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CPLR 3212(e): No Summary Judgment When Counterclaim Inseparable from Main Claim Exceeds Main Claim

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closure sessions, and use of referees can be costly.[96] Professor Siegel has observed that assignment of a judge or referee to preside over the taking of depositions "would take an unusual case, with relatively large sums or numerous parties involved. . . ."[97] The First Department has held that the power to appoint a referee under CPLR 3104(a) "should be exercised sparingly, particularly in advance of the actual commencement of proceedings."[98]

The policy of judicial self-restraint concerning supervision of proceedings was followed by the Supreme Court, Erie County, in *In re Dietrich's Will*.[99] The court concluded that full supervision was not warranted under the circumstances but maintained continuing jurisdiction over the examination before trial.[100] The quotation by Professor Siegel stated in the preceding paragraphs was repeated approvingly.[101]

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3212(e): No summary judgment when counterclaim inseparable from main claim exceeds main claim.

Technical impediments to summary judgments in cases involving counterclaims were eliminated by the Legislature in CPLR 3212(e).[102] Summary judgment for the plaintiff is not barred by mere assertion of a counterclaim.[103] Additionally, when the counterclaim exceeds the damages demanded by the plaintiff, summary judgment may be granted and entry or execution stayed.[104] This procedure for partial summary judgment should be implemented whenever appropriate.[105]

In *Seneca Trucking Co., Inc. v. D. H. Overmeyer Co., Inc.*,[106] the Supreme Court, Erie County, granted summary judgment for the plaintiff but allowed counterclaims to remain. The allegations of the

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96 *See* 7B McKINNEY'S CPLR 3104, commentary 1, at 338 (1970).

97 *Id.*

98 National Dairy Prods. Corp. v. Lawrence American Field Warehousing Corp., 23 App. Div. 2d 650, 257 N.Y.S.2d 471, 472 (1st Dep't 1965).

99 65 Misc. 2d 811, 318 N.Y.S.2d 72 (Sup. Ct. Erie County 1970).

100 *Id.* at 812, 318 N.Y.S.2d at 74.

101 *Id.*

102 7B McKINNEY'S CPLR 3213, commentary 31, at 448 (1970).

103 M&S Mercury Air Conditioning Corp. v. Rodolitz, 24 App. Div. 2d 873, 264 N.Y.S.2d 454 (2d Dep't 1965).

104 Dalminter, Inc. v. Dalmine, S.P.A., 28 App. Div. 2d 852, 288 N.Y.S.2d 110 (1st Dep't), *aff'd*, 23 N.Y.2d 653, 242 N.E.2d 488, 295 N.Y.S.2d 337 (1968); Pease & Elliman, Inc. v. 926 Park Avenue Corp., 23 App. Div. 2d 361, 260 N.Y.S.2d 693 (1st Dep't 1965), *aff'd*, 17 N.Y.2d 890, 218 N.E.2d 700, 271 N.Y.S.2d (1966). *See* 7B McKINNEY'S CPLR 3213, commentary 31 at 449 (1970).

105 Janos v. Peck, 21 App. Div. 2d 529, 251 N.Y.S.2d 254 (1st Dep't), *aff'd*, 15 N.Y.2d 509, 202 N.E.2d 560, 254 N.Y.S.2d 115 (1964).

106 36 App. Div. 2d 894, 320 N.Y.S.2d 314 (4th Dep't 1971) (mem.).

counterclaims, if established, would have defeated plaintiff's right of recovery on his complaint.[107] The Court of Appeals had held that a court may not grant a summary judgment when there is a valid counterclaim for a sum equal to or greater than the amount demanded in the complaint.[108] Upon appeal by defendants, the Appellate Division, Fourth Department, acting under the above well-established rule, reversed the trial court, on the ground that the counterclaim was so "inseparable" from the main claim as to preclude entry of judgment.[109]

The inseparability of the counterclaim from the main claim necessitates a stay of entry of judgment. "The mere fact that they are related, however, should not make them inseparable for this purpose."[110]

CPLR 3213: Written and undenied account stated deemed to constitute an instrument for the payment of money only.

By authorizing substitution in lieu of complaint of a notice for summary judgment and the supporting papers, CPLR 3213 provides an expeditious means of commencing judgment.[111] This facile procedure, however, is expressly limited to those actions "based upon an instrument for the payment of money only or upon any judgment." Thus, utilization of this "action-motion"[112] initially involves determination of whether the action is founded upon an instrument within the contemplation of CPLR 3213.

This preliminary scrutiny is necessary because the courts, without definitive precedent to follow,[113] have treated the question on a case-by-case basis. While the statute was intended by the revisors to provide the means to speedy adjudication of claims presumptively valid,[114] it was enacted in the precise and restrictive language quoted above. As a consequence of this conflict and of the lack of precedent, those courts presented with motions under CPLR 3213 have rendered inconsistent decisions.[115] Disparate interpretation includes the liberal approach of

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107 *Id.*, 320 N.Y.S.2d at 315.

108 Illinois McGraw Elec. Co. v. John J. Walters, Inc., 7 N.Y.2d 874, 876-77, 164 N.E.2d 872, 873, 196 N.Y.S.2d 1003, 1004 (1959); Treacy v. Melrose Paper Stock Co., 269 N.Y. 155, 190 N.E. 40 (1935).

109 36 App. Div. 2d at 894, 320 N.Y.S.2d at 315.

110 *See* 7B McKINNEY'S CPLR 3212, commentary 31 at 449 (1970).

111 *See* 4 WK&M ¶ 3213.01.

112 *See* 7B McKINNEY'S CPLR 3213, commentary 1 at 828 (1970).

113 CPLR 3213 is novel. *See* 4 WK&M ¶ 3213.01. Additionally, legislative documents lack suggestions as to when the motion should lie. *See* FIRST REP. 91; FIFTH REP. 492; SIXTH REP. 338.

114 *See* FIRST REP. 91; 4 WK&M ¶ 3213.01.

115 *See* 7B McKINNEY'S CPLR 3213, commentary 3 at 829 (1970). *Compare, e.g.*, Seaman-Andwall Corp. v. Wright Mach. Corp., 31 App. Div. 2d 136, 295 N.Y.S.2d 752 (1st Dep't 1968); Wagner v. Cornblum, 62 Misc. 2d 161, 308 N.Y.S.2d 495 (Sup. Ct.