



COMMERCIAL DIVISION UPDATE

Expert Analysis

Issues Over Summary Judgment in Lieu Of Complaint Provide Litigation Fodder

The Commercial Division faces motions for summary judgment in lieu of complaint with considerable frequency. A review of decisions on such motions over the last two years reflects at least 10 issued out of the Commercial Division. This is not surprising given that the nature of such proceedings, most often actions on promissory notes, cleanly fits into the criteria for a commercial case.

We address in this article several of the primary issues that provide litigation fodder in this arena. First, we consider recent Commercial Division cases analyzing what constitutes an instrument for the payment of money only so as to fall within the bounds of CPLR §3213. Second, we address the typical defenses advanced in these cases. Last, we examine the defense tactic of asserting counterclaims to motions for summary judgment in lieu of complaint.

The Statutory Framework

CPLR §3213 provides in part:

When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.

This provision offers plaintiffs the means to obtain a judgment expeditiously by avoiding the complaint, motion to dismiss and answer phases of litigation. “The purpose of the rule is to provide a speedy and effective means of securing a judgment on claims presumptively



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meritorious.”¹ Section 3213 recognizes that actions on instruments for the payment of money only have greater presumptive merit and should have easier access to the courts than ordinary plenary actions.²

Two cases are compatible with the overriding principle that the obligation, if not the precise amount, be clear from the face of the instrument.

The Court of Appeals has noted that, in actions commenced under §3213, “if a prima facie case [is] made out by the instrument and a failure to make the payments called for by its terms, the moving party would be entitled to summary judgment unless the other party came forward with evidentiary proof sufficient to raise an issue as to the defenses to the instrument.”³ While in a plenary action a defendant can meet its duty to respond by simply serving an answer with denials, in a §3213 case the defendant is required to submit answering papers containing evidentiary support of a viable defense sufficient to establish a triable issue of fact. If the court denies the motion, the moving and answering papers are deemed the complaint and answer unless the court orders otherwise.

The minimum time for responding to a §3213 case is determined by CPLR §320. The plaintiff can choose a return date as early as 20 days after service, depending on how service is effectuated. If a plaintiff adds 10 days to the return date, under CPLR §3213 service of the answering papers can be required after the earliest date response could have been requested and before the return date.

Payment of Money Only

One of the most vexing issues courts face in §3213 actions is whether the obligation the plaintiff seeks to enforce arises from an instrument for the payment of money only. The statute provides little guidance. The Court of Appeals has described the “prototypical example” of an instrument for the payment of money only to be “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.”⁴ The complex reality of commercial transactions, however, often complicates this determination. Two recent Commercial Division cases illustrate the requirement that, at a minimum, the instrument must express on its face the defendant’s unconditional promise to pay a debt.

In *Emperor Industries v. Rothbaum*, the New York County Commercial Division found an account did not satisfy the requirements for a §3213 motion. In that case, the plaintiff corporation alleged that it had made a personal loan to the defendant, a former officer of plaintiff.⁵ The instrument reflecting this obligation was a memorandum addressed to the plaintiff’s president and initialed by the defendant. That memorandum set forth the following on subject line: “Loan of Barry.” It contained a running table showing the loan amounts, payments and balance of the loan over time, reflecting an outstanding balance of \$267,146.29.

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To determine whether this writing constituted an instrument for the payment of money only, the court applied the following test: "The terms of payment must...be apparent on the face of the instrument itself."⁶ Here, the court found that, although the memorandum was evidence of a debt, it did not indicate to whom the debt was due or whether interest accrued on the debt. Because the plaintiff needed to resort to evidence beyond the memo itself to prove these central elements of its case, the court denied summary judgment.⁷

In contrast, in *Bank of America, N.A. v. Solow*,⁸ the New York County Commercial Division held that a personal guaranty of a debt owed under a consolidated mortgage agreement satisfied the requirements of §3213; it granted summary judgment, even though it was necessary to look to documents beyond the guaranty for the terms of the debt. There, the plaintiff sought recovery on defendant's guarantee of a loan to a limited liability company of which defendant was the sole member. The history of the limited liability company's obligations was complex, involving multiple loans, multiple notes later consolidated into a single note, and the assignment of the rights under the note to the plaintiff when the noteholder was merged into it.

On its motion, the plaintiff submitted the guaranty executed by defendant and several other documents dating back to 1994 tracing the underlying obligations that defendant guaranteed. Three of those documents purportedly reflected agreements between the defendant's company and the plaintiffs providing that the outstanding principal balance on the underlying obligation was \$15.9 million.

While the guaranty referred to obligations under a "Note" and a "Mortgage," the defendant argued that the guaranty failed to define these terms, and that the other documents referred to in the guaranty did not define them either. The defendant further argued that several of the documents submitted by the plaintiff (other than the guaranty) were unsigned and therefore did not provide evidence of the defendant's obligations, and that some of the documents created obligations beyond the payment of money only.

