SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1223

CA 08-01603

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

CYNTHIA B. HURD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL O. HURD, DEFENDANT-RESPONDENT.

WELCH & ZINK, CORNING (COLLEEN G. ZINK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WENDY LEE GOULD, BATH, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Alex R. Renzi, A.J.), entered May 9, 2008. The order dismissed the complaint for failure to state a cause of action.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the complaint is reinstated.

Memorandum: Plaintiff appeals from an order in which Supreme Court sua sponte dismissed her complaint for failure to state a cause of action. We note at the outset that, because the order did not determine a motion made on notice, it is not appealable as of right (*see Sholes v Meagher*, 100 NY2d 333, 335; *Matter of Mary L.R. v Vernon B.*, 48 AD3d 1088, *lv denied* 10 NY3d 710), and plaintiff did not seek leave to appeal (*see Mary L.R.*, 48 AD3d 1088). Nevertheless, under the circumstances of this case, we treat the notice of appeal as an application for leave to appeal, and we grant the application in the interest of justice (*see Spada v Sepulveda*, 306 AD2d 270, 270; *Sena v Nationwide Mut. Fire Ins. Co.*, 198 AD2d 345, 345-346; *see generally* CPLR 5701 [c]).

With respect to the merits of the appeal, we agree with plaintiff that the court erred in dismissing the complaint for failure to state a cause of action in the absence of a request by defendant for such relief (*see Abinanti v Pascale*, 41 AD3d 395, 396; *Grimes v Kaplin*, 305 AD2d 1024; *Sena*, 198 AD2d at 346; *see generally McLearn v Cowen & Co.*, 60 NY2d 686, 689). Indeed, in doing so, the court "thereby depriv[ed plaintiff] of [her] opportunity to lay bare [her] proof . . . and render[ed] meaningful appellate review of the propriety of the court's determination on the merits impossible" (*Sena*, 198 AD2d at 346). "[U]se of the [sua sponte] power of dismissal must be restricted to the most extraordinary circumstances," and no such extraordinary circumstances are present in this case (*Myung Chun v North Am. Mtge.*

Co., 285 AD2d 42, 46; *see Rienzi v Rienzi*, 23 AD3d 450*; cf. Wehringer v Brannigan*, 232 AD2d 206, *lv dismissed* 89 NY2d 980, 1087). We therefore reverse the order and reinstate the complaint.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court