

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

D23669
O/kmg

_____AD3d_____

Argued - May 28, 2009

FRED T. SANTUCCI, J.P.
JOSEPH COVELLO
JOHN M. LEVENTHAL
ARIEL E. BELEN, JJ.

2007-06725

DECISION & ORDER

WMC Mortgage Corp., appellant,
v Hendrika Vandermulen, et al., respondents.

(Index No. 371-05)

Esseks, Hefter & Angel, LLP, Riverhead, N.Y. (Theodore D. Sklar of counsel), for appellant.

Irwin Popkin, Shirley, N.Y., for respondents Hendrika Vandermulen and 234 South Magee, Co., Inc., and Patricia Weiss, Sag Harbor, N.Y., for respondents Donald MacPherson and Carrie MacPherson (one brief filed).

In an action, inter alia, to foreclose a mortgage, the plaintiff appeals from so much of an order of the Supreme Court, Suffolk County (Emerson, J.), dated May 29, 2007, as denied those branches of its cross motion which were for leave to serve a supplemental summons and second amended complaint to add George O. Guldi and Thomas T. McVann as defendants and to add a claim for punitive damages.

ORDERED that the order is reversed insofar as appealed from, on the law, with one bill of costs, and those branches of the plaintiff's cross motion which were for leave to serve a supplemental summons and second amended complaint to add George O. Guldi and Thomas T. McVann as defendants and to add a claim for punitive damages are granted.

A motion for leave to amend a pleading pursuant to CPLR 3025(b) shall be freely granted in the absence of surprise or prejudice to the opposing party (*see* CPLR 3025[b]; *Comsewogue Union Free School Dist. v Allied-Trent Roofing Sys., Inc.*, 15 AD3d 523, 524; *Paolano*

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v Southside Hosp., 3 AD3d 524, 525; *Traveler's Prop. Cas. v Powell*, 289 AD2d 564, 565. The proposed second amended complaint, which seeks to add George O. Guldi and Thomas T. McVann as defendants, was neither palpably insufficient nor patently devoid of merit (*see Lucido v Mancuso*, 49 AD3d 220, 232). Accordingly, that branch of the plaintiff's cross motion which was for leave to serve a supplemental summons and second amended complaint to add George O. Guldi and Thomas T. McVann as defendants should have been granted.

Further, the proposed second amended complaint alleged conduct sufficient to sustain a demand for punitive damages (*cf.*, *Grazioli v Encompass Ins. Co.*, 40 AD3d 696). Accordingly, the Supreme Court improperly denied that branch of the plaintiff's cross motion which sought leave to add a claim for punitive damages.

SANTUCCI, J.P., COVELLO, LEVENTHAL and BELEN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court