In rejecting those arguments, the court cited precedent that a motion for summary judgment in lieu of complaint

based on a guaranty need not "recite[] a sum certain."⁹ Additionally, the court held that, because the guaranty acknowledged the validity of the other documents it referenced, the lack of signatures on those documents was not a defense to defendant's guaranty obligation.¹⁰ The guaranty acknowledged the amount owed and "contain[ed] a straightforward unconditional promise to pay the money after the maturity date."¹¹ The defendant was therefore obligated to pay the amount owed under his company's consolidated mortgage, independent of obligations that may have existed under

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other contractual provisions.¹²

Although at first glance the *Bank of America* decision might seem to conflict with *Emperor Industries*, both cases are compatible with the overriding principle that the obligation, if not the precise amount, be clear from the face of the instrument. In *Bank of America*, the defendant's guaranty stated that certain documents relating to his company's payment obligations were duly executed, and promised the "prompt payment when due" of all obligations with interest, as determined in the other documents.¹³ Although the specific terms were absent from the guaranty, it reflected a clear promise to pay and described where the repayment terms were set forth. Indeed, where there is a dispute over the amount due, a court may grant summary judgment in lieu of complaint as to liability, and set down for an inquest the determination of damages.¹⁴

Typical Defenses

Once the plaintiff establishes a prima face case by submitting a debt instrument and evidence of the defendant's failure to pay, the defendant must present sufficient evidence to create a triable issue of fact.¹⁵ To this end, defendants

often present evidence that they have in fact paid the obligation, which appears to be a particularly prevalent defense where the parties have an ongoing business relationship involving the payment of monies.

For example, in *Metro Coffee Service Corp. v. Metro Spring Coffee Inc.*, the plaintiffs claimed non-payment of a promissory note establishing a debt of \$260,000 that was required to be paid with interest over four years.¹⁶ In response, the defendants submitted as evidence of payment two checks totaling \$100,000, and argued they had prepaid 17 months of the debt due under the note. Although the plaintiffs asserted that the \$100,000 payment had nothing to do with the note obligation but rather were paid in connection with other obligations, the Nassau County Commercial Division found an issue of fact was presented and denied summary judgment.¹⁷

In *Nussdorf v. Lekach*, the defendant's monthly payment on a \$4,433,650 promissory note had been returned by his bank for insufficient funds, causing the noteholder to assert a default thereunder.¹⁸ In opposing the noteholder's motion for summary judgment in lieu of complaint, the defendant argued that the plaintiff's purported agent had waived the default arising from the bounced check and agreed to redeposit it, and that late payments to same plaintiff had been accepted under previous notes.

The Nassau County Commercial Division rejected this defense, noting that "[b]ald, conclusory allegations are insufficient to defeat a motion for summary judgment in lieu of complaint."¹⁹ The defendant had submitted no admissible evidence that the purported agent had authority to act on behalf of the plaintiff, or that the plaintiff had accepted late payments under previous notes. Significantly, the promissory note in that action expressly prohibited oral modifications.

Nussdorf also suggests that assertions of forgery in response to motions for summary judgment in lieu of complaint may create a triable issue of fact. In that action, the plaintiff brought claims against multiple defendants. In response to plaintiff's motion, one defendant submitted an affidavit from a forensic document examiner stating that the signature on the note attributable to her, dating from four years earlier, did not match samples of the defendant's handwriting from the same time period.

This defendant had not contested the validity of the note prior to litigation. Nonetheless, the court noted the lack of direct evidence that the defendant had signed the guaranty, and denied summary judgment against her. Likewise, usury is a valid defense to a motion for summary judgment in lieu of complaint.²⁰

Another area of defenses arises where the plaintiff fails to adhere strictly to jurisdictional and service requirements. For example, in *Malament v. Kim*, the plaintiffs served a notice of motion for summary judgment in lieu of complaint, but failed to comply with the requirement that a summons be served with the motion papers. As an additional flaw, the moving papers required that answering papers be served before the earliest date permitted under CPLR §320.²¹ Although the defendant failed to oppose the motion, the court held that it had no jurisdiction to hear it and dismissed the action without prejudice.²²

Effect of Counterclaims

In response to motions for summary judgment in lieu of complaint, defendants frequently will assert counterclaims. Where those counterclaims, even if successful, would not undermine the validity of the instrument sued upon, courts appear reluctant to deny the motion.

In *Acute Corp. v. Stewart*, the Kings County Commercial Division granted the plaintiff's motion for summary judgment on a promissory note and guaranty issued in connection with the purchase of a retail stationery store despite the defendants' assertion of counterclaims.²³ In opposing the motion, the defendants asserted claims of fraudulent inducement and quantum meruit. While the fraudulent inducement claim could have provided a valid defense to the enforcement of the note and guaranty, the court rejected it because the agreement of sale disclaimed all representations and warranties by the plaintiff. And while the defendants cross-moved for summary judgment on their quantum meruit claim, they failed to submit any evidence supporting it. In addition, although presumably it arose out of the same transaction, the defendants submitted no evidence that the quantum meruit counterclaim, even if valid, would affect the validity of the promissory note or guaranty. As such, the court granted the plaintiff summary judgment in lieu of complaint

and ordered the defendants to convert their counterclaim into a complaint.

