SUPREME COURT OF THE STATE OF NEW YORK

SCHOHARIE COUNTY

FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FANNIE MAE") A CORPORATION ORGANIZED AND EXISTING UNER THE LAWS OF THE UNITED STATES OF AMERICA,

Plaintiff,

-against-

FRED DUFEK, JR.; ROBIN DUFEK; LAURIE DUFEK; TROY DUFEK,

Defendant(s).

AFFIRMATION IN OPPOSITION AND IN SUPPORT OF CROSS MOTION

Index No. 2022-3

Charles Wallshein, an attorney licensed to practice in the State of New York affirms the following:

1. I make this affirmation in opposition to Plaintiff's motion for summary judgment. The opposition is based upon the public land record and the documents on file in the proceedings of the foreclosure action that vested title in the Plaintiff. No statement of sworn fact is necessary form Defendants because all facts appear as matter of public record or are admitted by the parties in these or in prior proceedings.
2. I have searched the docket. As a threshold matter Plaintiff has failed to submit a statement of disputed material facts as required by 22 NYCRR §202.8-g(a)(5). Plaintiff's motion is defective and should not be considered. Defendants respond to Plaintiff's motion without waiver of the objection to its failure to comply with 22 NYCRR §202.8-g. There are sufficient facts that appear on the face of the record that are a matter of public record and, as such, are not in dispute.
3. The foreclosure action pursuant to which Plaintiff took title is identified as Federal National Mortgage Association v. Fred Dufek et al., Supreme Court, Schoharie County, Index Number 2015-573. The Judgment of Foreclosure and Sale together with the Report of Sale/Terms of Sale are annexed hereto as **Exhibit "A".**
4. Plaintiff brings the instant action to have this Court grant an easement by implication and or by necessity to that portion of Lot 12 (servient estate), title to which is held by Fred Dufek Jr. and Robin Dufek to gain access to the foreclosed property, lots 3 and 4 (dominant estate)

over the private access road leading from the public road, Bassler Road, across the servient estate. See land map annexed hereto as **Exhibit "B".**

5. Defendant opposes Plaintiff's motion because material issues of fact exist that bar summary judgment and establish grounds for denial as a matter of law.

6. It is the Defendants' position that the Plaintiff is not entitled to an easement by necessity because the foreclosed property, lots 3 and 4, is directly adjacent to the public road. The basis for Plaintiff's demand for the imposition of an easement by necessity is that the access available is essentially too inconvenient for access by automobile. At no time does Plaintiff state that access to the foreclosed property is impossible because the foreclosed property is "landlocked".

7. Second, Plaintiff offers no proof in admissible form that lot numbered '12" was ever joined with lots numbered "3" and "4" in a unity of interest. The only undisputed fact in evidence is that Fred Dufek Jr. and his wife Robin Dufek took title to two sperate parcels on two separate dates from two different grantors.

8. Plaintiff references the foreclosed property, dominant estate, (lots 3 and 4) as having a source of title from its Exhibit "D" the deed recorded on November 21, 1995 deed from Edward G. Smith and Lynda G. Smith to Fred Dufek Jr. and his wife Robin Dufek, Book 588 Lot 313.

9. Plaintiff references the source of title to Lot 12, the servient estate, from Edward Smith and Eugene G. Smith as the co-administrators of the Estate of Eugenia Grace Smith, to Fred Dufek Jr. and his wife Robin Dufek by deed recorded on March 12, 2007 at Book 831, Page 289.

10. Plaintiff places great weight on the separation of the unity of interest. However, Plaintiff offers no proof that the two separate parcels were unified in interest at one time as one whole parcel that was later subdivided. Unity of interest does not mean that one party owns two separate but contiguous parcels. In fact Plaintiff does not set forth the facts and circumstances that create the unity of ownership in the dominant estate's chain of title. The public land record contains no record of a grant of a easement to the dominant estate.

