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NY Ruling Paves A Court Payment Shortcut For More Creditors

By **Alexander Levi** (June 3, 2024, 11:19 AM EDT)


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New York law offers creditors an expedited procedure to enforce an "instrument for the payment of money only" — like many promissory notes and guaranties. Pursuant to Section 3213 of the Civil Practice Law and Rules, creditors can commence an action in New York state court via a motion for summary judgment in lieu of complaint. Under this procedure, a creditor does not need to wait for the obligor to answer a complaint before moving for summary judgment, as is usually the case pursuant to Section 3212(a).

Just as important, Section 3213 does not authorize the parties to take discovery. Therefore, a successful creditor usually can obtain a judgment more rapidly than in an action commenced via a complaint, while also avoiding the considerable expense associated with discovery.

Because of these timing and cost benefits, creditors have invoked Section 3213 in hundreds of cases in the New York state courts.

A decision by a New York state appeals court on March 5 in Marjan International Corp. v. Lillian August Designs Inc. should make it easier for creditors to take advantage of this expedited procedure.[1] The First Judicial Department's decision allows a creditor to minimize the risk of potentially challenging litigation on threshold issues by including a provision in the applicable documentation that specifies that it qualifies as an instrument for the payment of money only, within the meaning of Section 3213.

In the absence of such a provision, the threshold issue of whether a particular instrument is one for the payment of money only is frequently litigated — even in cases involving promissory notes and guaranties — and can have significant consequences.

To analyze this issue, courts examine, among other things, whether payment under the instrument is conditioned on additional performance by the creditor and/or the occurrence of complex events; whether the instrument can be satisfied through means other than through the payment of money, such as through an employee's work; or the extent to which evidence beyond the instrument itself is necessary to prove liability or the amount due. Courts routinely deny motions for summary judgment in lieu of complaint where some or all of these factors weigh against expedited treatment.

Promissory notes, guaranties and other instruments — especially those entered into as part of large, complex transactions — often contain terms that would ordinarily preclude the use of Section 3213. For example, some promissory notes require a court to refer extensively to other contracts that are part of

the same transaction or to outside documents, such as financial records, in order to assess liability. Others condition the payment obligation on the occurrence of events that cannot be proven from the note alone.

A creditor that loses a motion for summary judgment in lieu of complaint on a threshold issue may find itself in a marginally worse position than if it had commenced the lawsuit with a complaint. Under Section 3213, unless the court orders otherwise, when a motion for summary judgment in lieu of complaint is denied, the motion papers are treated as the pleadings for the case.

While the creditor will not have to start over from scratch, it will have incurred significant costs on motion practice on threshold issues that are unique to the procedure in Section 3213, and likely, it will not have been able to take discovery until after the court has ruled on the motion, which could take months. By contrast, in an action started by a complaint in a New York state court, these threshold issues are irrelevant and a creditor can begin taking discovery shortly after commencement.

The First Department, in the Marjan decision, held that it did not need to consider the threshold issue of whether the note and guaranty before the court constituted instruments for the payment of money only, because in both instruments, the parties expressly had agreed that they did, and the borrower and guarantor waived their rights to challenge the instruments' status as such.[2] Significantly, the court did not explicitly conduct an independent analysis of the note or the guaranty to assess whether they constituted instruments for the payment of money only, as it would have done in the ordinary case without such contractual language.

The First Department's opinion appears to be an expansion of its previous decisional authority. In the 1996 case of SCP (Bermuda) Inc. v. Bermudatel Ltd., the First Department granted a motion for summary judgment in lieu of complaint, observing that the notes and guaranties at issue contained provisions stating that those documents were instruments for the payment of money only, and waiving the obligors' rights to assert, inter alia, defenses and counterclaims.[3]

However, the SCP court did not hold that these provisions were dispositive. Indeed, the court examined other provisions of the instruments — such as provisions stating that the guaranties were absolute, irrevocable and unconditional — in determining that the applicable instruments were ones for the payment of money only.[4]

Thus, before the First Department's recent decision in Marjan, an observer might reasonably have believed that a provision stating that an instrument qualifies as one for the payment of money only would serve as just one factor, among several to be considered, supporting the use of the expedited procedure.

However, such a provision, standing alone, might not have been determinative. Under Marjan, it now should be in many cases.

Although the Marjan decision paves the way for creditors to rely on Section 3213 in a broader array of cases, it is doubtful that the decision's reach is boundless. Surely, creditors and obligors cannot bring any contract — regardless of its form and terms — within the scope of the procedure simply by agreeing that it constitutes an instrument for the payment of money only.

For example, in one of the leading cases on the subject, the New York Court of Appeals in Weissman v. Sinorm Deli held in 1996 that an indemnification agreement did not qualify as an instrument for the

payment of money only.[5]

Among other things, New York's highest court observed in Weissman that the amount potentially due under that agreement depended on unknown contingencies, such as whether the indemnified party faced liability for unpaid wages, salaries or taxes.[6] It is unlikely that an indemnified party could invoke Section 3213 to enforce a similar agreement, even if it were to contain a provision stating it is an instrument for the payment of money only.

Although it is difficult to predict where New York courts might draw a line, Marjan will likely have the greatest effect in cases involving promissory notes and unconditional guaranties issued in connection with complex transactions. As mentioned, such instruments often require reference to other contracts and documents to establish an obligor's liability. Courts are likely to be more forgiving in these circumstances where the instrument at issue contains the relevant contractual language from Marjan.

However, Marjan is unlikely to allow parties to invoke Section 3213 with respect to contracts that stray too far away from the traditional types of instruments for the payment of money only, such as promissory notes and guaranties.

In sum, Section 3213 can serve as a time- and cost-saving tool for creditors to enforce promissory notes, guaranties and other instruments in New York state courts. A creditor that may wish to use this procedure should include in its documentation a provision stating that the instrument at issue qualifies as one for the payment of money only and that the obligor waives its right to challenge the instrument's status as such. Under the Marjan decision, these provisions will help minimize the risk of a successful threshold challenge to the instrument's enforceability under Section 3213.

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[1] Marjan Int'l Corp. v. Lillian August Designs, Inc., 225 A.D.3d 408, 408 (1st Dep't 2024).

[2] Id.

[3] SCP (Bermuda) Inc. v. Bermudatel Ltd., 224 A.D.2d 214, 216 (1st Dep't 1996).

[4] Id. at 215-16.

[5] Weissman v. Sinorm Deli, 88 N.Y.2d 437, 445 (1996).

[6] Id.