St. John's Law Review

Volume 48, October 1973, Number 1 Article 17

CPLR 3213: Court Will Not Enter Default Judgment Where Instrument Is Not for Money Only and Plaintiff Gives Short Notice

St. John's Law Review

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation

St. John's Law Review (1973) "CPLR 3213: Court Will Not Enter Default Judgment Where Instrument Is Not for Money Only and Plaintiff Gives Short Notice," *St. John's Law Review*: Vol. 48 : No. 1 , Article 17.
Available at: https://scholarship.law.stjohns.edu/lawreview/vol48/iss1/17

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

of the grounds permitted to be raised in a CPLR 3211 motion.[99] Prior law was inconsistent in permitting an immediate trial of such factual issues when a CPLR 3211 motion was treated as a motion for summary judgment, but denying it on an ordinary CPLR 3212 summary judgment motion. Formerly, an immediate trial was available under CPLR 3212(c) only where the extent of the damages was at issue. Its expansion to post-answer motions based on grounds enumerated in CPLR 3211(a) brings symmetry to the two sections which was, for no apparent reason, previously lacking.[100]

CPLR 3213: Court will not enter default judgment where instrument is not for money only and plaintiff gives short notice.

By allowing a plaintiff to serve summary judgment motion papers in lieu of a complaint, the Legislature has provided a convenient procedure for securing judgments in certain presumptively meritorious categories of actions.[101] The procedure is available only in actions based upon "an instrument for the payment of money only or upon any judgment. . . ."[102] In noticing the motion to be heard, the plaintiff must give the defendant at least as much time as would be allowed for making an appearance in an ordinary action.[103] The plaintiff may extend the notice period by as much as ten days[104] beyond the required minimum and may demand that the defendant serve answering papers upon him during the period of extension. Although courts have permitted deviations from these complicated requirements where the defendant has appeared and consented to the CPLR 3213 procedure,[105] a recent case indicates that strict compliance will be demanded as a condition to entry of judgment when the defendant defaults.

---

99 JUDICIAL CONFERENCE REPORT 82-83.

100 *See* McLaughlin, *New York Trial Practice,* 169 N.Y.L.J. 111, June 8, 1973, at 4, col. 1.

101 *See* 7B McKINNEY'S CPLR 3213, commentary at 828 (1970); 4 WK&M ¶ 3213.01.

102 CPLR 3213.

103 The time within which an appearance must be made is governed by CPLR 320(a) in the Supreme and County Courts and by section 402 of the UDCA, UCCA, UJCA, and CCA in the District, City, Justice, and New York City Civil Courts. The period of time allowed for an appearance generally depends upon the method of service used.

104 In the lower courts there is no ten-day limitation. *See* section 1004 of the UDCA, UCCA, UJCA, and CCA. *See also* 7B McKINNEY'S CPLR 3213, commentary at 835 (1970); 4 WK&M ¶ 3213.02.

105 *See* Reilley v. Insurance Co. of North America, 32 App. Div. 2d 918, 302 N.Y.S.2d 435 (1st Dep't 1969) (mem.); Flushing Nat'l Bank v. Brightside Mfg., Inc., 59 Misc. 2d 108, 298 N.Y.S.2d 197 (Sup. Ct. Queens County 1969). The Court of Appeals in Stevenson v. News Syndicate Co., Inc., 302 N.Y. 81, 96 N.E.2d 187 (1950) held that

> [w]here . . . all parties to a litigation choose to do so, they may to a large extent chart their own procedural course through the courts.

Id. at 87, 96 N.E.2d at 190.

In *Kemp v. Hickson*,[106] an action was commenced in the District Court, Suffolk County, pursuant to UDCA 1004, the District Court counterpart of CPLR 3213. The plaintiffs sought recovery on a real estate bond which provided that "all of the covenants, conditions and agreements contained in said mortgage are hereby made part of this instrument."[107] Process was served pursuant to CPLR 308(4) on December 27, 1972. The motion was originally noticed to be heard on January 10, 1973, but was later adjourned to January 24, 1973. The plaintiff demanded that answering papers be served at least five days prior to the return date. This meant that the notice period was far shorter than the required minimum.[108] When the defendant failed to serve answering papers or to appear on the return date, the court dismissed the action on two grounds. The court first held that the incorporated provisions in the real estate bond prevented it from qualifying as an instrument for the payment of money only.[109] Secondly, the court held that the short notice was fatal to jurisdiction. The court distinguished *Flushing National Bank v. Brightside Manufacturing, Inc.*,[110] wherein the defendant received short notice but appeared. There it was held that the defendant had waived any objection to the notice by serving answering papers and arguing the merits. While the court in *Flushing National Bank* retained jurisdiction and gave the defendant an extended time to answer, the *Kemp* court held that it could not adopt this procedure when the defendant had not appeared.

The speed and convenience of a motion under CPLR 3213 make it a welcome innovation of which practitioners should try to take advantage. Its successful use requires careful attention to time requirements in drawing up the motion papers.[111] Professor David D. Siegel has recommended that the practitioner make certain that service is by personal delivery in accordance with CPLR 308(1) to facilitate calculation of the return date.[112] As *Kemp* illustrates, defects are not likely to be overlooked when a defendant has defaulted.

---

106 73 Misc. 2d 76, 341 N.Y.S.2d 527 (Dist. Ct. Suffolk County 1973).

107 *Id.* at 77, 341 N.Y.S.2d at 529.

108 *See* UDCA 1004 and 402(b)(4).

109 The court cited New York Conference Ass'n of 7th Day Adventists v. 915 James St. Associates, Ltd., 63 Misc. 2d 38, 310 N.Y.S.2d 742 (Sup. Ct. Onondaga County 1970), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 342, 360 (1970), where a similar instrument was held not to be for the payment of money only.

110 59 Misc. 2d 108, 298 N.Y.S.2d 197 (Sup. Ct. Queens County 1969), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 313, 334 (1969).

111 *See* 7B MCKINNEY'S CPLR 3213, commentary at 832-35 (1970).

112 *Id.* at 836.