

# CPLR 3212(e): Partial Summary Judgment Denied in Personal Injury Action

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*CPLR 3212(e): Partial summary judgment denied in personal injury action.*

Since the landmark decision of *Di Sabata v. Soffes*,<sup>94</sup> plaintiffs in personal injury actions have been permitted to avail themselves of the expeditious remedy of summary judgment. Although this much is clear, a new obstacle has arisen. In *Enker v. Slattery Construction Co.*,<sup>95</sup> the Appellate Division, Second Department, denied plaintiff's motion for partial summary judgment<sup>96</sup> on the issue of defendant's negligence since it was conceded that plaintiff's freedom from contributory negligence was still in issue. The court reasoned that the negligence issues were so intertwined that even if partial summary judgment were granted, a consideration of defendant's negligence would of necessity be involved in a determination of plaintiff's contributory negligence.

If the defendant's negligence is so closely related to plaintiff's contributory negligence that the issues would reappear notwithstanding partial summary judgment, then the *Enker* result is sound. Indeed, in this instance, the issue sought to be summarily resolved is still disputable and cannot be determined as a matter of law.<sup>97</sup> Nonetheless, it should not be presumed that *Enker* has closed the door to 3212(e) relief in personal injury actions. Rather, each case should be determined on an ad hoc basis. As a practical matter, the application of CPLR 3212(e) in personal injury actions would greatly relieve the court's congested calendar.

*CPLR 3213: Bank and mortgage instrument deemed not to constitute an instrument for the payment of money only.*

A motion under CPLR 3213 for summary judgment in lieu of complaint is potentially an expeditious means of arriving at judgment. However, there is a great deal of uncertainty regarding which "presumptively meritorious" claims will fall within a particular court's conception of an "instrument for payment of money only." This dilemma is attributable to two factors: first, the "motion-action"<sup>98</sup> did not exist prior to the CPLR and consequently there is a lack of

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<sup>94</sup> 9 App. Div. 2d 297, 193 N.Y.S.2d 184 (1st Dep't 1959).

<sup>95</sup> 34 App. Div. 2d 673, 310 N.Y.S.2d 729 (2d Dep't 1970).

<sup>96</sup> CPLR 3212(e) provides that "summary judgment may be granted as to one or more causes of action, or part thereof, in favor of one or more parties, to the extent warranted, on such terms as may be just."

<sup>97</sup> CPLR 3212(b).

<sup>98</sup> Because an action under CPLR 3213 can be prosecuted with the facility of a motion, it has been styled a "motion-action." See 7B MCKINNEY'S CPLR 3213, commentary 1 at 829 (1970).