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CPLR 3213: Separation Agreement Held Not To Be an Instrument for the Payment of Money Only

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so holding, the court cites Professor Siegel's practice commentary wherein this procedure is recommended.[99]

Although this court's adoption of Professor Siegel's suggested procedure is merely dictum,[100] if this suggestion is followed it will, in effect, amount to a short adjournment by the court to allow the defendant his statutorily guaranteed twenty day notice. However, the adjournment has the advantage of permitting the court to retain personal jurisdiction over the parties.

Retention of personal jurisdiction can become exceedingly acute when there is also a statute of limitations problem or a possible problem in regaining personal jurisdiction over the defendant. For example, where the statute of limitations has tolled during the period between the service of the summons and the return date of the motion, a concededly remote possibility, the plaintiff's attorney might be guilty of malpractice through no real fault of his own. The other possible injustice which might otherwise arise is where the personal jurisdiction of the defendant is permanently lost to the plaintiff upon dismissal of the action. In all other cases the plaintiff can begin his suit anew by serving another summons and motion for summary judgment under CPLR 3213 and hoping for a more fortuitous service.

The result suggested in both the instant case and by Professor Siegel would further the legislative intent underlying the enactment of 3213 and should be adopted to alleviate the two problems discussed. In this manner, defendant gets the twenty days to answer to which he is entitled, and plaintiff is not out of court merely because the process server he used was unable to serve the papers on the exact date contemplated.

CPLR 3213: Separation agreement held not to be an instrument for the payment of money only.

A motion for summary judgment in lieu of a complaint is warranted under CPLR 3213 when an action is presumptively meritorious, *i.e.*, when it "is based upon an instrument for the payment of money only or upon any judgment. . . ."

The predecessors of the CPLR did not offer a plaintiff similar summary relief. Therefore, little New York statutory or case law precedent existed to aid in the section's interpretation after its enact-

[99] 7B McKINNEY'S CPLR 3213, supp. commentary 286-88 (1965).

[100] The court found that defendants had waived the right to object to the lack of the twenty-day notice of motion because they served answering affidavits and elected to contest on the merits.

ment.[101] Additionally, legislative documents do not go far in amplifying the intent behind the use of the phrase "instrument for the payment of money only."[102] The judiciary therefore has been unable to clearly define exactly what instruments will meet the statutory test, and this is particulary true when proof of the claim may rest upon extrinsic facts or when the instrument may contain additional obligations beyond the one calling for the payment of money. Lacking strong appellate authority to the contrary, the lower courts tend to construe the section rather liberally on occasion.[103] However, two recent appellate decisions[104] and one recent district court decision[105] afford more conservative guidelines which may make future determinations of this nature easier to arrive at.

In *Seaman-Andwall Corp. v. Wright Machine Corp.*,[106] the first department, reversing an order of the special term, held that a promissory note came within the purview of the statute in spite of defendant's allegations that the note arose from a transaction embracing other features which it had been fraudulently induced to enter. The appellate division dismissed these assertions, arguing that they were precluded by a disclaimer clause in the contract between the parties or, in the alternative, that they were without substance. Moreover, the court expressed the view that CPLR 3213 was not limited in its application to notes to which defendant fails to assert a defense based upon extrinsic facts. "Even despite such issues, the note itself requires the defendants to make certain payments *and nothing else.*"[107]

All-O-Matic Manufacturing Corp. v. Shields,[108] decided by the District Court of Nassau County, expressly adopted the *Seaman-Andwall* reasoning and concluded that a chattel mortgage for the sale and

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101 Two early New York cases have, however, construed the words "instrument for the payment of money only." *See* Kratzenstein v. Lehman, 19 App. Div. 228, 230, 46 N.Y.S. 71, 72 (1st Dep't 1897); Adler v. Bloomingdale, 8 N.Y. Super. Ct. (1 Duer) 601 (1852).

102 *See* FIRST REP. 91; FIFTH REP. 492; SIXTH REP. 338.

103 *See, e.g.*, 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); Orenstein v. Orenstein, 58 Misc. 2d 377, 295 N.Y.S.2d 116 (Civ. Ct. Queens County 1968), *rev'd*, 59 Misc. 2d 565, 299 N.Y.S.2d 648 (App. T. 2d Dep't 1969). *See also, The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 686, 696 (1969); *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 283, 302, 303 (1967).

104 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).

105 All-O-Matic Mfg. Corp. v. Shields, 59 Misc. 2d 199, 298 N.Y.S.2d 268 (Dist. Ct. Nassau County 1969).

106 31 App. Div. 2d 136, 295 N.Y.S.2d 752 (1st Dep't 1968).

107 *Id.* at 137, 295 N.Y.S.2d at 754 (emphasis added).