11. Nevertheless, Plaintiff claims that the property foreclosed on included an easement across Lot 12 to make access by the foreclosing Plaintiff, the Federal National Mortgage Association, to Bassler Road convenient. There is no evidence of this in the public land record or offered in these proceedings. Plaintiff's statement is simply a mischaracterization of fact.

12. The law is clear that mere inconvenience is insufficient to establish an easement by necessity. Plaintiff seeks to portray the instant demand as required by necessity despite the fact that the subject property is adjacent to the public road for a distance of approximately 600 feet. *See Simone v. Heidelberg* 9 N.Y.3d 177 (2007), see also, *Heyman v. Biggs,* 223 N.Y. 118, (1918).

13. Plaintiff is likewise not entitled to an easement by implication. A person claiming an easement by implication cannot acquire that right by a foreclosure upon the dominant estate. The burden of proof is squarely upon the person claiming an easement by implication. See, *Van Deusen v. McManus,* 202 A.D.2d 731, 732, (3rd Dep't 1994).

14. To acquire an easement by implication that three criteria must be met. First, there must be a unity and subsequent separation of title; Second, the claimed easement must have, prior to separation, been so long continued and obvious or manifest as to show that it was meant to be permanent, and (3) use must be necessary for beneficial enjoyment of land retained. See *Beretz v. Diehl*, 302 A.D.2d 808 (3rd Dep't 2003).

15. Even if the first two elements are present Plain tiff cannot demonstrate necessity. The Plaintiff foreclosed and now has a deed to parcels 3 and 4. Parcel 3 abuts and is adjacent to Bassler Road for a distance of approximately 600 feet. There is now unity of ownership by the Plaintiff to lots 3 and 4.

16. Plaintiff's demand for an easement by implication fails as a matter of law because there is no necessity. The footpath access to ingress and egress admitted to by the Plaintiff at paragraph numbered "26" of its affirmation in support (Robert Link Esq.).

17. The Plaintiff submits that *Heyman v. Biggs,* 223 N.Y. 118, (1918) suggests a more relaxed interpretation of the doctrine of necessity to require "a reasonable use" rather than "indispensable". The *Heyman* Court uses the term "indispensable". Every other case cited for an easement by necessity requires the servient estate to be landlocked without any ingress and egress.

18. The 600 feet of road frontage without an existing driveway may create a significant inconvenience for the Plaintiff. The law clearly states that inconvenience does not give rise to necessity. *See Simone v. Heidelberg,* id.

19. Plaintiff has also failed to introduce testimony and facts in admissible form concerning the prior use of the properties to establish that the demanded driveway easement was an easement

by necessity at the time the dominant and servient estates were severed. Moreover, there is no evidence offered by the plaintiff as to when the estates were severed or even if the estates were severed.

20. Even if an easement existed prior to severance, which it did not, the public land record indicates that the alleged easement was never re-created. See *Witter v. Taggart,* 78 N.Y.2d 234 (1991). This is of course because the easement never appeared in the public land record in the first instance.

21. Plaintiff has not established prima facie, entitlement to summary judgment for either an easement by necessity or for an easement by implication. Plaintiff has failed to include facts sufficient to establish the elements for necessity as landlocked, for unity of interest, or by implication.

22. Last, there is nothing preventing the Plaintiff from ingress and egress to the subject property although the access may be inconvenient. In essence, the Plaintiff seeks an injunction so that they avoid getting mud on their boots. Access to the property may be messy but it is certainly not impossible. Plaintiff's demand for an injunction is without support of the facts. No injunctive relief is necessary. Plaintiff's request should be denied.

23. There is no basis for a Court to order the trespass by Plaintiff over the Defendants' property.

24. Contrary to the Plaintiff's contentions there is in fact a remedy available. It is called walking in on foot over property the Plaintiff already owns.

WHEREFORE, Defendants respectfully request that the Court deny Plaintiff's motion for summary judgment and that the Court grant such other and further relief as the Court may deem just, equitable and proper.

Dated: February 9, 2022
Melville, NY

/S/
Charles Wallshein,
Counsel for Defendants Dufek