ALVORD, J., dissenting. I respectfully dissent because I conclude that the trial court properly granted the motion for summary judgment as to liability filed by the plaintiff, Congress Street Condominium Association, Inc., as against the defendant, Frederick L. Anderson.[1] The record reflects that the court sustained the plaintiff's objection to the defendant's second request to amend his answer, which included a special defense of equitable estoppel and a counterclaim, on the same day that it granted the plaintiff's motion for summary judgment. Without the special defense and counterclaim, the court correctly determined that there was no genuine issue of material fact with respect to the defendant's liability.

I rely on the following facts and procedural history. The plaintiff filed its complaint in June, 2009. On July 20, 2009, the defendant filed his answer without any special defenses or counterclaims. On January 20, 2010, the plaintiff filed a motion for summary judgment as to liability only against the defendant. On February 2, 2010, the defendant filed a request for leave to file an amended answer with special defenses and a counterclaim. The plaintiff filed a motion to strike the special defenses and counterclaim on February 23, 2010, which was granted by the court, absent objection by the defendant, on March 30, 2010. At that point, the plaintiff reclaimed its motion for summary judgment, and a hearing was scheduled for April 12, 2010. On April 13, 2010, the defendant filed his second request for leave to amend his answer. His second amended answer included the special defense of equitable estoppel and a counterclaim seeking damages for emotional distress.

The following day, the plaintiff filed an objection to the defendant's second request for leave to amend the answer. Stating that the parties already had appeared at a hearing on the plaintiff's motion for summary judgment and that the second request to amend the answer included a special defense and counterclaim previously stricken by the court, the plaintiff argued that the second request was untimely and would cause prejudicial delay. The defendant did not file a response to the plaintiff's objection but did file a memorandum of law in opposition to the plaintiff's motion for summary judgment on April 16, 2010.[2] In that opposing memorandum, the defendant did argue that it would be premature for the court to rule on the plaintiff's motion for summary judgment because he had just filed his second amended answer with a special defense and a counterclaim.[3] He claimed that the court was required to consider the substance of his substituted pleading in ruling on the motion for summary judgment because he had filed it

within fifteen days of the striking of the special defenses and counterclaim in his first amended answer. See Practice Book § 10-44.[4]

On April 26, 2010, the court issued two rulings. The court sustained, without comment, the plaintiff's objection to the defendant's second request for leave to amend the answer. By separate order, the court granted the plaintiff's motion for summary judgment as to liability. In its order on the summary judgment motion, the court further noted that the issues raised by the defendant in his opposing memorandum of law did not constitute valid defenses to the plaintiff's foreclosure action.[5]

On appeal, the defendant claims that the court improperly (1) sustained the plaintiff's objection to his request for leave to file his second amended complaint and (2) granted the plaintiff's motion for summary judgment because equitable estoppel is a valid defense to an action brought by a condominium association to foreclose a lien based on a unit owner's failure to pay fines.[6] The defendant should not prevail on either claim.

The standard of review for determining whether a trial court improperly ruled on a request to amend the pleadings is well settled. "While our courts have been liberal in permitting amendments . . . this liberality has limitations. Amendments should be made seasonably. Factors to be considered in passing on a motion to amend are the length of delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment. . . . The motion to amend is addressed to the trial court's discretion which may be exercised to restrain the amendment of pleadings so far as necessary to prevent unreasonable delay of the trial." (Citations omitted; internal quotation marks omitted.) *Connecticut National Bank* v. *Voog*, 233 Conn. 352, 364, 659 A.2d 172 (1995).

The defendant argues that the court could not sustain the plaintiff's objection to his second request to amend because he had timely filed a substituted pleading with a special defense and counterclaim within the fifteen day period specified in Practice Book § 10-44. The short answer is that the provisions in that section do not preclude a party from filing an objection to the substituted pleading nor preclude the court from exercising its discretion in sustaining the objection. Practice Book § 10-60, which addresses the amendment of pleadings by consent, order of the judicial authority or by the failure of the adverse party to object, expressly allows a court to rule as the court did in the present case. Practice Book § 10-60 (b) provides in relevant part: "The judicial authority may restrain such amendments so far as may be necessary to compel the parties to join issue in a reasonable time for trial. If the amendment occasions delay in the trial or inconvenience to the other party, the judicial authority may award costs in its discretion in favor of the other party. *For the purposes of*

this rule, a substituted pleading shall be considered an amendment. . . ." (Emphasis added.)

