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Article 23

CPLR 3216: Counterclaim Dismissed for General Delay

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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.

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[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).

At any rate, the *Kippen* case clearly illustrates the extent to which the first department has dismissed causes for general delay under the old version of 3216, and makes one curious as to how they will react to the new amendment's strict limitations upon their discretion.

Collateral Estoppel: Defense allowed despite claim that issue was not decided by the jury.

In *Bronxville Palmer, Limited v. State*,[97] the Court of Appeals held that the plaintiff's action in the Court of Claims was barred by a previous judgment against the plaintiff in the supreme court. In the supreme court, the plaintiff had unsuccessfully sought recovery for trespass against two contractors engaged by the state. While it was not disputed that the exoneration of the servant would inure to the benefit of the master, the plaintiff urged that the issue of the contractors' trespass was not properly presented to the jury. Plaintiff contended that the jury was erroneously charged that if it found that the state was to blame for *directing* the trespass, the verdict could be for the contractors. The majority of the Court of Appeals found that this argument of erroneous charge was not substantiated by the trial record and, therefore, allowed the state's defense.[98]

The dissent felt that the result of the earlier adjudication was the finding that the state had directed the contractors to go onto plaintiff's land.[99] Thus, the issue of whether a trespass had been committed by the contractors had been excluded from the jury's determination. Therefore, the dissent concluded that collateral estoppel should not bar the suit.

It must be noted that the majority and the dissent differed only on the question of whether, *in fact*, the jury had decided some issue other than the physical trespass of the contractors. Both agreed that if that issue had not actually been decided, the supreme court judgment would not have barred the Court of Claims action. It is well settled that a prior judgment is final only as to issues that are actually decided.[100]

Although this case does not alter any existing principles of the law of judgments, it has a practical significance which must be noted by the litigator. Where the issues actually decided by the jury are unclear, whether because of an improper charge or

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[97] 18 N.Y.2d 560, 223 N.E.2d 887, 277 N.Y.S.2d 402 (1966).
[98] *Id.* at 564, 223 N.E.2d at 890, 277 N.Y.S.2d at 406-07.
[99] *Id.* at 567, 223 N.E.2d at 891-92, 277 N.Y.S.2d at 409.
[100] New York State Labor Relations Bd. v. Holland Laundry, 294 N.Y. 480, 63 N.E.2d 68 (1945); Gelb v. Mazzeo, 5 App. Div. 2d 10, 169 N.Y.S.2d 58 (3d Dep't 1957).