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CPLR 3213: Support Clause in Separation Agreement Considered an Instrument for the Payment of Money

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Lustig v. Congregation B'Nai Israel,[98] the Supreme Court, Kings County, in adherence to the position of the Second Department, held that a 3211(c) motion is analogous to one brought under 3212 and, therefore, the same rules should govern.[99] The Third Department has expressed a similar view.[100]

Professor David Siegel agrees with the approach taken by the First Department, asserting that there is no indication in the language of CPLR 3211(c) that a court's power to grant summary judgment is limited to post-joinder motions. Moreover, since seven out of ten objections listed under CPLR 3211(a) must be made before answer, the authority conferred by 3211(c) would be useless if the movant were compelled to await joinder of issue.[101] Hopefully, the conflict will soon be resolved by the Court of Appeals.[102]

CPLR 3213: Support clause in separation agreement considered an instrument for the payment of money.

The seemingly clear and unequivocal language of CPLR 3213[103] continues to present problems of interpretation as courts, hindered by the absence of definitive precedent,[104] strive to discern what instruments are included in the phrase "instrument for the payment of money only."[105] The basis for this dilemma is the apparent conflict between the revisors' intent and the statute as finally enacted. For, the intendment was to provide a speedy method for adjudicating

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98 62 Misc. 2d 216, 308 N.Y.S.2d 480 (Sup. Ct. Kings County 1970).

99 *See* Pisano v. County of Nassau, 41 Misc. 2d 844, 246 N.Y.S.2d 733 (Sup. Ct. Nassau County 1963), *aff'd without opinion*, 21 App. Div. 2d 754, 252 N.Y.S.2d 22 (2d Dep't 1964).

100 *See* Milk v. Gottschalk, 29 App. Div. 2d 698, 286 N.Y.S.2d 39 (3d Dep't 1968). This holding apparently supersedes the decision granting pre-joinder summary judgment in Dana v. Board of Supervisors, 48 Misc. 2d 876, 266 N.Y.S.2d 229 (Sup. Ct. St. Lawrence County 1966).

101 7B McKINNEY'S CPLR 3211, commentary 45, at 49 (1970).

102 In any event, all of the departments are in agreement that a court should advise the parties that a motion to dismiss will be treated as a motion for summary judgment. *See, e.g.*, Mareno v. Kibbe, 32 App. Div. 2d 825, 302 N.Y.S.2d 324 (2d Dep't 1969).

103 CPLR 3213 permits the service of a summons and motion for summary judgment in lieu of complaint when an action "is based upon an instrument for the payment of money only or upon any judgment."

104 This lack of guidance stems from the fact that the predecessors of the CPLR did not offer a plaintiff similar relief. Moreover, the legislative documents are lacking in suggestions as to when the motion should lie. *See* FIRST REP. 91; FIFTH REP. 492; SIXTH REP. 338.

105 *See, e.g.*, Holmes v. Allstate Ins. Co., 33 App. Div. 2d 96, 305 N.Y.S.2d 563 (1st Dep't 1969); Seaman-Andwall Corp. v. Wright Mach. Corp., 31 App. Div. 2d 136, 295 N.Y.S.2d 752 (1st Dep't 1968); Orenstein v. Orenstein, 59 Misc. 2d 565, 299 N.Y.S.2d 648 (App. T. 2d Dep't 1969), *rev'g* 58 Misc. 2d 377, 295 N.Y.S.2d 116 (N.Y.C. Civ. Ct. Queens County 1968); All-O-Matic Mfg. Corp. v. Shields, 59 Misc. 2d 199, 298 N.Y.S.2d 268 (Dist. Ct. Nassau County 1969). *See also The Quarterly Survey*, 44 ST. JOHN'S L. REV. 335-38 (1969).

claims "presumptively meritorious."[106] Nevertheless, when the statute is analyzed with reference to this intent, no mention is made of such claims; instead, the precise requirement of a "money only" instrument is utilized.

In *Wagner v. Cornblum*,[107] a 3213 motion was permitted in an action to recover support payments under a separation agreement. Rejecting the *Orenstein v. Orenstein*[108] approach, the court chose to adopt the viewpoint of one authority that "the money clause in a separation agreement can be separately regarded and sustained for CPLR 3213 use."[109]

The arguments for both sides of the conflict over whether a separation agreement falls within the ambit of CPLR 3213 are well reasoned. On one hand, it is posited that unlike negotiable or nonnegotiable instruments in the commercial sense, a separation agreement is not directed solely toward the payment of money.[110] Rather, the gravamen of these post-marriage contracts is to delineate the various rights and obligations of the parties, support being merely one such duty.

