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Commercial division update: Motions for summary judgment in lieu of complaint

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In this update, Thomas J. Hall and Judith A. Archer examine recent Commercial Division decisions addressing some of the factors that can render an instrument too complex, the payment obligation too conditional, or the sum due too uncertain to qualify for Section 3213 relief.

In his July 13, 1885, diary entry, Thomas Edison wrote: "A lawsuit is the suicide of time." Almost a century and a half later, few litigants would dispute this proposition. While plaintiffs attorneys frequently search for ways to expedite reaching final judgment, few are successful. To the relief of a certain category of creditors, New York offers an avenue out of this quagmire. Creditors seeking recovery on "an instrument for the payment of money only" may avail themselves of an expedited process under CPLR Section 3213, a motion for summary judgment in lieu of complaint.

In this update, we will examine recent Commercial Division decisions addressing some of the factors that can render an instrument too complex, the payment obligation too conditional, or the sum due too uncertain to qualify for Section 3213 relief.

Appellate precedent

The New York Court of Appeals has had limited opportunity to address CPLR Section 3213. In 2015, the court explained that it was "enacted to provide quick relief on documentary claims so presumptively meritorious that a formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless." *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v. Navarro,* 25 N.Y.3d 485, 491-92 (2015) (internal quotations and citation omitted). In 1996, the Court of Appeals noted that Section 3213 is applicable only where the defendant was bound to pay a "sum certain," and where the instrument at issue may be "read in the first instance" as one "for the payment of money only," rather than having been reduced to such by "part performance or by elision of a portion of it." *Weissman v. Sinorm Deli,* 88 N.Y.2d 437, 444-45 (1996). As

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that Court stated: "The prototypical example of an instrument within the ambit of the statute is of course a negotiable instrument for the payment of money—an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time."

It is important to note that, just because Section 3213 affords the right to file an early motion for summary judgment, it does not alter the traditional framework for obtaining summary judgment. As the Court of Appeals explained in *Cooperatieve Centrale*, to meet one's burden under Section 3213, a plaintiff must "prove the existence of the [obligation], the underlying debt, and the [debtor's] failure to perform." Once that is proven, the defendant's burden is similar to that under any other summary judgment context, to "establish, by admissible evidence, the existence of a triable issue with respect to a bona fide defense."

The Appellate Division has had more to say on this topic, distilling the requirements under Section 3213. Essentially, this short-cut to judgment is available only "where a right to payment can be ascertained from the face of a document." *Boland v. Indah Kiat Finance (IV) Mauritius,* 291 A.D.2d 342, 343 (1st Dep't 2002). If proving the claim, including the amount due, requires anything more than a review of the document sued upon and "simple proof of non-payment or a similar de minimis deviation" (including as to the amount due), then Section 3213 relief is not available. *Ippolito v. Family Medicine of Tarrytown and Ossining,* 46 A.D.3d 752, 753 (2d Dep't 2007).

Because of the requirement that an instrument be one for the payment of money only, extrinsic conditions may have the two-fold effect of barring an obligation from treatment under Section 3213 and, simultaneously, creating a triable issue of fact for the defendant to latch onto to defeat summary judgment. However, not all conditions to payment preclude access to Section 3213.

In *Juste v. Niewdach*, 26 A.D.3d 416, 416-17 (2d Dep't 2006), for example, the Second Department made clear that the existence of other obligations in the agreement sued upon does not bar relief so long as the promise to pay itself "did not require additional performance as a condition precedent to repayment, or otherwise alter the defendant's promise of payment." In that case, the debtor had argued to the trial court that a guaranty was not "an instrument for the payment of money only" because the guaranty required the defendant "to be responsible for all covenants in [a] lease, not just the provision regarding the payment of rent." *Juste v. Niewdach,* 6 Misc. 3d 1010(A), at 2 (Kings Co. 2004). But since none of those other obligations had any bearing on the obligation to pay, the court found them too immaterial to defeat the motion.

Instrument for payment of money only

Following this appellate precedent, the Commercial Division has frequently addressed the requirements under Section 3213. In *Persichilli v. Metropolitan Paper Recycling,* 30 Misc. 3d 1227(A), at 3 (Nassau Co. 2010), Justice Ira Warshawsky of the Nassau County Commercial Division explained that Section 3213 "was intended as a limited procedure for commercial paper, promissory notes, and similar instruments," even if that commercial paper was "part of a larger transaction involving other agreements" and even where the document "may not recite a sum certain." The fact that the promissory notes at issue there included clauses related to another agreement did not disqualify them from being an instrument for the payment of money.

In *Allied Irish Banks v. Young Men's Christian Association of Greenwich*, 36 Misc. 3d 216, 220 (N.Y. Co. 2012), Judge Bernard J. Fried of the New York County Commercial Division agreed that Section 3213 was meant to have narrow application, stating that "the instrument must qualify for CPLR Section 3213 treatment at the time of signing; an instrument's eligibility can never depend upon the occurrence (or nonoccurrence) of any unrelated future event" (quotations and citations omitted). The court found interest rate swap agreements qualify for Section 3213 relief even though the determination of the amount due thereunder required reliance on extrinsic materials, including the floating interest rate set by the Securities Industries and Financial Markets Association Municipal Swap Index.

