St. John's Law Review

Volume 43
Number 4 *Volume 43, April 1969, Number 4*

Article 14

December 2012

CPLR 3013: Court Clarifies Elements of Cause of Action Versus Insurer for Bad Faith Refusal to Settle

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Significantly, the insured, in its previous suit, had specifically excluded as an element of damage that for which the insurance company subsequently sued (loss of the trailer itself). The case of *Pearl Assurance Company v. Epstein*[21] involved similar facts except that the insured had sought recovery for his entire damages in his previous action. Also there was no evidence that the defendant had any notice of the insurance company's subrogation rights. The Court of Appeals under these circumstances concluded that the rule against splitting a cause of action precluded plaintiff-insurance company from recovering. Thus, it appears that the rule against splitting a cause of action is not applicable where at least a) there is a mutual exclusivity of the damages sought in each action, and b) the defendant has notice of the insurance company's rights.

Practitioners are therefore advised that if, in representing a defendant, notice is received of the subrogation rights of the plaintiff's insurer (or plaintiff's assignee), such insurer (or assignee) should be joined in a pending action in order to avoid multiple litigation.

CPLR 3013: Court clarifies elements of cause of action versus insurer for bad faith refusal to settle.

Recently, the appellate division, first department, further defined the material elements of a cause of action against an insurance company for its bad faith refusal to accept a settlement. Most liability insurance contracts protect the insurer by providing that the insurance company will represent the insured when he is sued for matters covered by the contract. In return for the protection the law has imposed a duty upon insurers to consider the interests of the insured while representing him in settlement negotiations. Today, in New York it is well established that an insurance company may incur liability to an insured, if, in "bad faith," it refuses to accept a reasonable offer of settlement within the policy limits.[22] This rule affords an insured who has had an excess judgment entered against him (which excess could have been avoided if the insurance company had acted in good faith) a cause of action.

Until recently, it was unsettled whether the cause of action accrued when the excess judgment was entered or subsequent to the insured's payment of such excess. In *Henegan v. Merchants Mutual Insurance Company*,[23] it was established that a cause of action is stated by an allegation that an excess judgment has been entered. The court reasoned that at this point the insured has

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[21] 295 N.Y. 674, 65 N.E.2d 325 (1946).

[22] Note, *Insurer's Liability for Refusal to Settle*, 42 ST. JOHN'S L. REV. 544, 552-56 (1968).

[23] 31 App. Div. 2d 12, 294 N.Y.S.2d 547 (1st Dep't 1968).

incurred damages, *i.e.*, the judgment increases his debts, it impairs his credit and subjects his property to a judgment-lien. Furthermore, a requirement of payment would permit the insurance company to take unfair advantage of the financial status of its insured.

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3213: Procedure held available in suit on separation agreement.

The procedure for summary judgment in lieu of a complaint is available, pursuant to CPLR 3213, in those actions "based upon a judgment or instrument for the payment of money only." A speedy and effective means of securing a judgment, on claims having a strong presumptive merit in instances wherein a formal complaint would be superfluous,[24] is thus provided. Motivated by the rules of construction applicable to the CPLR,[25] New York courts have generally taken an expansive view of this accelerated procedure.

Lacking specific indication of legislative intent, courts have adopted a practical approach in construing the statute. Although of recent vintage, a continuum of cases under the statute has provided clearly discernible lines of development.[26] Invocation of the procedure has been limited to those cases in which the obligation created is not only certain but simple and absolute, *i.e.*, free from any condition or contingency.[27] The procedure is thus applicable to those situations in which the instrument is, upon its face, evidence of a debt; evidence, not merely of the right of the litigant to recover but of the liability of the defendant to pay. Thus, where proof of extrinsic facts is necessary, such facts must be averred in an accompanying complaint.

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[24] FIRST REP. 91; 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶3213.01 (1968).

[25] Construction: "The civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding." CPLR 104.

[26] The cases have been singularly consistent in their construction of the words "instrument for the payment of money only." *See, e.g.*, Signal Plan, Inc. v. Chase Manhattan Bank, 23 App. Div. 2d 636, 256 N.Y.S.2d 866 (1st Dep't 1965); Burnell v. Peoples Sav. Bank of Yonkers, 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 1965); 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).

[27] The construction of the words "an instrument for the payment of money only" has historical origins. For an identical construction, see Adler v. Bloomingdale, 8 N.Y. Super. Ct. (1 Duer) 601 (1852).