

April 2013

CPLR 3211(a)(8) and (9): Defendant Allowed Further Objection Where Basis of Jurisdiction Uncertain

St. John's Law Review

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purpose to direct the exclusion of one disclosure device and the use of the other where the party to be examined was an Alabama resident, and where the use of interrogatories might obviate the need for later depositions.⁵⁶

It is submitted that refusal to permit interrogatories to be used concurrently with depositions may serve to avoid harrassment. However, as in *Ford*, it appears that courts will allow such concurrent use where the facts of the particular case warrant it.

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3211(a)(8) and (9): Defendant allowed further objection where basis of jurisdiction uncertain.

In *Kelly v. Stanmar, Inc.*,⁵⁷ plaintiff sought damages for breach of contract from defendant, a foreign corporation. The defendant moved, under CPLR 3211(a)(8), to dismiss the complaint on the ground that the court lacked in personam jurisdiction. The court held that since defendant was not authorized to engage in business in New York, and since performance of the contract was to be in Vermont, it did not have in personam jurisdiction. However, the court noted that the complaint stated a cause of action against the defendant for an in rem judgment under CPLR 314(2), which could divest defendant of its interest in a bond and promissory note executed by plaintiff in New York and held in New York by the other defendant, a New York bank. The court, therefore, granted the plaintiff the right to amend his complaint to include this in rem cause of action.

The court then noted that since only one motion to dismiss is permitted under CPLR 3211, and since the defendant had moved under 3211(a)(8), he was technically precluded from urging that the court lacked jurisdiction under CPLR 314(2) or (3). However, under the circumstances, since the plaintiff himself was uncertain as to the type of jurisdiction that he was asserting, the court said that it would overlook the defendant's error, "since the moving papers described the alleged defect sufficiently clearly to apprise the plaintiff of its nature and thus will not result in any prejudice to him."⁵⁸

The defendant could, therefore, move under 3211(a)(9), to dismiss for lack of jurisdiction. However, it would appear that since the court has already stated that the plaintiff has a valid in

⁵⁶ *Ford Motor Co. v. O. W. Burke Co.*, *supra* note 55, at 421, 273 N.Y.S.2d at 271. *But see* *Katz v. Posner*, 23 App. Div. 2d 774, 258 N.Y.S.2d 508 (2d Dep't 1965).

⁵⁷ 51 Misc. 2d 378, 273 N.Y.S.2d 276 (Sup. Ct. Albany County 1966).

⁵⁸ *Kelly v. Stanmar, Inc.*, 51 Misc. 2d 378, 380, 273 N.Y.S.2d 276, 278 (Sup. Ct. Albany County 1966).

rem cause of action under 314(2), this would preclude such a dismissal. At this point, defendant could do one of two things: he could withdraw from the action and take an in rem default, or he could defend the action on the merits. If he does the latter, he will subject himself to full in personam jurisdiction pursuant to CPLR 320(c).

Thus, the practitioner would be well advised, in cases where there is doubt as to the basis for plaintiff's action, to move for a dismissal under both CPLR 3211(a)(8) and (9).

CPLR 3213: Accommodation indorser of promissory note held amenable to summary judgment.

In actions on an "instrument for the payment of money only," CPLR 3213 permits the plaintiff to seek summary judgment upon service of a summons with a notice of motion and supporting affidavits in lieu of a complaint. However, the determination of who is liable on an "instrument for the payment of money only" has been left to judicial interpretation.

It has been held that the *maker* or *co-maker* is liable on the instrument itself.⁵⁹ Also, in *M. Gilsten, Inc. v. Ullman*,⁶⁰ it was held that an action against an *unconditional guarantor* of a promissory note was an action on the instrument.⁶¹ A question has arisen as to whether an *accommodation indorser* of a promissory note was primarily liable on the instrument and, thus, amenable to summary proceedings under CPLR 3213.

The court, in *Welbilt Concrete Constr. Corp. v. Kornicki*,⁶² answered this question in the affirmative. However, it appears that, both under the Negotiable Instruments Law and the Uniform Commercial Code, the accommodation indorser's liability is, in fact, secondary, since there must first be a demand and notice of dishonor before his liability is established.⁶³ Nonetheless, it would appear that, although the accommodation indorser's liability on a promissory note is secondary, since his liability is based on an "instrument for the payment of money only," the speedy relief afforded plaintiffs under CPLR 3213 should be available. However, if the defendant, in answering the plaintiff's motion, raises *actual* issues of fact as to whether or not he did receive the necessary demand and

⁵⁹ See, e.g., *McGoldrick v. Family Fin. Corp.*, 287 N.Y. 535, 41 N.E.2d 86 (1942); *Trietel v. Gibson*, 131 Misc. 377, 226 N.Y. Supp. 603 (Sup. Ct. N.Y. County 1928).

⁶⁰ 45 Misc. 2d 6, 255 N.Y.S.2d 747 (Dist. Ct. Nassau County 1965).

⁶¹ However, the contract of guaranty in that case provided that an action could be brought against the unconditional guarantor without first having proceeded against the maker of the note, thereby making the guarantor primarily liable.

⁶² 26 App. Div. 2d 661, 272 N.Y.S.2d 422 (2d Dep't 1966).

⁶³ See NIL §§ 3, 55, 14; UCC §§ 3-414, 3-415.