On the other hand, it is maintained that the separation agreement usually falls within the criterion enunciated in *Seaman-Andwall Corp. v. Wright Machine Corp.*,[111] *i.e.*, that an instrument satisfies CPLR 3213 if a prima facie case would be established by proof of the instrument and a failure to make the payments called for by its terms. Accordingly, a preliminary determination of a 3213 motion should be based on the propriety of the motion[112] rather than the merits of the case, *i.e.*, whether or not a defense to the claim is presented.[113]

Even if it were established that CPLR 3213 is limited to commercial transactions, the separation agreement would still not be excluded since many courts have recognized the commercial indicia of

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106 *See* FIRST REP. 91. *See also* 4 WK&M ¶ 3213.01.

107 62 Misc. 2d 161, 308 N.Y.S.2d 495 (Sup. Ct. Erie County 1970).

108 59 Misc. 2d 565, 299 N.Y.S.2d 648 (App. T. 2d Dep't 1969).

109 7B MCKINNEY'S CPLR 3213, commentary 4, at 832 (1970).

110 Unless the circumstances indicate otherwise, clauses of a separation agreement are "dependent" on one another. Hence, a husband can defend a support action on the ground that his wife breached another clause, *e.g.*, visitation rights. *See* Greene v. Greene, 31 Misc. 2d 1009, 221 N.Y.S.2d 236 (Sup. Ct. Monroe County 1961). *But see* Walker v. Walker, 23 App. Div. 2d 764, 258 N.Y.S.2d 585 (2d Dep't 1965).

111 31 App. Div. 2d 136, 295 N.Y.S.2d 752 (1st Dep't 1968).

112 *Cf.* Holmes v. Allstate Ins. Co., 33 App. Div. 2d 96, 305 N.Y.S.2d 563 (1st Dep't 1969).

113 Seaman-Andwall Corp. v. Wright Mach. Corp., 31 App. Div. 2d 136, 295 N.Y.S.2d 752 (1st Dep't 1968).

these agreements.[114] Unfortunately, however, the refusal to extend the benefits of CPLR 3213 could be motivated by the fact that this is the safer approach. For, the denial of a 3213 motion only prolongs the action; it does not even foreclose a subsequent motion under CPLR 3212.[115] Nevertheless, it is anomalous to deny the possibly destitute spouse the advantages of CPLR 3213 while affording such relief in commercial transactions.[116]

CPLR 3216: Service of forty-five day demand by ordinary mail permitted where no prejudice is shown.

One year after joinder of issue, a motion to dismiss for lack of prosecution may be heard, provided that the motion is preceded by a demand for a note of issue.[117] If the note of issue is filed within forty-five days, *all* delay is forgiven.[118] However, the failure to comply with the demand warrants dismissal, either sua sponte or by motion of the aggrieved party, unless the recalcitrant party exhibits a meritorious cause of action and a justifiable excuse for the delay.[119] Although dismissal is usually without prejudice,[120] its implications are obvious if the statute of limitations has run. For, CPLR 205 specifically excepts a dismissal under CPLR 3216 from its ambit.[121]

The imminency of a malpractice suit in the above situation impels familiarity with the exact procedures to be followed; yet, the constitutional dimensions of CPLR 3216 have pervaded judicial construction of the section.[122] Now that the constitutionality of the sec-

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114 *See* Van Wagenberg v. Van Wagenberg, 24 Md. 154, 215 A.2d 812, *cert. denied*, 385 U.S. 833 (1966); Kochenthal v. Kochenthal, 52 Misc. 2d 437, 275 N.Y.S.2d 951 (Sup. Ct. Nassau County 1966). *See* notes 17-18 and accompanying text *supra*.

115 7B McKINNEY'S CPLR 3213, commentary 4, at 832 (1970).

116 *Id.*

117 CPLR 3216. A condition precedent to the motion is that a year must have elapsed between the joinder of issue and the hearing date for the motion to dismiss. Hence, CPLR 3216 would seem to sanction a demand for a note of issue served 45 days before the end of the first year. 7B McKINNEY'S CPLR 3216, commentary 16, at 926 (1970).

118 *See* Cohn v. Borchard Affiliations, 25 N.Y.2d 237, 250 N.E.2d 690, 303 N.Y.S.2d 633 (1969).

119 CPLR 3216(e). For a list of the factors that a court should take into consideration when passing on a 3216 motion, see Sortino v. Fisher, 20 App. Div. 2d 25, 245 N.Y.S.2d 186 (1st Dep't 1963).

120 CPLR 3216(a). *See* 7B McKINNEY'S CPLR 3216, commentaries 12-13, at 922-25 (1970).

121 CPLR 205 permits the commencement of a new action within six months of termination despite the fact that the statute of limitations has run. However, it expressly excepts termination due to a voluntary discontinuance, a dismissal for neglect to prosecute, or a final judgment on the merits. *See* 1 WK&M ¶ 205.06.

122 *See* Cohn v. Borchard Affiliations, 25 N.Y.2d 237, 250 N.E.2d 690, 303 N.Y.S.2d 633 (1969). For a discussion of the history of CPLR 3216, including amendments and judicial hostility, see 7B McKINNEY'S CPLR 3216, commentaries 1-4, at 910-17 (1970).