

CPLR 3213: Words "Instrument for the Payment of Money" Liberally Construed

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The courts have consistently held that the "instrument" need not be negotiable.²⁸ Thus, the procedure has been held available to the holder of an unconditional guaranty of a note.²⁹ A more recent and, perhaps, significant extension of the application of section 3213 is to be found in *Baker v. Gundermann*,³⁰ 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."³¹ 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.³²

A recent case has extended the scope of section 3213 into the matrimonial area. In *Orenstein v. Orenstein*,³³ 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 approach³⁴ 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 3213³⁵ is evidenced by the recent case of *Mike Nasti Sand Company v. Almar Landscaping*

²⁸ *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).

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

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

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

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

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

³⁴ 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.

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

*Corp.*³⁶ The proceeding was upon motion by the plaintiff for order to renew and for leave to reargue a prior motion for summary judgment in lieu of a complaint. The underlying action was founded upon a subcontract wherein the plaintiff agreed to supply snow removal equipment for the defendant pursuant to which plaintiff was to be paid a certain amount as rental upon receipt by defendant of such amount from the port authority.

In granting the motion and reordering judgment pursuant thereto for plaintiff, the court was confronted with the issue of whether the agreement constituted an "instrument for the payment of money only." The defendant contended that an "instrument for the payment of money only" as described in 3213 must be a negotiable instrument. Citing established authority to the contrary,³⁷ the court proceeded to find the instrument complete as to the time and amount payable, independent of extrinsic facts and thus within the purview of the statute. Quoting from *Kratzenstein v. Lehman*,³⁸ the court reasoned that where it appears that the principal object of the instrument is to assure the payment of a sum certain upon a fully executed consideration, the only thing remaining to complete the contract being the payment of money, such may be said to be an "instrument for the payment of money only."

While the instrument is thus clearly one for the payment of money, is it, nevertheless, of that species the terms of which are absolute, specific and unconditional?³⁹ Insofar as resort need not be had to extrinsic facts in order to establish a prima facie case, the facile relief afforded under 3213 should be available.

While *Nasti* represents a viable extension of 3213, the practitioner is advised to watch for appellate developments in the area.

³⁶ 57 Misc. 2d 550, 293 N.Y.S.2d 220 (Sup. Ct. Nassau County 1968).

³⁷ No cases are to be found limiting the application of 3213 relief to negotiable instruments. See *Louis Sherry Ice Cream Co. v. Kroggel*, 42 Misc. 2d 21, 245 N.Y.S.2d 755 (Sup. Ct. N.Y. County 1965). Such a construction would seem contrary to the liberal policy underlying the section, i.e., to produce a broad base for those actions, presumptively meritorious, calling for dispatch.

³⁸ 19 App. Div. 228, 230, 46 N.Y.S. 71, 72 (1st Dep't 1897). Cf. *Adler v. Bloomingdale*, 8 N.Y. Super. Ct. (1 Duer) 601 (1852) wherein the court limits application of these words, found in the Revised Code of 1851, to situations in which the instrument is, upon its face, free from any condition or contingency. See also *Orenstein v. Orenstein*, 58 Misc. 2d 377, 295 N.Y.S.2d 116 (Civ. Ct. Queens County 1968).

³⁹ This factor would seem to be of controlling importance. See, e.g., *Burnell v. Peoples Sav. Bank*, 54 Misc. 2d 140, 281 N.Y.S.2d 960 (App. T. 2d Dep't 1967); *Lopez v. Perry*, 53 Misc. 2d 445, 278 N.Y.S.2d 947 (Sup. Ct. Kings County 1967); *Estate of Silverman*, 43 Misc. 2d 675, 252 N.Y.S.2d 14 (Sup. Ct. Kings County 1964).