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## NO COMPLAINT, NO PROBLEM! NAVIGATING CPLR 3213

A motion for summary judgment in lieu of a complaint, as the CPLR 3213 motion is often referred, provides a quick avenue for relief, melding pleadings and motion practice into one step. Practitioners must be aware, however, of the motion’s strict procedural requirements, discussed here.

By **Jack A. Gordon and Alex T. Paradiso**

A CPLR 3213 motion for summary judgment is a procedural mechanism that allows a party to make a motion for summary judgment before even filing a complaint in actions based upon “an instrument for the payment of money only or a judgment.”

A motion for summary judgment in lieu of a complaint, as the CPLR 3213 motion is often referred, provides a quick avenue for relief, melding pleadings and motion practice into one step. Indeed, the purpose of a CPLR 3213 motion is to provide prompt relief on 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.” (1st Prelim Report of Advisory Comm. on Practice and Procedure, 1957 N.Y. Legis. Doc No. 6[b], at 91).

Practitioners must be mindful, however, of the motion’s strict procedural requirements, as discussed below.

### Instruments or Judgments Enforced

**Bringing a CPLR 3213 Motion Under an Instrument for the Payment of Money.** As a “prototypical example,” an instrument “for the payment of money” was meant to be an executed agreement with an unconditional promise to pay a sum certain on demand or at a definite time. *Weissman v. Sinorm Deli, Inc.*, 88 N.Y.2d 437, 444 (1996). With its increasing popularity, however, the CPLR 3213 motion began to apply to a variety of commercial instruments, including checks, promissory notes, and unconditional guaranties to pay a sum certain. *See, e.g., PDL Biopharma, Inc. v. Wohlstadter*, 147 A.D.3d 494 (1st Dep’t 2017); *European American Bank v. Cohen*, 183 A.D.2d 453, 453 (1st Dep’t 1992).

To qualify for a CPLR 3213 motion, the instrument must require the payment of money that is not contingent upon any other occurrence that requires outside proof, other than simple proof of nonpayment or a similar *de minimus* deviation from the face of the document, such as the simple calculation of an accessible interest rate. *Weissman*, 88 N.Y.2d at 444; *Bank Leumi Trust Co., v. Rattet & Liebman*, 182 A.D.2d 541, 542 (1st Dep’t 1992). Moreover, an instrument’s qualification for relief under a CPLR 3213 motion should be determinable when the financial instrument is executed, so conditional agreements to pay money will not suffice. *Kerin v Kaufman*, 296 A.D.2d 336, 338 (1st Dep’t 2002).

An instrument for the payment of money will remain within CPLR 3213 even if it provides additional terms, so long as such additional terms do not require further performance *as a condition precedent to payment*. *Bank of Am., N.A. v. Lightstone Holdings, LLC*, 2011 N.Y. Slip Op. 51702(U), 2011 WL 4357491 (N.Y. Sup. Ct., N.Y. Cty., July 14, 2011) (citing *UBS Commercial Mortg. Trust 2007–FL1 v. Garrison Special Opportunities Fund L.P.*, 2011 N.Y. Slip Op. 51774(U), 2011 WL 900949 (N.Y. Sup. Ct., N.Y. Cty., Mar. 8, 2011)).

**Bringing a CPLR 3213 Motion Under a Judgment.** A CPLR 3213 motion may be based on any of three kinds of judgments: a New York state judgment, a judgment from a U.S. court outside of the state of New York, or a foreign country money judgment.

A New York state judgment is typically enforceable under Articles 51 and 52 of the CPLR, and Article 7 of the Real Property and Proceedings Law, for ten years since the judgment is docketed. CPLR 5014(1). If a party intends to enforce the judgment after that time, it should first bring a CPLR 3213 motion to renew the money judgment. *Lull v. Van Tassell*, 171 A.D.3d 1155 (2d Dep't 2019).

A judgment from a U.S. court outside of New York is typically enforceable under the Full Faith and Credit Clause of the U.S. Constitution. Procedurally, an out-of-state judgment may be registered in New York under Article 54 of the CPLR. CPLR 5401, however, precludes the registration of an out-of-state judgment obtained by default or confession. Thus, a party seeking to enforce an out-of-state judgment obtained by default or confession is better served by properly bringing a CPLR 3213 motion. *Progressive Intern. Co. v. Varun Continental, Ltd.*, 16 A.D.3d 476 (2d Dep't 2005).

