ALM | LAW.COM

New York Law Journal

Real Estate Trends

LANDLORD-TENANT LAW

Motions for Summary Judgment In Lieu of Complaint

By Gary M. Rosenberg and Brendan J. Derr
Wednesday, June 7, 2023

For New York State litigators, moving for summary judgment in lieu of complaint pursuant to CPLR 3213 offers a quick, cost-effective approach to enforcing a lease guaranty. The accelerated procedure, if successful, allows the plaintiff to obtain a judgment relatively quickly and without engaging in costly and time-consuming discovery.

While an attractive option, eager litigators should be mindful that CPLR 3213 is available only "[w]hen an action is based upon an instrument for the payment of money only" (or for payments on judgments). Therein lies the rub; not all guaranties are created equal.

Moreover, not all departments of the Appellate Division treat CPLR 3213 motions in the same manner; as described below, a notable divide exists between the First and Second Departments regarding whether a guaranty qualifies as "an instrument for the payment of money only" if it promises not just payment, but also performance.

GARY M. ROSENBERG *is the founding member of Rosenberg & Estis.* ALEXANDER LYCOYANNIS *is a (former member), and* BRENDAN J. DERR *is of counsel at the firm.*

CPLR 3213 Motions Generally

By **Gary M. Rosenberg**

And **Brendan J. Derr**

CPLR 3213 permits a plaintiff to move for summary judgment in lieu of a complaint to collect on an instrument for payment of money only. This summary procedure "affords a speedy and efficient remedy to secure judgment in certain cases where service of formal pleadings would be unnecessary for the expeditious resolution of the dispute between the parties" (*Maglich v. Saxe, Bacon & Bolan, P.C.*, 97 AD2d 19 [1st Dept. 1983]).

It provides for "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" (*SpringPrince, LLC v. Elie Tahari, Ltd.*, 173 AD3d 544, 545 [1st Dept. 2019]). Owners' attorneys often invoke CPLR 3213 to enforce lease guaranties when commercial tenants fail to pay rent.

To make out its *prima facie* case, a plaintiff must establish "the existence of the guaranty, the underlying debt and the guarantor's failure to perform under

the guaranty" (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v. Navarro*, 25 NY3d 485, 492 [2015]), *citing Davimos v. Halle,* 35 AD3d 270, 272 [1st Dept 2006]; *see also SCP (Bermuda) Inc. v. Bermudatel Ltd.*, 224 AD2d 214, 216 [1st Dept 1996]).

Second Department's Interpretation

The Appellate Division, Second Department has consistently interpreted CPLR 3213 broadly when determining whether a lease guaranty qualifies as an instrument for the payment of money only. Provided that the guaranty is absolute and there are no conditions precedent to the guarantor's obligation to pay the tenant's rental arrears, the Second Department has held that an owner may enforce the guaranty via CPLR 3213 even where the instrument guarantees both payment and performance.

If board members could incur personal liability for mere mistakes, errors in judgment or general negligence, shareholders and unit owners would be reluctant to serve on their boards. Directors and Officer's insurance may be limited in scope and amounts.

Plaintiffs moving for summary judgment in lieu of complaint often cite *Afco Credit Corp. v. Boropark Twelfth Ave. Realty Corp.* (187 AD2d 634 [2d Dept. 1992]). There, a finance agreement contained an insured's unconditional promise to repay to the lender certain sums advanced on its behalf.

Although the agreement also contained other provisions and terms apart from the obligation to repay the lender, the court found that those terms and provisions did not require "additional performance by the lender as a condition precedent to repayment, [nor] otherwise alter[ed] the insured's promise of repayment" (*id.* at 634)

Therefore, the court held that the finance agreement was an instrument for the payment of money only under CPLR 3213.

In *Premium Assignment Corp. v. Utopia Home Care, Inc.*, the court similarly held that because the instrument at issue did not require additional performance on the plaintiff's part as a condition precedent to repayment and also did not require the plaintiff to pursue its claim against the defendant's insurer, the instrument qualified as an instrument for the payment of money only (58 AD3d 709 [2d Dept 2009]).

First Department's Interpretation

By contrast, the Appellate Division, First Department has applied a stricter standard where a guaranty requires the guarantor to perform obligations in addition to the payment of money.

Generally, the First Department has held that an agreement guaranteeing both payment and performance does not qualify for CPLR 3213 treatment (*see Punch Fashion, LLC v. Merch. Factors Corp.*, 180 AD3d 520 [1st Dept. 2020]).

