

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

D23873
Y/prt

_____AD3d_____

Submitted - March 3, 2009

ROBERT A. SPOLZINO, J.P.
ANITA R. FLORIO
JOSEPH COVELLO
RANDALL T. ENG, JJ.

2007-09600

DECISION & ORDER

Financial Freedom Senior Funding Corporation, etc.,
appellant, v Steven Rose, as heir to the estate of
Jack Rose, et al., respondents, et al., defendants.

(Index No. 13771/06)

Rosicki, Rosicki & Associates, P.C., Plainview, N.Y. (Edward Rugino of counsel),
for appellant.

David A. Smith (Geisler & Gabriele, LLP, Port Jefferson, N.Y. [Lori A. Marano] of
counsel), for respondent Steven Rose, as heir to the estate of Jack Rose.

In an action to foreclose a mortgage, the plaintiff appeals, as limited by its brief, from
stated portions of an order of the Supreme Court, Queens County (Rosengarten, J.), dated April 2,
2007, which, inter alia, denied its motion for summary judgment on the issue of liability against the
defendants Steven Rose, as heir to the estate of Jack Rose, and Debra Rosenberg, as heir to the estate
of Jack Rose, and directed the plaintiff to join the estate of the now-deceased mortgagor, Jack Rose.

ORDERED that the order is modified, on the law, by deleting the provision thereof
directing the plaintiff to join the estate of the now-deceased mortgagor, Jack Rose, and adding thereto
a provision that the denial of the plaintiff's motion for summary judgment is without prejudice to
renewal upon completion of discovery; as so modified, the order is affirmed insofar as appealed from,
without costs or disbursements.

There was no need to join the estate of the now-deceased mortgagor, the father of the
respondents Steven Rose and Debra Rosenberg, as it appears that he died intestate and the complaint
does not seek a deficiency judgment (*see Countrywide Home Loans, Inc. v Keys*, 27 AD3d 247;

July 7, 2009

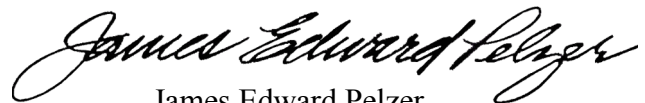
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Winter v Kram, 3 AD2d 175).

However, the Supreme Court properly denied summary judgment to the plaintiff, although the motion should have been denied without prejudice to renewal upon completion of discovery. The respondents alleged that the now-deceased mortgagor was incompetent when he executed the subject loan, and that the plaintiff knew or should have known of the incompetence, which, if both facts are proven, would constitute a basis to void this transaction (*see Ortelere v Teachers' Retirement Bd.*, 25 NY2d 196; *Matter of Loretta I.*, 34 AD3d 480; *see generally Peterson v Spartan Ind.*, 33 NY2d 463, 465-466; *Matter of People v Jaguar Sales, LLC*, 61 AD3d 872; *Benfeld v Fleming Props, LLC*, 38 AD3d 814; *Ying Jun Chen v Lei Shi*, 19 AD3d 407). Since the respondent Steven Rose set out a sufficient basis for his inability to include medical evidence as to the decedent's mental capacity in his opposition papers, further discovery was warranted.

SPOLZINO, J.P., FLORIO, COVELLO and ENG, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court