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**STATE OF VERMONT
WINDSOR COUNTY**

RICHARD DANIELS)	
)	
v.)	Windsor Superior Court
)	Docket No. 49-1-09 Wrcv
)	
THE ELKS CLUB OF HARTFORD, VT., INC.,)	
VERMONT HUMAN RIGHTS COMMISSION,)	
WALTRAUD KIELLY, MARILYN McMILLAN,)	
JANE THIBODEAU, MAYLEEN E. CAMERON,)	
WATTS LAW FIRM PC,)	
and BEST BINGO SUPPLIES, INC.)	

**DECISION
Defendants’ Motion for Permission to Appeal
Defendants’ Motion to Amend Counterclaim**

The present matters before the court in this foreclosure action are a motion to amend the counterclaim and a motion for permission to appeal from the summary judgment ruling issued by this court on September 14th, 2009. For the following reasons, both motions are denied.

First, the motion to amend the counterclaim is untimely and futile. Although leave to amend pleadings “shall be freely given when justice so requires,” V.R.C.P. 15(a), amendments are not permitted when there has been undue delay, where the proposed amendment is futile, or where there would be prejudice to the opposing party. *Hickory v. Morlang*, 2005 VT 73, ¶ 5, 178 Vt. 604 (mem.).

Here, the proposed amendment seeks to add Mascoma Savings Bank as a counterclaim defendant “so that the Supreme Court can correctly rule on all issues in the case.” The proposed amendment derives from the allegations that the bank had actual or constructive knowledge about the existence of the junior judicial attachment on the Elks Club property but nevertheless wrongfully funded the defense to the underlying gender discrimination litigation by making future advances on the senior mortgage.

It is not apparent to the court why Mascoma Savings Bank needs to be added as a counterclaim defendant for purposes of appeal, since it has already been participating in the case as an intervenor. It does not make sense for an appeal to be taken from a different procedural posture than was presented to the trial court. Moreover, the allegations in the proposed amendment were already part of the case, and the court has already determined that the allegations are not supported by either the evidentiary record or the law. The proposed amendment is accordingly futile.

The proposed amendment is moreover untimely. There is no reason why the defendants could not have sought to name the bank as a counterclaim defendant at an earlier stage of the litigation. Doing so now would only encourage an unnecessary new round of

answers and substantive motion practice on issues that have already been decided. For these reasons, the motion to amend the counterclaim is denied.

Second, it would be premature at this time to grant permission to appeal. Although summary judgment has been granted to plaintiff Richard Daniels, the clerk has not yet performed an accounting, and the court has not yet issued a final judgment order or decree of foreclosure under Rule 80.1(g) and Rule 58. Granting permission to appeal from the interlocutory summary judgment order would not move the case forward, but rather would prevent the entry of final judgment and create an unnecessary risk of piecemeal appeals: the first from the summary judgment order, and the second from the accounting and final judgment. This is not encouraged under the procedural rules governing interlocutory appeals. *In re Pyramid Co. of Burlington*, 141 Vt. 294, 305 (1982); *Castle v. Sherburne Corp.*, 141 Vt. 157, 162 (1982).

Indeed, the defendants have not articulated a reason why an appeal should be granted on an interlocutory basis. The rationale appears to be attempting to ensure that the request for permission to appeal is not deemed untimely.

Rule 80.1(m) and 12 V.S.A. § 4601 provide that permission to appeal should be requested within ten days following the final judgment order. This procedure promotes finality, *Bank of New York v. Lenge*, 172 Vt. 609, 609 (2001) (mem.), and there is no reason in this case why an appeal should be taken before the accounting and final judgment. The motion for permission to appeal is accordingly premature at this time, and therefore denied.

ORDER

Defendants' Motion to Amend Counterclaim (MPR #17), filed September 29, 2009, is *denied*. Defendants' Motions for Permission to Appeal (MPR #18 & MPR #20), both filed September 28, 2009, are also *denied*. The matter shall be scheduled for an accounting by the clerk.

Dated at Woodstock, Vermont this ____ day of October, 2009.

Hon. Harold E. Eaton, Jr.
Superior Court Judge