

Show You the Money ... How Will Depend on Your Note or Guaranty

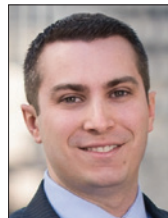
There is an open question as to whether a guarantor's promise to perform obligations other than the payment of the principal's debts disqualifies the guaranty from the purview of CPLR 3213. This article explores how that question is answered in the Second and First Departments.

Litigants suing under a note or guaranty want one thing—their money, and they want it quickly. CPLR 3213 provides the vehicle for such litigants to reach a speedy judgment. Pursuant to CPLR 3213 a party may commence an action by serving a motion for summary judgment in lieu of complaint “when the action is based upon an instrument for the payment of money.” Thus, CPLR 3213 provides plaintiffs with a way to skip discovery and immediately seek a judgment.

CPLR 3213 is a major tool that should be used more often by litigants and, in the eyes of these authors, embraced more by the courts. As the Court of Appeals explained in *Cooperative Centrale Raiffeisen-Boerenleenbank, B.A. v. Navarro*, 25 N.Y.3d 485, 491 (2015), “CPLR 3213 was enacted to provide quick relief on documentary claims so presumptively meritorious that a formal complaint is superfluous, and even the delay



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incident upon waiting for an answer and then moving for summary judgment is needless ...”

The Court of Appeals has recognized, however, that “the question of what constitutes an ‘instrument for the payment of money only’ may appear to be a vexing problem.” *Interman Indus. Products Ltd. v R.S.M. Electron Power*, 37 N.Y.2d 151, 154 (1975). Indeed, there is an open question as to whether a guarantor's promise to perform obligations other than the payment of the principal's debts disqualifies the guaranty from the purview of CPLR 3213. This article explores how that question is answered in the Second and First Departments.

Second Department's Broad Interpretation

The Second Department has taken a practical view of CPLR 3213 and will allow a motion for summary judgment in lieu of complaint where the guaranty includes promises to perform obligations in addition to the payment of the principal's debts, provided that the payment obligations are unconditional.

In *Afco Credit Corporation v. Boropark Twelfth Avenue Realty*, 182 A.D.2d 634, 634 (2d Dept. 1992), the plaintiff-lender moved for summary judgment in lieu of complaint on a premium finance agreement that contained a guarantee of repayment. Supreme Court denied the motion on the basis that the agreement was not an instrument for the payment of money only because it contained other promises of performance. In reversing Supreme Court's order and granting summary judgment to the lender, the Second Department held that the

guaranty was a qualifying instrument for the payment of money only because it contained an unconditional promise of repayment. The Second Department found that “[a]lthough the agreement also contains other provisions and terms, none of these requires additional performance by the lender as a condition precedent to repayment, or otherwise alter the insured’s promise of repayment.”

In *Juste v. Niewdach*, 26 A.D.3d 416, 417 (2d Dept. 2006), the Second Department further explained that the “mere presence of additional provisions in the guaranty referring to the defendant’s assumption of the tenant’s obligations in the lease did not constitute a bar to CPLR 3213 relief, because these provisions did not require additional performance as a condition precedent to repayment, or otherwise alter the defendant’s promise of payment.”

Accordingly, in the Second Department a guarantor’s unconditional promise to pay will allow a creditor to seek summary judgment under CPLR 3213, even where the note or guaranty guarantees other obligations.

First Department’s Narrow Interpretation

Historically, the courts in the First Department have interpreted CPLR 3213 strictly. They have not permitted a motion

for summary judgment in lieu of complaint where the note or guaranty promises more than just payment, e.g., when the routine phrase “all obligations” is included in the document.

The First Department’s reasoning was set forth in the seminal case of *Times Square Associates v. Grayson*, 39 A.D.2d 845, 845 (1st Dept. 1972), where the First Department was faced with a guaranty that promised “the full performance and observance of the covenants, conditions and agreements” that the tenant was obligated to perform under a lease. In reversing Supreme Court and denying the plaintiff’s motion for summary judgment in lieu of complaint, the First Department held that the “guaranty is not an instrument for the payment of money only” because the “instrument in suit goes beyond merely guaranteeing payment of rent, and as such it possesses characteristics quite different from one for the payment of a sum of money only.”

