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CPLR 3213: Bank and Mortgage Instrument Deemed Not To Constitute an Instrument for the Payment of Money Only

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

Since the landmark decision of *Di Sabata v. Soffes*,[94] 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.*,[95] the Appellate Division, Second Department, denied plaintiff's motion for partial summary judgment[96] 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.[97] 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"[98] did not exist prior to the CPLR and consequently there is a lack of

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

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

96 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."

97 CPLR 3212(b).

98 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).

definitive precedent to guide the courts,[99] and, second, there is an apparent conflict between the revisors' intendment and the statute as finally enacted.[100]

A recent example of the confusion generated by CPLR 3213 is provided by *New York Conference Association of 7th Day Adventists v. 915 James Street Associates, Ltd.*[101] Plaintiff, suing under an acceleration clause of a bond and mortgage, proved the instrument and defendant's default; defendant did not offer any defense on the merits of the claim, but merely contended that the bond and mortgage did not constitute an instrument for the payment of money only. The court accepted defendant's objection, pointing out the number of conditions written into the instrument.

Although there were a number of obligations imposed on the defendant,[102] this does not alter the fact that plaintiff's prima facie case consisted of proof of the instrument and a failure to make the payments called for by its terms.[103] Thus, if any of the conditions were serious enough to defeat recovery, it would be an appropriate opportunity for a disposition on the merits. Unfortunately, however, the disparity arising from the interpretation of CPLR 3213 has progressed to a point where there is ample authority to support either a liberal[104] or restrictive[105] approach to a given area. Admittedly, doubts at the preliminary stages of litigation should be resolved in favor of the defendant. Nevertheless, the judiciary's refusal to recognize even straightforward claims may compel the practitioner to ignore the machinery established by CPLR 3213 and prosecute his presumptively meritorious claims via the longer but surer procedure found in CPLR 3212.

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99 Additionally, legislative documents do not go far in amplifying the intent behind the phrase "instrument for the payment of money only." *See* FIRST REP. 91; FIFTH REP. 492; SIXTH REP. 338.

100 The revisors intended a speedy method for adjudicating claims "presumptively meritorious." *See* FIRST REP. 91; 4 WK&M ¶ 3213.01. Nevertheless, the statute contains the precise requirement of a "money only" instrument.

101 63 Misc. 2d 38, 310 N.Y.S.2d 742 (Sup. Ct. Onondaga County 1970).

102 If the mere existence of collateral obligations were enough to defeat a 3213 motion, then only a negotiable instrument would be sustained for 3213 use. 7B MCKINNEY'S CPLR 3213, supp. commentary 4 at 831 (1970).

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

104 *See, e.g., id.*; Wagner v. Cornblum, 62 Misc. 2d 161, 308 N.Y.S.2d 495 (Sup. Ct. Erie County 1970); Mike Nasti Sand Co. v. Almar Landscaping Corp., 57 Misc. 2d 550, 293 N.Y.S.2d 220 (Sup. Ct. Nassau County 1968); Baker v. Gundermann, 52 Misc. 2d 639, 276 N.Y.S.2d 495 (Sup. Ct. Nassau County 1966).

105 *See, e.g.*, Signal Plan v. Chase Manhattan Bank, 23 App. Div. 2d 636, 256 N.Y.S.2d 866 (1st Dep't 1965); Orenstein v. Orenstein, 59 Misc. 2d 565, 299 N.Y.S.2d 648 (App. T. 2d Dep't 1969); All-O-Matic Mfg. Corp. v. Shields, 59 Misc. 2d 199, 298 N.Y.S.2d 268 (Dist. Ct. Nassau County 1969).