Different from an out-of-state judgment, a money judgment from a foreign county is typically converted to a New York state judgment under Article 53 of the CPLR. Yet CPLR 5301(b) precludes Article 53 conversions of foreign country judgments when based on taxes, fines, penalties, or judgments for support in matrimonial or family matters. In these circumstances, a party may bring a CPLR 3213 motion to convert those judgments into New York judgments, unless there are grounds for non-recognition under CPLR 5304. *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contr. and Fin. Services Co.*, 117 A.D.3d 609, 610 (1st Dep't 2014).

## **Filing Procedures**

When filing a CPLR 3213 motion, the plaintiff should include the summons, notice of motion, affirmation, affidavit(s), exhibit(s), and a memorandum of law. The plaintiff must also immediately submit a Request for Judicial Intervention.

In its response, the defendant may object (*e.g.*, for lack of personal jurisdiction), bring affirmative defenses, or cross move to dismiss. The defendant will need to mount an opposition to the CPLR 3213 motion in its initial response. If the court denies the defendant's objections or cross motions, it will immediately proceed to assess the plaintiff's CPLR 3213 motion without awaiting further motion papers. *Alfred E. Mann Living Trust v. ETIRC Aviation S.A.R.L.*, 78 A.D.3d 137, 142 (1st Dep't 2010). Additionally, the defendant may not bring counterclaims, unless they amount to a

defense of the CPLR 3213 motion. *Harris v. Miller*, 136 A.D.2d 603, 603 (2d Dep't 1988); *Singotiko v. Kenealy*, 89 A.D.3d 917, 918 (2d Dep't 2011).

When deciding the CPLR 3213 motion, the court may grant the motion and enter judgment on the amount sought, without a damages trial or inquest. Alternatively, a court may deny the CPLR 3213 motion, and (i) elect to continue the action with or without requiring the parties serve formal pleadings; or (ii) dismiss the action altogether. A court may dismiss the action if the claim fails on its merits, if it lack jurisdiction over the defendant, or if the evidence defeats the plaintiff's claim. See, e.g., *Weissman*, 88 N.Y.2d at 446–47; *Schulz v Barrows*, 94 N.Y.2d 624, 626 (2000); *Staten Island Savings Bank v. Tri-State Power Wash, Inc.*, 284 A.D.2d 527, 528 (2d Dep't 2001).

### **Risks and Best Practices**

The primary risk of proceeding by way of a CPLR 3213 motion is that the court will dismiss the proceeding because the subject instrument does not fall within CPLR 3213, or because the motion fails on its merits and/or was improperly drafted. If a court elects to terminate the entire proceeding, it may require that the plaintiff “start over” by serving a complaint and complying with applicable rules for service of process. It should be noted that a re-filing plaintiff remains subject to statute of limitations applicable to the initial filing. See *Schulz*, 94 N.Y.2d at 628.

Many of these risks are avoidable. A properly drafted CPLR 3213 motion should assess whether triable issues of fact exist, and provide explanations as to why they do not. See *Cooper Capital Grp., Ltd. v. Densen*, 104 A.D.3d 898 (2d Dep't 2013); *Lugli v. Johnston*, 78 A.D.3d 1133, 1135 (2d Dep't 2010); *Park Union Condominium v. 910 Union St., LLC*, 140 A.D.3d 673, 673 (1st Dep't 2016) (defendant failed to raise an issue of fact as to a defense to its execution of the payment obligation and its failure to pay).

A properly drafted CPLR 3213 motion will request that, in the event the motion is denied, the parties be allowed to proceed into discovery rather than be backlogged into the pleading stage, and that plaintiff be allowed to litigate any additional or underlying claims included in its moving papers. Similarly, the moving papers should notify the court if—in the event of dismissal—the plaintiff would be barred from bringing a subsequent action due to the statute of limitations.

Thus, while laden with stringent prerequisites, a properly drafted CPLR 3213 motion can offer an invaluable, expedited remedy for a commercial transaction gone awry.

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