

AN ACT to amend the civil practice law and rules in relation to motions for summary judgment in lieu of complaint

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 3213 of the civil practice law and rules, as amended by chapter 210 of the laws of 1969, is amended to read as follows:

§ 3213. Motion for summary judgment in lieu of complaint. **(a) Motion in lieu of complaint.** The plaintiff may serve, with the summons, a motion for summary judgment, with supporting papers described in this section, when the action is based solely upon:

(1) any judgment,

(2) an instrument for the payment of money only,

(3) any other writing, signed by the defendant, that contains a clear, unambiguous, absolute, unconditional and irrevocable obligation for the payment of money in a sum certain or in a sum which can by computation be made certain, or

(4) a signed guaranty, suretyship agreement, undertaking or bond securing an obligation described in paragraphs (1), (2) or (3) of this subdivision (a).

(b) Supporting proof. A motion for summary judgment under this section shall be supported as provided in subdivision b of rule 3212 of this chapter. In addition, the motion shall include a copy of the document on which the action is based. If the action is based on a judgment, the papers shall include a copy of the judgment certified or authenticated in accordance with applicable law.

(c) Answering and reply papers on the motion.

(1) The summons served with such motion papers and the notice of motion, shall state that the defendant must serve answering papers on the motion on or before a date which is not less than thirty days after the completion of service on the defendant of the summons and supporting papers.

(2) The notice of motion shall also state the date on which the motion will be heard, which shall be at least fourteen days after the answering papers are due.

(3) Any reply papers shall be served seven days before the hearing date.

(4) If completion of service does not occur with respect to all defendants at least 30 days prior to the date stated in the notice of motion for service of answering papers, the plaintiff may set a new hearing date by serving an amended notice of

motion. There may be only one hearing date for all defendants under this section. The amended notice shall set a new response date for service of answering papers and a new hearing date which shall comply with the requirements of paragraphs (1) and (2) hereof. With respect to any defendant who has been served with the summons and original notice of motion, the amended notice of motion may be served on such defendant in the manner set forth under rule 2103 of this chapter.

(5) No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion.

(d) Decision on the motion; relief. The court shall deny the motion if it determines that none of the criteria set forth in subdivision (a) of this section is satisfied. Otherwise, the criteria for deciding the motion are identical to those applicable with respect to a motion under rule 3212. The court may enter such orders and grant such relief as are provided in rule 3212. If summary judgment disposing of the motion in its entirety is not granted, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders pleadings be served, in which case, the complaint and answer shall be served within such time as the court shall order.

(e) Actions against consumers. This section is inapplicable where the plaintiff's claim is based upon a transaction entered into between a creditor, seller, transferor or lessor as one party with a natural person who is the debtor, buyer, transferee or lessee as the second party, and the money, other property or services which are the subject of the transaction are primarily for personal, family or household purposes.

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.

Memorandum

This measure is intended to revise and reform CPLR 3213. CPLR 3213 was first enacted as part of the CPLR in 1963. As the Advisory Committee stated at the time, the new provision was "intended to provide a speedy and effective means of securing a judgment on claims presumptively meritorious. In the actions covered, a formal complaint is superfluous and even the delay incident upon waiting for an answer and then moving for summary judgment is needless."

Although CPLR 3213 has generally proven useful, the definition of "instrument for payment of money only" has been problematic. As one leading commentator has stated, "[t]he question of what kind of instrument qualifies for CPLR 3213 treatment has been the most disputed question arising under it. There is a plethora of case law, not all of it reconcilable." Siegel, Practice Commentaries, C3213:3. Because CPLR 3213 actions are often detoured into a dispute over whether the action qualifies for treatment under CPLR 3213 in the first place rather than whether the plaintiff is entitled to summary judgment, Professor Siegel advises that plaintiffs stay away from CPLR 3213 in all but the clearest of cases. See also *Schulz v. Barrows*, 94 N.Y.2d 624, 628 (2000) ("When all

goes smoothly, plaintiffs who choose this accelerated procedure can have relief in record time. The significant body of 3213 case law, however, signals that the course is not always a smooth one").

In addition there are other problems with the procedures provided in CPLR 3213, and its language is confusing. The revised language is intended to clarify which writings qualify under CPLR 3213, and be easier to understand, so that decisions on CPLR 3213 motions are more likely to turn on whether there is an issue of fact requiring trial or further discovery rather than whether the matter can be decided at the outset as a matter of law.