108 59 Misc. 2d 199, 298 N.Y.S.2d 268 (Dist. Ct. Nassau County 1969).

financing of an automobile was not within the purview of 3213. However, the importance of the case lies not in this holding, but in its examination of earlier decisions which denied the motion under CPLR 3213.[109] This enabled the court to isolate the characteristic common to all the instruments unsuccessfully sued upon in those cases — "[they] called for something in addition to the payment of money."[110] In light of these decisions, the *All-O-Matic* court adopted the principle that summary judgment is the proper remedy only when an instrument requires the payment of money and "nothing else."

Finally, and most recently, the second department unanimously reversed an order granting a motion made pursuant to 3213 in *Orenstein v. Orenstein*.[111] In so doing, the court held that an action to recover payments pursuant to a separation agreement was not an action based upon an instrument for the payment of money only, even though the terms of the agreement were absolute, specific and unconditional. The decision illustrates the wisdom of the *All-O-Matic* pronouncement and serves to further indicate some of the considerations which a court should weigh before it summarily disposes of a defendant's objections to a cause of action which may only appear presumptively meritorious.

An action to recover payments due pursuant to a separation agreement is not an action on an instrument for the payment of a sum of money only because there are often other issues arising from the underlying contractual agreement that must be adjudicated. Typically, a separation agreement spells out the many and varied obligations of the parties over and above the payment of money. Moreover, there are many obligations imposed upon a husband and wife by law which are impliedly incorporated into such an agreement. It therefore would seem that a separation agreement could never be a proper "instrument" upon which to base a motion under CPLR 3213.

The foregoing cases will most likely cause lower courts to carefully examine *all* the aspects of an instrument before relief is granted under 3213. And, quite predictably, where doubts exist as to the effect of extrinsic facts or secondary obligations, express or implied, other-

109 *See* Signal Plan v. Chase Manhattan Bank, 23 App. Div. 2d 636, 256 N.Y.S.2d 866 (1st Dep't 1965); Guele v. Scaiano, 56 Misc. 2d 1040, 290 N.Y.S.2d 950 (App. T. 2d Dep't 1968); Burnell v. People Sav. Bank, 54 Misc. 2d 140, 281 N.Y.S.2d 960 (App. T. 2d Dep't 1967); Vanni v. Long Island City Sav. & Loan Ass'n, 53 Misc. 2d 453, 278 N.Y.S.2d 988 (App. T. 2d Dep't 1967); Embassy Indus., Inc. v. SML Corp., 45 Misc. 2d 91, 256 N.Y.S.2d 214 (App. T. 2d Dep't 1964); Lopez v. Perry, 53 Misc. 2d 445, 278 N.Y.S.2d 947 (Sup. Ct. Kings County 1967); Baker v. Gundermann, 52 Misc. 2d 639, 276 N.Y.S.2d 495 (Sup. Ct. Nassau County 1966).

110 59 Misc. 2d at 200, 298 N.Y.S.2d at 270.

111 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 (Civ. Ct. Queens County 1968).

wise proper motions may be denied. However, due to the nature of the section, such doubts are properly resolved in favor of the defendant. The extra expenses incurred when a plaintiff finds it necessary to serve a complaint are minimal in comparison to the costs of appealing from summary determinations which may have failed to recognize all the equities present.

ARTICLE 34 — CALENDAR PRACTICE; TRIAL PREFERENCES

CPLR 3402: Second department conditions restoration to calendar on payment of money by plaintiff's attorney to defendant.

In *Barrada v. Target Construction Corp.*,[112] the Appellate Division, Second Department, reversed a supreme court order denying plaintiff's motion to restore the case to the trial calendar (following dismissal for failure to appear at a calendar call) on the condition that plaintiff's attorney pay defendant two hundred and fifty dollars.

Since CPLR 3404 provides for *automatic* dismissal by the court clerk of all cases abandoned for more than one year, it is apparent that the instant case involved a timely motion to restore within the designated one year period although the facts do not so indicate.

The *Barrada* opinion appears to strike a balance between the onerous consequences which would have flowed from dismissal, and the harm to the defendant resulting from plaintiff's default. If the lower court decision had been allowed to stand, the plaintiff's attorney might have been found guilty of malpractice, and therefore liable for all the associated consequences; whereas, by allowing the plaintiff's attorney to pay the defendant two hundred and fifty dollars in lieu of any expenses incurred as a result of the delay, both parties are placed in nearly the same position they were in before dismissal, and both may proceed with the litigation on the merits.

The court has thus placed the financial responsibility upon the party presumably at fault—the attorney for the plaintiff. Of course, a warning to all practitioners is in order. The reason plaintiff's attorney missed the calendar call is not stated and one must, accordingly, presume that it was not for a frivolous purpose. The court, however, indicates that the facts and circumstances must be weighed in each particular case, and future cases may well arise wherein the court is not so lenient with counsel.

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[112] 31 App. Div. 2d 810, 299 N.Y.S.2d 708 (2d Dep't 1969).