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CPLR 3213: Accomodation Indorser of Promissory Note Held Amenable to Summary Judgment

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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

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[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.

notice of dishonor, it would appear that summary judgment should not be granted since CPLR 3213 was intended to be used only where substantial issues of fact were not present.

CPLR 3216: Plaintiff's unexcused general delay before filing note of issue held ground for dismissal of action.

CPLR 3216 was amended in 1964 to provide that a motion to dismiss an action for the plaintiff's failure to serve and file a note of issue could not be granted until at least six months after joinder of issue. Thereafter, if the defendant served a written demand upon the plaintiff requiring a note of issue to be filed, the plaintiff had forty-five days within which to comply, at the risk of having his case dismissed. It was widely believed by the plaintiffs' bar that this amendment enabled a plaintiff to file his note of issue within forty-five days and thereby avoid a 3216 dismissal. However, confusion as to the effect of the amendment still existed among the various departments; the first department regarded it as merely creating a new basis for a 3216 dismissal,[64] while the second department regarded it as being relevant to all 3216 motions.[65]

It appeared that the Court of Appeals had resolved the question in *Commercial Credit Corp. v. Lafayette Lincoln-Mercury, Inc.*[66] There, the Court recognized the existence of a dismissal for general delay and held that such a dismissal could be had although the plaintiff had already filed a note of issue.[67] However, confusion still exists, as illustrated by the recent case of *Lunn v. United Aircraft Corp.*[68] There, the majority, citing *Commercial Credit,* dismissed the action because of the plaintiff's general delay *antedating* the filing of her note of issue. However, while concurring in the result, Justice Benjamin stated that the court was empowered to dismiss for general delay only with respect to delay *following* the filing of the note of issue, where a note of issue has actually been filed in response to a forty-five day notice.

It would, therefore, appear that further clarification by the Court of Appeals is needed to dispose of this question.

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[64] Weeks v. Jankowitz, 23 App. Div. 2d 549, 256 N.Y.S.2d 341 (1st Dep't 1965).

[65] McLoughlin v. Weiss, 23 App. Div. 2d 881, 259 N.Y.S.2d 941 (2d Dep't 1965).

[66] 17 N.Y.2d 367, 218 N.E.2d 272, 271 N.Y.S.2d 212 (1966).

[67] For a comprehensive discussion of the history behind *Commercial Credit* see *The Quarterly Survey of New York Practice,* 41 ST. JOHN'S L. REV. 279, 312 (1966).

[68] 26 App. Div. 2d 698, 272 N.Y.S.2d 674 (2d Dep't 1966).