To achieve these results CPLR 3213 would be divided into subdivisions. Under current law "an instrument for payment of money only" and "any judgment" qualify for CPLR 3213 treatment. The new subdivision (a) would add "any other writing signed by the defendant, that contains a clear, unambiguous, absolute, unconditional and irrevocable obligation or acknowledgment of an obligation for the payment of money in a sum certain or in a sum which can by computation be made certain" and "a signed guaranty, suretyship agreement, undertaking or bond securing such a debt." The key would be not the form of the underlying documentation, but rather, documentation that is signed by the defendant, and contains a "clear, unambiguous, absolute, unconditional and irrevocable obligation." These additions are intended to codify prevailing current caselaw

Subdivision (b) would now govern the proof that would be required on the motion. That subdivision incorporates the provisions of CPLR 3212(b) with respect to such proof, and is intended to make clear that while CPLR 3213 is designed to permit summary judgment at the outset of the case and without the need for a complaint, the proof which must be presented to obtain summary judgment is the same under CPLR 3213 as it is under CPLR 3212. Of course, a plaintiff in a given case may be aided by certain presumptions that exists independently of CPLR 3213, such as presumptions governing signatures on an instrument under UCC Article 3 (See UCC 3-307), the elimination of defenses against holders in due course (see UCC 3-305) (but see UCC 3-306 governing rights of holders who are not holders in due course), so in many cases the proof required of the plaintiff may be relatively minimal. Subdivision (b) also requires that a copy of the writing on which the suit is based must be annexed to the moving papers, and in the case of a judgment the copy must be certified or authenticated as may be required by law.

Subdivisions (c) and (d) are designed to deal with procedural aspects of the motion and the standard to be applied in determining the motion. CPLR 3213 as currently drafted is confusing in its language and creates procedural confusion that can lead to the dismissal of the action even where the plaintiff otherwise might have a claim. See *Schulz v. Barrows*, *supra*. The new CPLR 3213(c) is designed to create a clear and easily understood procedure, which affords the defendant an adequate time to respond. A thirty day time frame is selected over the current requirement that the defendant shall be given the time provided under CPLR 320(a) to respond as that time frame can differ depending on the type of service and is not easily understood. A thirty-day time frame is

simpler and can be readily understood by the defendant receiving the papers. In view of the minimum thirty days provided the defendant to respond to the motion papers, the time for reply papers has been extended to at least seven days before the hearing date, with the hearing date at least fourteen days after the answering papers are due.

One of the problems with the current CPLR 3213 is that the plaintiff cannot always be certain when service will be effected on the defendant, and where the defendant proves difficult to serve, or service is otherwise delayed, the moving papers do not provide defendant the statutory time to respond. This problem is particularly acute where plaintiff sues a number of defendants, some of which are served within the relevant time requirements while others are not. Under the revised CPLR 3213(c), the plaintiff, in that situation, may set a new hearing date, and may provide notice to defendants who have been properly served in accordance with CPLR 2103. This avoids the need to dismiss the action for late service, but affords all defendants the statutory response time.

Subdivision (d) governs the resolution of the motion. The court would either grant summary motion in favor of plaintiff or defendant, or deny it and direct the action to proceed, either with or without a formal set of pleadings. CPLR 3212 is incorporated as the standard for granting the motion, and the court is empowered to enter orders and grant relief as provided in CPLR 3212.. For example, the court can, in an appropriate case, direct that the parties engage in discovery proceedings and may at a subsequent time grant summary judgment if it is appropriate.

Subdivision (e) is intended to carve out of CPLR 3213 consumer credit transactions. While CPLR 3213 is a useful device, where the transaction is against a consumer, the procedural shortcut of CPLR 3213 may impose an unfair burden on the individual consumer. The consumer should not be forced to defend against a summary motion at the commencement of the action. In this respect, it is more likely that a consumer are less likely to have ready access to legal counsel, and more likely to appear pro se. New York law contains numerous provisions granting special rights to consumers. See General Business Law Articles 34, 34A and 34B relating to billing practices, General Obligation Law § 5-327, which gives the consumer the right to collect legal fees if he successfully defends or bring an action based on an agreement which gives the creditor, seller or lessor the right to legal fees. Other states have enacted laws for the protection of the consumer. See Ohio Consumer Sales Practices Act and Kansas Consumer Protection Act. The reference in subdivision (e) to “other property” includes all types of property including real and personal.