It seems clear, though, that the core requirement of Section 3213 is that the obligation to pay, if not the precise amount, be imposed by and within the instrument sued upon. In *Cortlandt Street Recovery v. Hellas Telecom, S.A.R.L.,* 47 Misc. 3d 544, 563 (N.Y. Co. 2014), Justice Marcy S. Friedman of the New York County Commercial Division examined a situation where a plaintiff sought recovery under payment-in-kind (PIK) notes,

which in turn were governed by an indenture. The defendants argued against the applicability of Section 3213 "because the right to bring an action, the right to recover … and the calculation of the sum due [could not] be ascertained without reference to the indenture, which [was] not itself an instrument for the payment of money only." The core question was whether the required references to the indenture to ascertain collection rights nullified the right to accelerated recovery. The court answered no, holding that the PIK notes generated sufficient rights within themselves to allow for Section 3213 relief. The PIK notes stated that, by a particular date in 2015, € 200,000,000 was due, along with quarterly interest payments set at a rate of "EURIBOR, plus 8% as determined by the calculation agent." The defendants tried to latch onto the fact that the PIK notes also provided that they were "subject to all terms and provisions of the Indenture" and that "capitalized terms defined in the Indenture and not defined [in the PIK note] have the meanings ascribed thereto in the Indenture." For example, the indenture, and not the PIK notes, identified the defendant, Hellas, as the parent guarantor and the party that owed the PIK note amounts. The court reasoned that, despite the incorporation of the indenture's definitional language, the PIK's obligations to pay stood alone since "the right to repayment appeared on their face," and the PIK notes referenced the indenture only "to the extent necessary for the enforcement of the PIK notes."

The existence of conditions

While the prototypical Section 3213 motion depends on the existence of an unconditional obligation to pay, the existence of conditional language may not be a make or break factor for the plaintiff. In *Bank of America v. Lightstone Holdings,* 32 Misc. 3d 1244(A), at 3-4 (N.Y. Co. 2011), Justice Melvyn Schweitzer of the New York County Commercial Division rejected the notion that any condition precedent to payment is a wholesale bar to accelerated relief. Rather, the court found that any such conditions must in fact be "well-defined within the four corners of the debt instrument," rather than one that "requires something outside the agreement to determine what constitutes the condition." The defendants argued that, because the guaranty agreements at issue provided that the obligation to pay was triggered by a voluntary filing of bankruptcy, an event external to those agreements, the plaintiff was barred from utilizing Section 3213. In so arguing, the defendants relied on *Kerin v. Kaufman*, 296 A.D.2d 336 (1st Dep't 2001), in which the First Department determined the condition to payment there, whether the plaintiff had made disparaging comments about the defendant, required factual analysis to resolve thereby defeating the motion. The court held that, unlike in *Kerin*, "it its perfectly clear" what constitutes a bankruptcy filing, and that, moreover, it was "specifically contemplated" within the guaranty agreement.

Not surprisingly, even where the agreement sued upon is an instrument for the payment of money only, a Section 3213 motion must avoid disputed issues of material fact. In *Guzzone v. Masluf Realty*, 43 Misc. 3d 1205(A), at 5 (Kings Co. 2014), Justice Carolyn E. Demarest of the Kings County Commercial Division addressed defendants' challenge to a Section 3213 motion on a promissory note, arguing that the loan amount, which the plaintiff was required to transfer to a third party, for which the promissory note was issued was never paid. The plaintiff responded that the note contained, on its face, an acknowledgment that the obligation to pay the note arose "for value received." Despite the note providing that value had been rate received, the court found triable issues of fact existed precluding Section 3213 summary judgment.

Sum certain

To qualify for Section 3213 relief, courts do not necessarily apply a strict reading as to what constitutes a "sum certain." As noted in *Persichilli*, it is "generally immaterial" that the agreement itself does not "recite a sum certain" on its face. To prevail, the plaintiff usually need not present an instrument that states, for example, that the defendant agrees to pay $1 million — not a penny more or less. However, courts have generally found that the amount owed should be "readily ascertainable." *Bank of America v. Lightstone Holdings,* 32 Misc. 3d 1244(A), 938 N.Y.S.2d 225, at 4 (N.Y. Co. 2011). Provisions for interest are more than welcome under Section 3213, despite requiring some calculation. Finding a sum to be "readily ascertainable" is a far looser standard than a "sum certain." Examples can be found in the cases cited above, such as *Cortlandt* in which the sum owed required calculation wholly dependent on EURIBOR, a calculation outside the four corners of the notes sued upon, but nonetheless based on easily determinable facts.

Conclusion

When pursuing a claim for recovery on a debt, practitioners should closely examine whether Section 3213 is an available option. While not all instruments will qualify for Section 3213 relief, precedent suggests that the requirements may be less stringent than a strict reading of that Section implies. It is effort well spent to explore whether a matter qualifies for Section 3213 relief, which could ultimately save significant time and expense.

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