

CPLR 3213: Summary Judgment on Conditional Instrument Denied

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It seems, however, that the soundest procedure would be to rely upon a direct 3212 motion in such situations until the legislature provides a specific provision by which the defendant can speed the determination of 3211 defenses.

CPLR 3211(e): Jurisdictional defense raised in amended answer relates back to time of original answer.

In *Blatz v. Benschine*,⁸⁸ defendant raised the defense of lack of personal jurisdiction,⁸⁹ not in his original answer, but in his responsive pleadings to plaintiff's amended complaint. The Supreme Court, Queens County, ruled that the defense interposed was timely.⁹⁰ The court reasoned: since plaintiff decided to serve, as a matter of right, an amended complaint, defendant was forced to respond, also as a matter of course, with amended pleadings which contained the CPLR 3211(a)(8) defense. The amendment was deemed to relate back to the time of service of the original answer, therefore, defendant's assertion of the jurisdictional defense was timely.

It is significant to note that the court in the present case allowed the interposition of the defense as a *matter of right*, and not as a matter of its discretion. Thus, the plaintiff who elects to amend his complaint may then be faced with a jurisdictional defense.

CPLR 3213: Summary judgment on conditional instrument denied.

CPLR 3213 provides that "[w]hen an action is based upon a judgment or instrument for the payment of money only, the plaintiff may serve with the summons a notice of motion for summary judgment . . . in lieu of a complaint." The statute was conceived in an effort to provide a speedy and effective means of securing a judgment on claims presumptively meritorious where a formal complaint would be superfluous and the resulting delay needless.⁹¹

In *Baker v. Gundermann*,⁹² the plaintiff's motion for summary judgment was based on two written instruments. The first failed to come within the purview of the statute as an "instrument for

⁸⁸ 53 Misc. 2d 352, 278 N.Y.S.2d 533 (Sup. Ct. Queens County 1967).

⁸⁹ CPLR 3211(a)(8).

⁹⁰ 53 Misc. 2d at 354, 278 N.Y.S.2d at 535. CPLR 3211(e) provides: "An objection based upon a ground specified in paragraphs eight or nine of subdivision (a) is waived if a party . . . does not raise such objection in the responsive pleading."

⁹¹ FIRST REP. 91. See also 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3213.01 (1965).

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

the payment of money only." It consisted of a letter signed by the defendants assuring restitution to the plaintiff should certain stock certificates lent by him to the defendants not be returned safely. What was obviously fatal to the plaintiff's motion was the fact that the defendants' liability pursuant to this first letter was conditional, *i.e.*, it would not mature until there was a showing of a breach on the part of the defendants in returning the certificates. A substantial question of fact appeared unanswered and, accordingly, it required more complete pleadings.

No similar question was visible in the second writing. Again signed by the defendants, this letter acknowledged receipt of \$15,000 as a loan at four percent per annum. Here the defendants' liability was *unconditional* and, accordingly, the procedure of CPLR 3213 was available to the plaintiff.⁹³

Since *Louis Sherry Ice Cream Co. v. Kroggel*,⁹⁴ where the court upheld a customer's loan receipt as an "instrument for the payment of money" within the ambit of CPLR 3213, the courts have generally exhibited a willingness to afford substantial weight to the instrument itself.⁹⁵ It appears, however, that because of the summariness of CPLR 3213, the courts are determined to filter 3213 motions, rejecting all with questionable facts, so that the presumption of merit is conclusive.

CPLR 3216: Counterclaim dismissed for general delay.

Prior to the recent amendment of CPLR 3216, the appellate division, first department, in *Kippen & Company v. Stahl*,⁹⁶ reversed the lower court and ruled that defendant's *counterclaim* should be dismissed where the record revealed that defendant had delayed some thirty-two months in its prosecution.

The instant case has several unusual aspects. It appears to be the first time that a New York court has dismissed a counterclaim on the ground of general delay. Though the nature of the counterclaim in the present case is unknown, a feeling of bewilderment is elicited by the court's ruling, since it is usual for the prosecution of a counterclaim to await the trial of the main action.

⁹³ Compare *Gilston v. Ullman*, 45 Misc. 2d 6, 255 N.Y.S.2d 747 (Dist. Ct. Nassau County 1965), with *Channel Excavators v. Amato Trucking Corp.*, 48 Misc. 2d 429, 264 N.Y.S.2d 987 (Sup. Ct. Nassau County 1965).

⁹⁴ 42 Misc. 2d 21, 245 N.Y.S.2d 755 (Sup. Ct. N.Y. County 1963), where it was held that such an instrument need not be negotiable.

⁹⁵ *Supra* note 93. See *Winter v. Star Factors, Inc.*, (Sup. Ct. N.Y. County), N.Y.L.J., May 1, 1964, p. 18, col. 6, wherein a letter agreement which provided for the honoring of credit cards was held to be an "instrument for the payment of money only."

⁹⁶ 27 App. Div. 2d 650, 276 N.Y.S.2d 435. (1st Dep't 1967).