

# CPLR 3213: Written and Undenied Account Stated Deemed To Constitute an Instrument for the Payment of Money Only

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counterclaims, if established, would have defeated plaintiff's right of recovery on his complaint.<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup>

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."<sup>110</sup>

*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.<sup>111</sup> 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"<sup>112</sup> 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,<sup>113</sup> 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,<sup>114</sup> 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.<sup>115</sup> Disparate interpretation includes the liberal approach of

<sup>107</sup> *Id.*, 320 N.Y.S.2d at 315.

<sup>108</sup> *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).

<sup>109</sup> 36 App. Div. 2d at 894, 320 N.Y.S.2d at 315.

<sup>110</sup> See 7B MCKINNEY'S CPLR 3212, commentary §1 at 449 (1970).

<sup>111</sup> See 4 WK&M ¶ 3213.01.

<sup>112</sup> See 7B MCKINNEY'S CPLR 3213, commentary I at 828 (1970).

<sup>113</sup> 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.

<sup>114</sup> See FIRST REP. 91; 4 WK&M ¶ 3213.01.

<sup>115</sup> 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.

*Seaman-Andwall Corp. v. Wright Machine Corp.*<sup>118</sup> and the restrictive view of *Channel Excavators Inc. v. Amato Landscaping Corp.*<sup>117</sup> *Seaman* espoused the principle that CPLR 3213 is satisfied if the plaintiff can establish a prima facie case by proof of the instrument and of non-payment in accordance with its terms;<sup>118</sup> *Channel* held that the use of CPLR 3213 is precluded where proof of facts outside the instrument is necessary to determine the action.<sup>119</sup>

*Brickman v. Niagara Fruit Co.*<sup>120</sup> is in accord with *Seaman*. Plaintiff sued on a written account stated, proving the instrument and defendant's non-payment. Defendant raised no factual issues, basing his defense on the contention that the account stated did not constitute "an instrument for the payment of money only." The Supreme Court, Albany County, concluded that a written and undenied account stated is encompassed under CPLR 3213.<sup>121</sup> No citation or rationale for this determination was given in the opinion.

The most notable aspect of *Brickman* is its support of *Seaman*.<sup>122</sup> Under the extrinsic proof standard applied in *Channel*, use of CPLR 3213 would not have been sustained.<sup>123</sup> The "simple, direct and time and expense saving procedure"<sup>124</sup> in CPLR 3213 should be administered liberally in accordance with the mandate of CPLR 104. For realization of this goal, a general principle to determine what instruments qualify for this summary treatment must be established, to avoid the wasteful process of case-by-case determination and to end conflict in the area.

*CPLR 3213: Section encompasses notes payable "with interest at bank rates."*

Summary treatment of "an action . . . based on an instrument for the payment of money only" is authorized under CPLR 3213. The

Erie County 1970); *Baker v. Gundermann*, 52 Misc. 2d 639, 276 N.Y.S.2d 495 (Sup. Ct. Nassau County 1966) *with, e.g.*, *Signal Plan, Inc. v. Chase Manhattan Bank*, 23 App. Div. 2d 636, 256 N.Y.S.2d 866 (1st Dep't 1965) (mem.); *All-o-Matic Mfg. Corp. v. Shields*, 59 Misc. 2d 199, 298 N.Y.S.2d 268 (Dist. Ct. Nassau County 1969); *Louis Sherry Ice Cream Co. v. Kroggel*, 42 Misc. 2d 21, 245 N.Y.S.2d 755 (Sup. Ct. N.Y. County 1963).

<sup>116</sup> 31 App. Div. 2d 136, 295 N.Y.S.2d 752 (1st Dep't 1968), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 313, 335-38 (1969).

<sup>117</sup> 48 Misc. 2d 429, 264 N.Y.S.2d 987 (Sup. Ct. Nassau County 1968).

<sup>118</sup> 31 App. Div. 2d at 137, 295 N.Y.S.2d at 754.

<sup>119</sup> 48 Misc. 2d at 430, 264 N.Y.S.2d at 988-89.

<sup>120</sup> 65 Misc. 2d 483, 318 N.Y.S.2d 259 (Sup. Ct. Albany County 1971).

<sup>121</sup> *Id.* at 484, 318 N.Y.S.2d at 260.

<sup>122</sup> Professor Siegel considers *Seaman* "the most coherent standard yet rendered for determining what kind of instrument satisfies CPLR 3213." 7B MCKINNEY'S CPLR 3213, *supp.* commentary 4 at 20 (1970).

<sup>123</sup> Of course, proof of an account stated goes beyond the instrument itself, for transactions prior to the date of the statement determine whether it is an account stated.

<sup>124</sup> *Paul v. Weiss*, 48 Misc. 2d 683, 685, 265 N.Y.S.2d 687, 689 (Sup. Ct. Sullivan County 1965).