

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D12404  
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Submitted - September 13, 2006

THOMAS A. ADAMS, J.P.  
GABRIEL M. KRAUSMAN  
REINALDO E. RIVERA  
ROBERT A. LIFSON, JJ.

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2006-01685

DECISION & ORDER

Gary Fiumara, et al., respondents, v C&S Wholesale Grocers, Inc., appellant.

(Index No. 43481/02)

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Pillinger Miller Tarallo, LLP, Elmsford, N.Y. (Steven M. Pivovar of counsel), for appellant.

Charles Berkman, Brooklyn, N.Y. (Thomas Torto and Jason Levine of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the defendant appeals from an order of the Supreme Court, Kings County (Vaughan, J.), dated January 11, 2006, which denied its motion for leave to amend its answer to add an affirmative defense.

ORDERED that the order is reversed, on the law and in the exercise of discretion, with costs, the motion is granted, and the proposed amended answer, in the form annexed to the defendant's moving papers, is deemed served upon the plaintiffs upon service of a copy of this decision and order.

The Supreme Court should have granted the defendant's motion for leave to amend its answer. It cannot be said that the proposed amendment was palpably insufficient or patently devoid of merit and the plaintiffs failed to demonstrate prejudice or surprise (*see Iannone v Iannone*, 31 AD3d 713; *ABFT-II, LLC v Country Vil. Of Mooney Pond*, 21 AD3d 972, 972-973; *Naranjo v*

October 31, 2006

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FIUMARA v C&S WHOLESALE GROCERS, INC.

*Star Corrugated Box Co.*, 11 AD3d 438; *Holchender v We Transp.*, 292 AD2d 568, 568-569; *Northbay Constr. Co. v Bauco Constr. Corp.*, 275 AD2d 310, 311-312).

ADAMS, J.P., KRAUSMAN, RIVERA and LIFSON, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style with a large initial "J".

James Edward Pelzer  
Clerk of the Court