

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

St. John's Law Review

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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 3213¹⁰³ 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

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 motion¹¹² 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

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-

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).