

CPLR 3213: Where Neither Party Objects, and the Court Has Jurisdiction, Any Procedural Device May Be Used in the Course of a Trial To Effectuate Justice

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CPLR 3213: Where neither party objects, and the court has jurisdiction, any procedural device may be used in the course of a trial to effectuate justice.

In *Reilly v. Insurance Company of North America*,¹⁴⁵ an action commenced under CPLR 3213 as a motion for summary judgment in lieu of complaint, the Appellate Division, First Department, held that neither party had put forth sufficient information in its affidavit for the court to grant summary relief.

The sole issue remaining in contention was whether the word "dollars," as it appeared in a group accident policy, meant American or Canadian dollars. Plaintiff's affidavit did not set forth the evidence necessary to determine this question, and thus, since an issue of fact remained for trial, the affidavit did not meet the standard of a "claim presumptively meritorious."¹⁴⁶ Plaintiff's motion was therefore properly denied.

However, the fact that the defendant sought to avail itself of the summary judgment procedure which, under the express language of CPLR 3213¹⁴⁷ is applicable solely to the plaintiff, does make the case worthy of note. As Justice Steuer observed in his dissent, since the procedure was acquiesced in by both parties, the application should have been treated as "a motion and cross-motion for summary judgment with the affidavits serving both as pleadings and supporting the evidentiary contentions of the parties."¹⁴⁸ Both the dissent and the majority recognized that any procedural device may be used in litigation so long as all of the parties to the controversy acquiesce in the deviation from the statutory norm. In the absence of an express statutory prohibition, litigants should remain free to chart their own procedural course through the courts.

CPLR 3216: Cohn v. Borchard Affiliations reversed by Court of Appeals.

The spectre of the unconstitutionality of CPLR 3216 and other CPLR provisions has been laid to rest by the Court of Appeals' unani-

¹⁴⁵ 32 App. Div. 2d 918, 302 N.Y.S.2d 435 (1st Dep't 1969).

¹⁴⁶ See FIRST REP. 91.

¹⁴⁷ CPLR 3213 provides, *inter alia*:

When an action is based upon an instrument for the payment of money only . . . , the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. . . .

¹⁴⁸ 32 App. Div. 2d at 919, 302 N.Y.S.2d at 439.