusive effects.[1]

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Other times, courts can, in the exercise of their discretion, take a more lenient approach. Such was the case in *Fried v. Jacob Holding, Inc.*,[2] a recent Second Department case that addressed compliance with CPLR 2215.

CPLR 2215 provides that "a party may serve upon the moving party a notice of cross-motion" demanding affirmative relief in response to a motion. By its express terms, CPLR 2215 requires a party seeking affirmative relief in a cross-motion to serve and file a formal notice of cross-motion.

In *Fried*, though, the Second Department held that strict compliance with CPLR 2215 is not required for a court to entertain a cross motion if certain conditions are met by the cross-movant, but that satisfying those conditions is not a guaranty the application will be entertained.

In *Fried*, the plaintiffs served upon a corporate defendant a summons and complaint seeking damages based on an alleged personal injury. The defendant did not timely appear or respond to the complaint. The plaintiffs then moved pursuant to CPLR 3215 for leave to enter a default judgment on the issue of liability.

The defendant timely opposed the plaintiffs' motion and also sought leave to serve a late answer and to compel plaintiffs to accept its untimely answer. Notably, though, the defendant's application for affirmative relief was not made in a notice of cross-motion as required by CPLR 2215. Rather, the defendant made its affirmative request for relief on the first and last pages of the attorney affirmation submitted in opposition to the plaintiffs' motion. The defendant's arguments in opposition to the motion and in support of its own cross-motion were the same.

The plaintiffs submitted reply papers in which they opposed defendant's application for affirmative relief both on the merits and on the grounds that the court could not grant such relief to defendant in the absence of a formal notice of cross-motion. The trial court denied plaintiffs' motion for a default judgment and, in the exercise of its discretion, granted defendant's cross-application to serve an untimely answer. The trial court, applying CPLR 2001,[3] overlooked the defendant's failure to strictly comply with CPLR 2215 "because the defendant had clearly stated its request for affirmative relief and the plaintiffs were on notice of it and had responded to it."

On appeal, the Second Department affirmed the trial court's decision granting the defendant's application to serve a late answer. The court then took the opportunity to explain the difference "between, on the one hand, what a party must do in order to be entitled to have a request for relief adjudicated and, on the other, what a court may do with respect to a request for relief that has not been made in compliance with" CPLR 2215.

The court began its analysis with a review of a prior version of CPLR 2215, which only required a party seeking affirmative relief to serve upon a moving party "a notice demanding relief." The court noted that the vaguely-worded provision caused uncertainty about what constituted a "notice demanding relief." That uncertainty, the court continued, led to the 1980 change in CPLR 2215 requiring a cross-movant to serve a "notice of cross-motion." According to the Advisory Committee on Civil Practice, the goal of the change was to ensure the initial moving party was aware that a cross-application for relief was being made, rather than it coming up as a "hidden incident of affidavits opposing the main motion."[4]

Despite the change, the court acknowledged that its precedent concerning whether a formal notice of cross-motion was required remained inconsistent. On the one hand, the court cited a line of decisions in which it held a trial court did not "err" in ruling upon a request for cross-relief that was not made in a notice of cross-motion pursuant to CPLR 2215.[5]

For example, in *Fugazy v. Fugazy*[6] the court held the trial court "did not err" and "providently exercised its discretion" in entertaining a cross-application that was not properly noticed under CPLR 2215. The Court reasoned in Fugazy and its progeny that there was no prejudice caused by the lack of formal notice because the plaintiff was aware of the cross-application and had actually opposed it.

On the other hand, the court cited *Thomas v. Drifters,*[7] in which it held that in the absence of a formal notice of cross-motion under CPLR 2215, the moving defendant was "not entitled" to the affirmative relief requested. Notably, the decision in *Thomas*, as with the other precedent cited by the

court, did not discuss whether the opposing party had actual notice of the cross-application or if it had responded to it.

Ultimately, the court in *Fried* rejected its precedent that a cross-movant's failure to serve a notice of cross-motion under CPLR 2215 precluded the trial court from entertaining the application for relief, thereby relaxing the need for the party's strict compliance with CPLR 2215 to have its cross-motion heard by the trial court.[8]

But, the court's leniency comes with a price, as the court cautioned practitioners that absent a notice of cross motion under CPLR 2215, a cross-movant leaves the initial decision to even entertain its application to the court's discretion.[9] As the court explained, "a party in compliance with CPLR 2215 is entitled to have its cross motion considered; a party not in compliance with the statute must hope the court opts, in the exercise of discretion, to entertain the request."[10]

Factors the trial court should consider in decided to exercise such discretion are: (i) "the interrelatedness of the relief requested by the nonmoving party and the relief requested in the main motion," (ii) "the prominence in the opposition papers of the affirmative request for relief and the movant's opportunity to address that request," and (iii) "the interest of judicial economy."[11]

The Court further, and maybe more importantly, cautioned that while a failure to comply with CPLR 2215 may not prevent the cross-movant from initially having his application entertained by the trial court, it will affect the appealability of any order determining that application.