The plaintiff, in its objection to the defendant's second request to amend, detailed the procedural posture of the case and claimed that the request was untimely and that allowing the amendment would prejudice the plaintiff "by allowing the defendant to continue to delay [the] plaintiff's foreclosure action." The court simply sustained the plaintiff's objection without comment. In challenging the court's ruling, the sole argument proffered by the defendant is that the order "is contrary to the import of [Practice Book §] 10-44 . . . in that the defendant had the right to file a new or substitute special defense and counterclaim." In light of Practice Book § 10-60, and for the reasons previously discussed, I conclude that the judgment of the trial court should be affirmed.

Without a special defense and counterclaim, there is no genuine issue of material fact as to liability that would preclude the court's granting of the plaintiff's motion for summary judgment.[7] It is true, as the majority indicates, that the court mentioned the defendant's claim of equitable estoppel in its decision granting the motion for summary judgment. See footnote 5 of this dissent. I conclude that the two sentence comment by the court in this regard was dicta. Having denied the defendant's request to amend his answer, the court did not have the special defense of equitable estoppel in the pleadings before it. It is fundamental in our law that "any judgment should conform to the pleadings, the issues and the prayers for relief." (Internal quotation marks omitted.) *Journal Publishing Co.* v. *Hartford Courant Co.*, 261 Conn. 673, 686, 804 A.2d 823 (2002). "The [trial] court is not permitted to decide issues outside of those raised in the pleadings." (Internal quotation marks omitted.) *Gaffey* v. *Gaffey*, 91 Conn. App. 801, 804 n.1, 882 A.2d 715, cert. denied, 276 Conn. 932, 890 A.2d 572 (2005).

For these reasons, I conclude that the court did not abuse its discretion in sustaining the plaintiff's objection to the defendant's second request to amend his answer and that the court properly granted the plaintiff's motion for summary judgment as to liability because there was no genuine issue of material fact. Accordingly, I respectfully dissent.[8]

[1] The plaintiff filed its foreclosure complaint against several defendants. Because Frederick L. Anderson is the only defendant involved in this appeal, I refer to him in this dissent as the defendant.

[2] The hearing on the plaintiff's motion for summary judgment as to liability was held on April 12, 2010. The defendant did not file any documents in opposition to the summary judgment motion prior to the hearing. At the hearing, the court inquired whether the defendant still wanted the opportunity to address the plaintiff's claim for summary judgment. The defendant responded that he would like to file a memorandum and an affidavit and indicated that he could probably do so the following day. He did not file the memorandum in opposition to the motion for summary judgment on April 13, 2010, but, rather, filed his second request for leave to amend his answer. The defendant filed his opposing memorandum on April 16, 2010.

[3] The special defense alleged that another unit owner had acted in a similar fashion in altering her unit, that the plaintiff did not impose fines or any other sanction against her and that the plaintiff should therefore be equitably estopped from imposing fines or any other penalty against the defendant. The counterclaim alleged that the defendant sustained emotional distress and incurred expenses as the result of the plaintiff's "impermissible arbitrary, capricious and discriminatory treatment toward him."

[4] Practice Book § 10-44 provides in relevant part: "Within fifteen days after the granting of any motion to strike, the party whose pleading has been stricken may file a new pleading . . . ."

[5] The court's order is as follows: "SUMMARY JUDGMENT GRANTED AS TO LIABILITY ONLY IN ACCORDANCE WITH [PRACTICE BOOK §] 11-10.

"The issues raised by the defendant in his memorandum in opposition to summary judgment are not those which constitute a valid defense to payment of amounts due to a condominium for the reasons stated in *Commodore Commons Condominium Assn.* v. *Austin*, [Superior Court, judicial district of Ansonia-Milford, Docket No. 058025 (March 4, 1999) (24 Conn. L. Rptr. 116)] and cases cited therein. As that case states, the issues raised by the defendant are more appropriately raised in a separate action, and cannot defeat the [c]ondominium [a]ssociation's right to collect fees due."

[6] Although the defendant raised additional claims in this appeal, I agree with the majority's resolution of those claims. See footnote 4 of the majority's opinion.

[7] The defendant conceded at oral argument that there would be no genuine issue of material fact to be determined if the special defense and the counterclaim were eliminated.

[8] Whether an allegation of equitable estoppel is a viable defense to an action by a condominium association to foreclose a lien for *unpaid fines* is an issue of first impression for this court. The majority concludes that the reasoning that precludes the pleading of special defenses and counterclaims in actions to foreclose statutory liens based on the nonpayment of *common charges* is not applicable to the nonpayment of *fines*. Because the condominium documents, including a full copy of the declaration, bylaws, and rules and regulations, were not submitted as exhibits in this case, I would not have reached the merits of this claim because the record is inadequate. A review of the documents that address the circumstances under which such fines are imposed is required, in my opinion, before a well reasoned analysis can be provided by this court.