

Sanctions for Failing To ‘Immediately Notify’ Court of Settlement

by Thomas E.L. Dewey

The Appellate Division’s statewide Practice Rules contain an important requirement that generally applies to parties and counsel appearing before all Departments of the Appellate Division: “[t]he parties or their attorneys shall immediately notify the court when there is a settlement of a matter or any issue therein.” 22 NYCRR 1250.2(c). If parties and their counsel fail to comply with this immediate notification requirement, they may be subject to the “imposition of sanctions.” *Id.*

In *Bank of New York Mellon v. Smith*, the Second Department issued a decision sanctioning a party and its trial and appellate counsel for “flagrant violations” of this Practice Rule. Specifically, after the parties and counsel had failed to take any steps over a six-month period to inform the Second Department of a settlement that resolved pending appeals, the court imposed monetary sanctions on the respondent and its counsel due to their “excessive delays.”

In its decision, the Second Department emphasized that the primary purpose of this Practice Rule is to “protect the Appellate Courts from spending time analyzing matters that have been rendered academic.” In other words, this Practice Rule exists so that the state’s appellate courts need not devote resources to matters that have been resolved, but rather, actual controversies.

Background

On March 14, 2013, Bank of New York Mellon (BNY Mellon) filed a summons and complaint against Derek Smith in the Supreme Court, Westchester County to foreclose a mortgage securing certain real property (the 2013 action). During the pendency of that action, BNY Mellon filed a separate successive action against Smith (the 2014 action) in the same jurisdiction to foreclose the same mortgage securing the same real property at issue in the 2013 action. BNY Mellon’s counsel in the trial court in both actions was Gross Polowy, LLC, and Smith’s counsel was Marcos & Sitaras, PLLC.

While the 2013 action remained pending, BNY Mellon filed a motion for summary judgment in the 2014 action. On May 24, 2016, the Supreme Court issued two orders: one granting summary judgment in favor of BNY Mellon as against Smith, and another referring the matter to a referee to compute the amount due to BNY Mellon.

On May 24, 2016, Smith filed appeals from both orders to the Second Department. The appeals were fully brief and perfected on March 6, 2017. Also on that date, Smith’s brief and record on appeal were served on Gross Polowy. On March 21, 2017, Day Pitney LLP filed a notice of appearance in the Second Department, and it subsequently filed a brief for BNY Mellon. Thereafter, Smith filed a reply brief.

On July 12, 2018, Gross Polowy was informed that the 2013 action had settled as a result of a modification of the underlying mortgage. The appeals were then placed on the Second Department’s calendar for Feb. 11, 2019. On Feb. 6, 2019—less than a week before the appeals were to be heard—Day Pitney submitted a stipulation in which the parties agreed to withdraw the appeals.

On Feb. 8, 2019, the Second Department issued an order to show cause directing the parties to the appeals and their counsel, including Gross Polowy, Day Pitney, and Marcos & Sitaras, to show cause why an order should or should not be made imposing sanctions against them pursuant to 22 NYCRR 1250.2(c).

The Practice Rules

On June 29, 2018, the Presiding Justices of the Appellate Division promulgated statewide Practice Rules of the Appellate Division that apply to all Departments. These rules became effective on Sept. 17, 2018 and apply “to each matter pending in the Appellate Division” on that date (with limited exceptions not applicable here).

Section 1250.2(c) of the Practice Rules provides that “[t]he parties or their attorneys shall immediately notify the court when there is a settlement of a matter or any issue therein or when a matter or any issue therein has been rendered moot Any such notification shall be followed by an application for appropriate relief. Any party or attorney who, without good cause shown, fails to comply with the requirements of this subdivision may be subject to the imposition of sanctions.”

As the Second Department explained in *Bank of New York Mellon v. Smith*, §1250.2(c) applies to both “the parties” and their “attorneys” and “imposes a continuing obligation to monitor the status of the case and to apprise the Appellate Division of certain developments that might affect a pending appeal.” In addition, although this section only requires “one party or attorney . . . to notify the Court of the relevant developments, all of the parties and their attorneys are independently responsible for ensuring that timely notification occurs.” Thus, where timely notification is “not given by any of the parties or their attorney, they may each be held independently responsible and, absent a showing of good cause for the failure to ensure a timely notification, sanctioned for their respective misconduct.”

