

## CPLR 3213: Procedure Held Available in Suit on Separation Agreement

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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,<sup>24</sup> is thus provided. Motivated by the rules of construction applicable to the CPLR,<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> 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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<sup>24</sup> FIRST REP. 91; 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶3213.01 (1968).

<sup>25</sup> 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.

<sup>26</sup> 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).

<sup>27</sup> 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).

The courts have consistently held that the "instrument" need not be negotiable.<sup>28</sup> Thus, the procedure has been held available to the holder of an unconditional guaranty of a note.<sup>29</sup> A more recent and, perhaps, significant extension of the application of section 3213 is to be found in *Baker v. Gundermann*,<sup>30</sup> holding that a letter forwarded to the plaintiff would qualify as an instrument under the section. Conversely, the courts have refused invocation of the accelerated procedure where the determination would depend upon proof of facts outside the instrument itself. An early clarification held that the remedy of summary judgment in lieu of a complaint did not lie upon an action "to recover security, deposited under the terms of a lease."<sup>31</sup> So too, under 3213, it has been held that in an action to recover monies paid because of alleged economic duress, pursuant to a prepayment clause in a mortgage, plaintiff must serve a formal complaint before moving for a summary judgment.<sup>32</sup>

A recent case has extended the scope of section 3213 into the matrimonial area. In *Orenstein v. Orenstein*,<sup>33</sup> the Civil Court, Queens County, was confronted with the substantive issue of whether a separation agreement may serve as a basis for 3213 relief. The court held a separation agreement, the terms of which were absolute, specific and unconditional, to be an "instrument for the payment of money only" within the confines of the statute. In view of the tenor of prior decisions and the policy orientated approach<sup>34</sup> adopted by the court, such a construction would seem to be a rational extension of this motion device compatible with legislative intent.

*CPLR 3213: Words "instrument for the payment of money only" liberally construed.*

The continued expansion of CPLR 3213<sup>35</sup> is evidenced by the recent case of *Mike Nasti Sand Company v. Almar Landscaping*

<sup>28</sup> *Louis Sherry Ice Cream Co. v. Kroggel*, 42 Misc. 2d 21, 245 N.Y.S.2d 755 (Sup. Ct. N.Y. County 1963); *Channel Excavators, Inc. v. Amato Trucking Corp.*, 48 Misc. 2d 429, 264 N.Y.S.2d 987 (Sup. Ct. Nassau County 1965).

<sup>29</sup> *M. Gilston, Inc. v. Ullman*, 45 Misc. 2d 6, 255 N.Y.S.2d 747. (Dist. Ct. Nassau County 1965).

<sup>30</sup> 52 Misc. 2d 639, 276 N.Y.S.2d 495 (Sup. Ct. Nassau County 1966).

<sup>31</sup> *Embassy Indus., Inc. v. SML Corp.*, 45 Misc. 2d 91, 256 N.Y.S.2d 495 (Sup. Ct. Nassau County 1966).

<sup>32</sup> *Burnell v. Peoples Sav. Bank of Yonkers*, 54 Misc. 2d 140, 281 N.Y.S.2d 960 (App. T. 2d Dep't 1967).

<sup>33</sup> 58 Misc. 2d 377, 295 N.Y.S.2d 116 (Civ. Ct. Queens County 1968).

<sup>34</sup> In view of the liberal policy of extending the benefits of 3213 it would appear to be implicit in the court's emphasis upon public policy that, when confronted with an ambiguous situation, it would be disposed to allow relief.

<sup>35</sup> See 7B MCKINNEY'S CPLR 3213, commentary 817 (1963).