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# CPLR 3213: Section Encompasses Notes Payable "With Interest at Bank Rates"

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*Seaman-Andwall Corp. v. Wright Machine Corp.*[116] and the restrictive view of *Channel Excavators Inc. v. Amato Landscaping Corp.*[117] *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;[118] *Channel* held that the use of CPLR 3213 is precluded where proof of facts outside the instrument is necessary to determine the action.[119]

*Brickman v. Niagara Fruit Co.*[120] 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.[121] No citation or rationale for this determination was given in the opinion.

The most notable aspect of *Brickman* is its support of *Seaman*.[122] Under the extrinsic proof standard applied in *Channel*, use of CPLR 3213 would not have been sustained.[123] The "simple, direct and time and expense saving procedure"[124] 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

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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).

116 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).

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

118 31 App. Div. 2d at 137, 295 N.Y.S.2d at 754.

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

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

121 *Id.* at 484. 318 N.Y.S.2d at 260.

122 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).

123 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.

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

courts have had some difficulty in determining which instruments are eligible for this facile procedure, since the Legislature did not define or enumerate.[125] It has been held, however, that a non-negotiable instrument which includes "a clear, unequivocal, unconditional promise for the payment of money only,"[126] falls within the scope of CPLR 3213.[127] Does such an instrument still qualify if there are any facts which must be established outside the instrument?

In *A. Alport & Son, Inc. v. Hotel Evans, Inc.*,[128] the Supreme Court, Sullivan County, held that two notes payable "with interest at bank rates" were proper predicates under CPLR 3213.[129] The only facts requiring proof beyond the face of the notes were the respective interest rates. The court believed that this type of extrinsic evidence should not prevent summary judgment.[130] It should be noted that the cases which the *Alport* court cited in support of its decision[131] did not explicitly acknowledge acceptance of extrinsic evidence, and that some restated the rule that no proof dehors the instrument would be permitted in a 3213 motion.[132]

The *Alport* decision is laudable. The facts requiring proof dehors the instrument were (1) merely necessary to determine the precise amount for which judgment should be given and not essential to prove agreement to pay interest per se, and (2) readily ascertainable. The stringent *Channel* view,[133] which precludes use of CPLR 3213 where proof of facts outside the instrument is required to determine the action, is rejected in favor of a practical attitude. The *Alport* court seeks to formalize a previously unspoken exception to a too stringent

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125 *See* 4 WK&M ¶ 3213.02a.

126 Instituto Per Lo Sviluppo Economico Dell 'Italia Meridionale v. Sperti Prods., Inc., 47 F.R.D. 310, 314 (S.D.N.Y. 1969).

127 Louis Sherry Ice Cream Co. v. Kroggel, 42 Misc. 2d 21, 245 N.Y.S.2d 755 (Sup. Ct. N.Y. County 1963).

128 65 Misc. 2d 374, 317 N.Y.S.2d 937 (Sup. Ct. Sullivan County 1970).

129 *Id.* at 376-77, 317 N.Y.S.2d at 939-40, *citing* Seaman-Andwall Corp. v. Wright Mach. Corp., 31 App. Div. 2d 136, 295 N.Y.S.2d 752 (1st Dep't 1968); Koegel v. Birnbaum, 27 App. Div. 2d 653, 278 N.Y.S.2d 177 (1st Dep't), *aff'd*, 19 N.Y.2d 896, 227 N.E.2d 887, 281 N.Y.S.2d 89 (1967); Wagner v. Cornblum, 62 Misc. 2d 161, 308 N.Y.S.2d 495 (Sup. Ct. Erie County 1970); Paul v. Weiss, 48 Misc. 2d 683, 265 N.Y.S.2d 687 (Sup. Ct. Sullivan County), *aff'd*, 24 App. Div. 2d 1054, 265 N.Y.S.2d 625 (3d Dep't 1965).

130 65 Misc. 2d at 376, 317 N.Y.S.2d at 939.

131 *See* note 5 *supra.*

132 Seaman-Andwall Corp. v. Wright Mach. Corp., 31 App. Div. 2d 136, 137, 295 N.Y.S.2d 752, 754 (1st Dep't 1968); Paul v. Weiss, 48 Misc. 2d 683, 689, 265 N.Y.S.2d 687, 693 (Sup. Ct. Sullivan County), *aff'd*, 24 App. Div. 2d 1054, 265 N.Y.S.2d 625 (3d Dep't 1965).

133 Channel Excavators Inc. v. Amato Landscaping Corp., 48 Misc. 2d 429, 264 N.Y.S.2d 987 (Sup. Ct. Nassau County 1968); *see* 7B McKinney's CPLR 3213, commentary 3 at 830 (1970).

rule.[134] The need of extrinsic proof should not necessarily bar invocation of CPLR 3213.

*CPLR 3215(c): Default not equivalent to admission of allegations of complaint.*

CPLR 3215(c) provides that a plaintiff must seek entry of judgment within one year after default or see the complaint dismissed as abandoned unless said plaintiff shows sufficient reason why the court should not so dismiss.[135] The purpose of this section is to prevent plaintiffs from unreasonably delaying termination of their actions.[136]

In *Ballard v. Billings & Spencer Co.*[137] plaintiff secured restoration of this action to the trial calendar by falsely stating that all pleadings had been served. At the time defendants United and Houdaille had been in default for more than one year, but plaintiff's conduct indicated that he had expected them to serve their answers eventually. While a jury was being selected, defendants learned that plaintiff intended to treat their failures to answer as admissions of the complaints' allegations. Plaintiff refused to accept proposed answers, and the trial court, exasperated by the defendants' dilatoriness, denied their motions to serve answers and for mistrial and directed trial of the issue of damages only.[138] Defendants appealed *inter alia* the court's denial of their motions to serve answers.

The Appellate Division, Fourth Department, ruled that denial of the motions was an abuse of discretion and ordered a new trial.[139] Express limiting statutory provisions thwarted the trial court's attempt to punish defendant's failure to move to vacate the note of issue including a certificate of readiness stating that all pleadings had been served by equating default with admission of complaint.[140] Plaintiff could not circumvent CPLR 3215(c).[141] Plaintiff suffered no legal prejudice by the default, for he was aware of defendants' positions, and in fact waived the default. Since the law prefers disposition of cases

134 *Accord,* Instituto Per Lo Sviluppo Economico Dell 'Italia Meridionale v. Sperti Prods., Inc., 47 F.R.D. 310, 315 (S.D.N.Y. 1969).

135 *See* 7B McKinney's CPLR 3215, commentaries 11-13 (1970); 4 WK&M ¶¶ 3215.13-3215.16.

136 *See* 4 WK&M ¶ 3012.09.

137 36 App. Div. 2d 71, 319 N.Y.S.2d 191 (4th Dep't 1971).

138 *Id.* at 73-75, 319 N.Y.S.2d at 193-95.

139 *Id.* at 76, 319 N.Y.S.2d at 197.

140 *See* DeRosa v. La Sala, 31 App. Div. 2d 745, 297 N.Y.S.2d 483 (2d Dep't 1969); Herzbrun v. Levine, 23 App. Div. 2d 744, 259 N.Y.S.2d 237 (1st Dep't 1965); Kohn v. Kohn, 5 Misc. 2d 288, 158 N.Y.S.2d 978 (Sup. Ct. Monroe County 1957); 4 WK&M ¶¶ 3012.09; 3215.13-3215.14 (1969).

141 36 App. Div. 2d at 75, 319 N.Y.S.2d at 196.