For example, in *Bank of Am., N.A. v. Filho*, the guaranties at issue stated that they were "guarant[ies] of payment and performance" of an aircraft lease and that if there was a default, the guarantor "shall (i) punctually pay any such obligations requiring the payment of money ... and (ii) punctually perform any and all Obligations not requiring the payment of money" (203 AD3d 594, 594 [1st Dept. 2022]).

In addition, the court found that the guaranties' defined term "Obligations" grouped both payment and performance obligations together, and therefore promise both payment and performance. Accordingly, citing to *Punch Fashion,* the court held that summary judgment in lieu of complaint was inappropriate because the guaranties did not qualify as instruments for the payment of money only.

However, perhaps in response to the Second Department's broader interpretation, the First Department recently has expanded its interpretation of CPLR 3213, creating exceptions to the general rule where the guaranty of payment is separate from the guaranty of performance of obligations.

In *iPayment, Inc. v. Silverman*, the court held that a guaranty containing unconditional obligations to pay rent *and*, separately, perform all other covenants under the sublease qualified as an instrument for the payment of money only under CPLR 3213:

Plaintiff established its entitlement to summary judgment by submitting defendants' guaranty and evidence of their failure to pay. While a guarantee of both payment and performance does not qualify as an instrument for the payment of money only under CPLR 3213 (*see Punch Fashion, LLC v. Merchant Factors Corp.,* 180 A.D.3d 520, 521, 120 N.Y.S.3d 284 [1st Dept. 2020], *lv dismissed* 35 N.Y.3d 1124, 134 N.Y.S.3d 7, 158 N.E.3d 898 [2020]), paragraph 1 of the guaranty signed by defendants includes an unconditional obligation to pay all rent and additional rent owed under the sublease, and therefore does so qualify (*id*.); "it required no additional performance by plaintiff[ ] as a condition precedent to payment or otherwise made defendant[s'] promise to pay something other than unconditional" (*Park Union Condominium v. 910 Union St., LLC,* 140 A.D.3d 673, 674, 33 N.Y.S.3d 733 [1st Dept. 2016]).

(192 AD3d 586, 587 [1st Dept. 2021]). Key to this ruling was that the unconditional obligation to pay all rent and additional rent was contained in a different paragraph than the defendant's other obligations.

Last month, the First Department broadened the exception again. In *BBM3, LLC v. Vosotas*, the court held:

CPLR 3213 relief was appropriate despite the completion guaranty's provision requiring some additional performance obligations by the borrower, as the guaranty "include[d] an unconditional obligation to pay" that "required no additional performance by plaintiff as a condition precedent to payment" (*iPayment, Inc. v. Silverman*, 192 A.D.3d 586, 587, 146 N.Y.S.3d 51 [1st Dept. 2021], lv dismissed 37 N.Y.3d 1020, 154 N.Y.S.3d 27, 175 N.E.3d 909 [2021][citations omitted]). Furthermore, nothing in the guaranty rendered defendant's promise to pay anything but unconditional.

2023 NY Slip Op 02279 (1st Dept. May 2, 2023).

In *BBM3*, the guaranties' definition of "Guarantied Obligations" contained both monetary and non-monetary obligations. Nevertheless, because the monetary obligations were unconditional and distinct from the non-monetary obligations, the court held that the guaranties qualified as instruments for the payment of money only.

Takeaway

Litigators and transactional attorneys alike should be aware of the foregoing case law when litigating and drafting lease guaranties. Litigators who overzealously move for summary judgment in lieu of complaint to enforce guaranties of both the payment of money and the performance of other obligations may have their motions denied by the court—wasting the client's time and money and undermining the purpose of moving under CPLR 3213.

However, such a mistake is not necessarily fatal to the underlying claims. Indeed, the First Department has held that when a "plaintiff has mistaken his remedy and CPLR 3213 is in fact not available, the action typically should not be dismissed but simply converted to ordinary form as the statute provides [*i.e.* the CPLR 3213 summary judgment motion should be deemed a complaint], unless the court orders otherwise.

If the claims can be decided on the merits, the court can grant summary judgment accordingly" (*JFURTI, LLC v. First Capital Real Estate Advisors, L.P.*, 165 AD3d 419, 421 [1st Dept. 2018] [internal citations omitted]).