The Second Department’s Decision

After reviewing the record, the Second Department issued a decision imposing sanctions on BNY Mellon and its counsel. The Second Department began its analysis by noting that the modification of the mortgage at issue in the 2013 action triggered Gross Polowy’s duty to “immediately notify the court” of a settlement, because the same mortgage was at issue in the 2014 action (i.e., the action that was the subject of Smith’s appeals). Thus, as of July 12, 2018, Gross Polowy had a duty to *immediately* notify the Second Department.

Nevertheless, Gross Polowy undisputedly “did not take any steps to ensure or confirm that this Court or

[BNY Mellon's] appellate counsel was notified of the settlement." The Second Department held that this delay was "excessive," that Gross Polowy had failed to provide "any viable explanation for its failure to comply" with the immediate notification rule, and that sanctions of \$1,000 were warranted.

In addition, the Second Department held that BNY Mellon failed to discharge its own independent duty to take steps to ensure that the Second Department was timely notified of the settlement. The Second Department also criticized BNY Mellon's "dubious practice of maintaining two simultaneous actions against the same party for the same relief," and held that this practice "does not constitute good cause for its failure to comply" with the immediate notification requirement. The Second Department then held that BNY Mellon's "excessive delay, coupled with the absence of any viable explanation for its failure to comply" warranted sanctions of \$500.

Furthermore, the Second Department held that Day Pitney, BNY Mellon's appellate counsel, had failed to comply with the immediate notification requirement. While Day Pitney represented that Gross Polowy did not inform it of the settlement until Jan. 15, 2019, it did not contact the Second Department about the settlement until Feb. 6, 2018—over three weeks after it first learned of the mortgage modification. As a result, the Second Department held that Day Pitney did not comply with its obligation to "immediately notify the court."

Notably, the Second Department rejected Day Pitney's contention that its delay did not prejudice either party, because that argument "fails to account for one of the primary purposes" of the immediate notification requirement: the protection of "the Appellate Courts from spending time analyzing matters that have been rendered academic." As the Second Department explained, "if this Court had been timely advised of the settlement and modification in this case, it would have been able to devote additional resources to one of the many actual controversies that fill our docket." As a result, it imposed sanctions in the sum of \$250 on Day Pitney.

In addition, the Second Department held that no sanctions were warranted against Marcos & Sitaras or Smith, which were differently situated as compared with BNY Mellon and its counsel. In particular, Marcos & Sitaras took "affirmative steps" to secure dismissal of the 2014 action after the underlying mortgage had been modified, and it explained that its client was reluctant to withdraw the appeals while the orders remained valid and enforceable.

Conclusions

The Second Department's decision in *Bank of New York Mellon* shows that New York appellate courts take seriously statewide rules requiring parties and counsel to provide immediate notification of settlements. Where a settlement has occurred and parties and counsel fail to comply with this rule—even by waiting a few weeks—they may be subject to monetary sanctions.

In addition, this decision shows that counsel may be sanctioned somewhat more harshly than parties for essentially the same violations. This conclusion flows from the fact that the monetary sanctions imposed on Gross Polowy (\$1,000) were double the size of the monetary sanctions imposed on BNY Mellon (\$500), perhaps in recognition that counsel typically have greater legal training and ethical obligations. On the other hand, the comparatively smaller sanctions (\$250) imposed on Day Pitney, BNY Mellon's appellate counsel, appears to reflect the fact that Day Pitney's delay in informing the Second Department of the settlement was not "excessive," unlike that of Gross Polowy and BNY Mellon itself.

The Second Department also made clear in its decision that it will not automatically impose sanctions on a party or counsel for failure to provide immediate notification of a settlement. Instead, only parties that fail to take "any steps" to comply with this rule will face sanctions.

Going forward, counsel and their clients should be sure to take affirmative steps to provide immediate notification of any relevant settlements to New York appellate courts during the pendency of their appeals. Doing so will not only help guard against the imposition of sanctions, but also enable the state's appellate courts devote resources to actual controversies, rather than purely academic matters.

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