Specifically, a motion made by notice of cross-motion is a "motion made upon notice" and, pursuant to CPLR 5701, an order granting or denying that request is appealable as of right. Absent a notice of cross-motion, though, the appealing party must first make the extra step of seeking permission to appeal, which the appellate court could deny for any number of reasons.[12]

The court in *Fried* announced the Second Department's preference to resolve cross-applications for relief on their merits rather than dismiss them for technical non-compliance with CPLR 2215, provided that non-compliance does not surprise or cause prejudice to the initial moving party. The court cautions, though, that it remains a matter of discretion for the trial court to decide whether to entertain a cross-application that is not properly noticed, and that the failure to properly notice the application negates the automatic right to appeal any resulting order.

In light of *Fried*, it remains the best practice to properly notice a cross-motion to ensure that a request for affirmative relief is not only decided by the court but, if the cross-motion is denied, that the order determining the motion remains appealable as of right. In other words, just follow the rule.

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1. *See, e.g., Clark v. Pfizer, Inc.*, 64 A.D.3d 536, 537 (2d Dept. 2009) (dismissing appeal because the appellant failed to comply with the deadline to serve a notice of appeal pursuant to CPLR 5513[a]).
2. 2013 NY Slip Op 05555, 2013 N.Y. App. Div. LEXIS 5512 (2d Dept., Aug. 7, 2013).
3. CPLR 2001 permits a court to allow a party to correct "a mistake, omission, defect or irregularity ... upon such terms as may be just, or, if a substantial right of a party is not prejudiced ...."
4. Jud. Conf. and Chief Admin. of the Cts. of the State of N.Y., Rep. to the 1980 Legis. in Relat. to Civ. Pract. in the Cts., Rep. of Chief Admin., at 137.
5. *See id.* at *14-15 (citing *Rodriguez v. County of Rockland*, 43 A.D.3d 1026 (2d Dept. 2007) (finding trial court did not err in accepting "me too" affidavit adopting arguments and relief requested in properly noticed motion); *Wechsler v. People*, 13 A.D.3d 941, 942 (2d Dept. 2004) (finding trial court did not abuse discretion in deciding application for summary judgment made in derogation of CPLR 2215 because movant made application clear in papers and other party responded to it); *Fox Wander W. Neighborhood Assn. v. Luther Forest Comm. Assn.*, 178 A.D.2d 871, 872 (2d Dept. 1991) (finding trial court did not abuse discretion in deciding application to dismiss claims against individual defendant because it was convenient and expeditiously resolved the issue).
7. *See* 219 A.D.2d 639, 640 (2d Dept. 1995); *see also Knopp v. Slater*, 258 A.D.2d 624 (2d Dept. 1999) (reversing an award of summary judgment to the plaintiff where no notice of cross motion for such relief had been made); *Pierre v. City of New York*, 22 A.D.3d 733, 734 (2d Dept. 2005) (finding the trial court erred in granting affirmative relief to the plaintiffs – leave to file a late notice of claim – because a notice of cross motion seeking that relief was not made). The Court in *Fried* also noted its prior decisions holding, without explanation, that the failure to comply with CPLR 2215 presented a jurisdiction defect preventing a court from deciding such an unnoticed application. *See Fried*, 2013 N.Y. App. Div. LEXIS 5512 at * 13-14 (citing Bucceri v. Frazer, 297 A.D.2d 304, 306 (2d Dept. 2002), Marisco v. Southland Corp., 148 A.D.2d 503, 506 (2d Dept. 1989), and other cases).
8. *See Fried*, 2013 N.Y. App. Div. LEXIS 5512 at *14-15.
9. *See id.*
10. *Id.* at *17-18.
11. *Compare*, CPLR 5701(a) *with* CPLR 5701(c). *See also Blam v. Netcher*, 17 A.D.3d 495, 496 (2d Dept. 2005) (dismissing appeal from an order denying motion requesting leave to serve a late answer because "no appeal lies as of right from an order denying a motion not made on notice").