

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

D24934  
Y/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - October 7, 2009

WILLIAM F. MASTRO, J.P.  
MARK C. DILLON  
THOMAS A. DICKERSON  
ARIEL E. BELEN  
PLUMMER E. LOTT, JJ.

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2009-01146

DECISION & ORDER

Maspeth Federal Savings and Loan Association,  
plaintiff, v Pamela A. Simon-Erdan, a/k/a Pamela  
Simon, et al., defendants; David Schreiber,  
nonparty-appellant.

(Index No. 5563/04)

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Mulholland & Knapp, LLP, New York, N.Y. (Robert P. Knapp III and Ann Marie  
Park of counsel), for nonparty-appellant.

In an action to foreclose a mortgage, David Schreiber, as the assignee of the mortgage, appeals from an order of the Supreme Court, Kings County (Demarest, J.), dated November 21, 2008, which denied his unopposed motion to restore the action to the pre-note of issue calendar and amend the caption and pleadings to substitute himself as the plaintiff in place of Maspeth Federal Savings and Loan Association, and dismissed the action for failure to prosecute.

ORDERED that the order is reversed, on the law, without costs or disbursements, and the motion of the nonparty-appellant David Schreiber, as the assignee of the mortgage, to restore the action to the pre-note of issue calendar and amend the caption and pleadings to substitute himself as the plaintiff in place of Maspeth Federal Savings and Loan Association is granted.

Since the preconditions set forth in CPLR 3216 were not met, the Supreme Court was without power to dismiss the action on the ground of a general lack of prosecution (*see Chase v*

November 10, 2009

Page 1.

MASPETH FEDERAL SAVINGS AND LOAN ASSOCIATION v SIMON-ERDAN

*Scavuzzo*, 87 NY2d 228, 233; *Ovchinnikov v Joyce Owners Corp.*, 43 AD3d 1124; *Kesar v Green Ridge Enters. Corp.*, 30 AD3d 471; *Dominique v Flushing Hosp. Med. Ctr.*, 22 AD3d 789; *O'Connell v City Wide Auto Leasing*, 6 AD3d 682). Moreover, since the action was still in the pre-note of issue stage, the rules governing CPLR 3404 were inapplicable (see *Sellitto v Women's Health Care Specialists*, 58 AD3d 828; *Suburban Restoration Co., Inc. v Viglotti*, 54 AD3d 750).

“Leave to amend a pleading should be freely given (see CPLR 3025[b]), provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit” (*Ruby Land Dev. v Toussie*, 4 AD3d 518, 519). Here, the Supreme Court improvidently exercised its discretion in denying the motion of David Schreiber to amend the caption and pleadings to substitute himself as the plaintiff in the action. The plaintiff had assigned its interest in the mortgage to Schreiber after this action had been commenced, and the defendants did not oppose his motion (see *East Coast Props. v Galang*, 308 AD2d 431).

MASTRO, J.P., DILLON, DICKERSON, BELEN and LOTT, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court