Based on the holding in *Times Square Associates*, trial courts in the First Department routinely deny motions for summary judgment in lieu of complaint where the note and/or guaranty promised the payment of money and additional obligations. See, e.g., *Lenox NY LLC v. Goldman*, 2018 NY Slip Op 30932(U) (Sup. Ct. NY Co. 2018); *Cleo Realty Associates, L.P. v. Pagagiannakis*,



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2016 WL 69220320 (Sup. Ct. NY Co. 2016); *Ave A Realty Mgt. v. Masco*, 2015 WL 5366057 (Sup. Ct. NY Co. 2015).

Split in the First Department

Twenty years after *Times Square Associates*, the First Department issued its decision in *First Interstate Credit Alliance v. Sokol*, 179 A.D.2d 583, 584 (1st Dept. 1992), where the court held that the “existence of various clauses contained in a contractual agreement in addition to the unconditional promise to pay money does not necessarily disqualify the agreement as an instrument for the payment of money only.” The First Department, however, fell short of reversing its decision in *Times Square Associates*. Instead, it left open the possibility that its holding in *Times Square Associates* does not apply uniformly to all guarantees.

The holding in *First Interstate Credit Alliance* opened the door for more latitude and a split in the First Department. In fact, recently the trial courts in the First Department have shifted

their view and applied a broader interpretation of CPLR 3213.

In *UBS Commercial Mortgage Trust v. Garrison Special Opportunities Fund L.P.*, 33 Misc.3d 1204(A) (Sup. Ct. NY Co. 2011), the guaranty at issue unconditionally guaranteed the payment and performance of the borrower's obligations and/or liabilities to the lender. The guarantor argued that the guaranty did not qualify as an instrument for the payment of money only because it included performance obligations in addition to payment obligations. Supreme Court rejected the guarantor's argument and granted summary judgment by relying on, inter alia, *First Interstate Credit Alliance* and *Juste*. Supreme Court explained that "the additional provisions present in the Guaranty do not require additional performance as a condition precedent to payment, and as the references to the underlying obligations do not add or alter the guarantor's obligations, the court is of the opinion that the Guaranty is an instrument for the payment of money only which is suitable for a CPLR motion for summary judgment lieu of complaint."

Similarly, in *3607 Broadway Realty v. Guzman*, 2013 WL 1465579 (Sup. Ct. NY Co. 2013), plaintiff-landlord sought summary judgment against the tenant's guarantor for rental arrears. The subject guaranty stated that guarantor guaranteed all rental payments of

tenant and promised to "perform and fulfill all of such terms, covenants, conditions and provisions of the Lease." While Supreme Court acknowledged that *Times Square Associates* denied CPLR 3213 relief based on similar language, it granted plaintiff summary judgment. Relying heavily on *Juste* and *Afco Credit*, the court held that "in recent years the trend has been to treat such guarantees as being for the payment of money only, despite the existence of conditions and terms other than the promise of repayment."

Recently in *Eight Avenue Sky v. Patel*, 2019 NY Slip Op 31483(U) (Sup. Ct. NY Co. 2019), guarantors of a commercial lease opposed a motion for summary judgment in lieu of complaint by arguing that CPLR 3213 relief was unavailable because the guaranty promised the performance of all the tenant's obligations. Supreme Court granted plaintiff's motion, relying on *Juste*, and held that *Times Square Associates* was distinguishable "because a judgment of possession has been awarded to [the landlord] and, since [the tenant] no longer occupies the premises, the sole obligation the [guarantors] could possibly have at this time is to satisfy the judgment entered against [tenant] arising from the now terminated lease."

There is a growing movement to relax the rigid holding

of *Times Square Associates* in the First Department's trial courts. This trend should serve to allow more lenders and landlords to pursue guarantors through the expedited procedure afforded by CPLR 3213. This, in turn, will lessen the number of cases clogging the Court's already overburdened calendars.

Conclusion

Lenders and landlords in the Second Department can move for summary judgment against guarantors pursuant to CPLR 3213 so long as the payment obligation is unconditional. In the First Department, however, it is unclear whether a guaranty that promises more than just the repayment of the principal's obligations qualifies as an instrument for the payment of money only. This uncertainty will continue until either the First Department revisits its holdings in *Times Square Associates* and *First Interstate Credit Alliance* or the Court of Appeals squarely addresses the issue.

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