In *Bruefach v. Miessmer*, the Nassau County Commercial Division responded less drastically.²⁴ There, the defendant had signed a promissory note and guaranty in connection with his company's purchase of three local businesses. When he suspected that one of the sellers was diverting customers away from his company, despite a signed covenant not to compete, the defendant stopped paying all three of the sellers. Those sellers moved for summary judgment in lieu of complaint to enforce payment on the note.

The court held that the alleged diversion of customers was no defense to the enforcement of the note and granted each of the three plaintiffs summary judgment. The court found a violation of the covenant not to compete could be a defense to the note action only if payment on the note were somehow tied to compliance with that covenant.²⁵ However, the court stayed entry of judgment for the one plaintiff who was alleged to have diverted business, pending a determination of the defendant's counterclaims arising from the alleged breach of the covenant not to compete. The court may have concluded that the sale contract and the promissory note were too closely related—or the defendant's arguments were too strong—for enforcement of the note to proceed in advance of a determination on the counterclaim.

Conclusion

The expeditious nature of a motion for summary judgment in lieu of complaint makes it an attractive procedure for plaintiffs. The broad language of CPLR §3213 allows proceedings thereunder to be brought in cases that do not neatly fit the "prototypical" action on a negotiable instrument. Courts are careful to balance the plaintiff's entitlement to this accelerated procedure to avoid protracted litigation, with the defendant's right to have viable defenses heard.

1. *Emperor Industries Inc. v. Rothbaum*, No. 602303/2007, 17 Misc. 3d 1125 (A), 2007 WL 3311371 at * 1 (N.Y. Co. Nov. 8, 2007) (Fried, J.) (citation omitted).
2. Siegel, *New York Practice* §288, at 471 (4th ed. 2005).
3. *Interman Industrial Products, Ltd. v. R.S.M. Electron Power Inc.*, 332 N.E.2d 859, 862, 37 NY2d 151, 155, 371 NYS2d 675, 680 (1975).
4. *Weissman v. Sinorm Deli Inc.*, 669 N.E.2d 242, 245, 88 NY2d 437, 444, 646 NYS2d 308, 311 (1996).
5. *Emperor Industries* at *1.
6. Id. at *2 (citing *Seaman-Andwall Corp. v. Wright Mach. Corp.*, 31 AD2d 136, 137, 295 NYS 752, 754 (1st Dept. 1968)).
7. Id. at *3.
8. No. 601892/07, 19 Misc. 3d 1123(A), 862 NYS2d 812, 2008 WL 1821877 (N.Y. Co. April 17, 2008) (Fried, J.).
9. Id. at *4 (citing *European Am. Bank v. Cohen*, 183 AD2d 453, 453, 585 NYS2d 1017, 1017 (1st Dept. 1992); and *European Am. Bank v. Lofrese*, 182 AD2d 67, 71, 586 NY2d 816, 818 (2d Dept. 1992)).
10. *Bank of America* at *5.
11. Id. at *4.
12. Id. at *6. Similarly, even where a promissory note contains on its face terms or provisions other than the debtor's promise to pay, courts may find the instrument gives rise to a CPLR §3213 action. See *Peri Formwork Systems Inc. v. Tadco Construction, Inc.*, No. 19034/06, slip op. (Queens Co. Dec. 15, 2006) (Kitzes, J.) (granting summary judgment when other provisions in the note did not require additional performance by the holder of the note as a condition precedent to payment or otherwise altered the promise to pay).
13. *Bank of America* at *3.
14. *The North Face v. Carp*, No. 00320-08, 2009 WL 129903, at *4 (Nassau Co. Jan. 14, 2009) (Austin, J.).
15. *Interman*, 332 N.E.2d at 862, 37 NY2d at 155, 371 NYS2d at 680.
16. No. 16080/2008, 22 Misc. 3d 1110 (A), 2008 WL 5517590 (Nassau Co. Dec. 24, 2008) (Austin, J.).
17. Id. at *3.
18. No. 10466-08, NYLJ Feb. 5, 2009, at 30, col. 1 (Nassau Co. Jan. 16, 2009) (Austin, J.).
19. Id.
20. *Dampf v. Moshell*, No. 11838-07, 18 Misc. 3d 1107(A), 856 NYS2d 23, 2007 WL 4547725 (Nassau Co. Dec. 21, 2007) (Austin, J.).
21. No. 16602/08, 22 Misc. 3d 1110(A), 2008 WL 5517588, at *3 (Nassau Co. Dec. 23, 2008) (Austin, J.).
22. Id. at *3.
23. No. 12881/08, 21 Misc. 3d 1134(A), 2008 WL 4980352, at *7 (Kings Co. Nov. 24, 2008) (Demarest, J.).
24. No. 16966-07, 18 Misc. 3d 1114(A), 856 NYS2d 496, 2008 WL 108869 (Nassau Co. Jan. 9, 2008) (Austin, J.).
25. Id. at *2.

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