

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SCHOHARIEFEDERAL 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).

Index No. 2022-3

AFFIRMATION IN REPLY

ROBERT M. LINK, ESQ., an attorney duly admitted to practice law in the Courts of the State of New York, duly deposes and says:

1. I am a partner of David A. Gallo & Associates, LLP, counsel for the Plaintiff FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FANNIE MAE") A CORPORATION ORGANIZED AND EXISTING UNER THE LAWS OF THE UNITED STATES OF AMERICA.

2. This affirmation is in Reply to Counsel's Opposition and in further support of Plaintiff's Order to Show Cause for an Order (1) granting summary judgment against the Defendants, FRED DUFEK, JR.; ROBIN DUFEK; LAURIE DUFEK; TROY DUFEK, (2) for a permanent injunction restraining and enjoining the Defendants from interfering with Plaintiff's Property by preventing access through constructed fences, signage threatening violence, cameras, and locks to prevent the use of Plaintiff's Property; (3) During the pendency of this action, a preliminary injunction to enjoin and restrain Defendants from the acts set forth above; (4) A declaratory judgment finally determining the rights and obligations of the respective parties with respect to the Subject Premises and Lot 12; (5) A permanent easement by necessity allowing ingress and egress from the Subject Premises to Bassler Road through Lot 12; (6) A permanent

easement by implication allowing ingress and egress from the Subject Premises to Bassler Road through Lot 12; (7) Alternatively, a temporary easement for the limited purpose of facilitating the eviction proceedings and to explore the construction of an alternative ingress and egress to the landlocked Lot 3. (8) Compensatory damages in a sum to be determined at trial; (9) Exemplary damages in a sum to be determined at trial; (10) Costs of suit including but not limited to reasonable attorney fees; (11) That plaintiff has such other and further relief as may be just and proper.

3. As a preliminary matter, Defendants' Opposition should be discarded because it improperly relies on the hearsay testimony of an attorney.

4. It is well-settled that the affirmation of an attorney without knowledge of the facts alleged fails to create an issue of fact and contains no probative value. See, e.g., *Brookman & Brookman, P.C. v. Schiavoni*, 245 A.D.2d 93 (1st Dept. 1997) (Affirmation of counsel lacking personal knowledge was insufficient to defeat motion for summary judgment); See also, *Smith v. Johnson Products Co.*, 95 A.D.2d 675, (1st Dept. 1983); See also, *Currie v. Wilhouski*, 93 A.D.3d 816, (2d Dept. 2012) (attorney affirmation was not based upon personal knowledge and thus was of no probative or evidentiary significance); See also, *U.S. Natl. Bank Assn. v. Melton*, 90 A.D.3d 742, 743 (2d Dept. 2011); See also, *Warrington v. Ryder Truck Rental, Inc.*, 35 A.D.3d 455, 456 (2d Dept. 2006).

5. To address the substance of counsel's hearsay testimony, Paragraph 22 summarizes his argument: "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."

6. In other words, counsel imposes an "impossibility" standard, utterly foreign to New York law, which demands that the Schoharie County Sheriff's Office assemble an eviction unit to climb fences, trudge through rough terrain, and ignore signage threatening to open gunfire.

7. Counsel's rigid construction of the law exposes the Sheriff's Department to an

unnecessary safety risk to enforce the Judgment and Order of this Court and the warrant of eviction issued by the Town of Schoharie.

8. There is no reason to unnecessarily put the safety of Sheriff deputies at risk by forcing them to facilitate a hostile eviction and removing the Defendants' belongings from the residence by foot, across a dangerous hiking path.

9. Defendants are silent in response to the Affidavit testimony from Sgt. McCoy and Mr. Card that an eviction cannot be facilitated through the narrow hiking path.

10. Sergeant McCoy's Affidavit explains: "For practical purpose *there is a single point of access* from Bassler Road to 208 Bassler Road which would allow vehicular travel (ie a moving truck) [at Lot 12]. This entry point is blocked by a gate with numerous signs on it stating "no trespassing"."

11. As explained in the Card Affidavit: "Lot 3 cannot be accessed through Lot 4 because, to the extent a narrow hiking path exists, even walking access is prevented by challenging terrain and overgrown trees and shrubbery. Moreover, even on Lot 4, the Defendants have installed chains, gates, and signage stating that trespassers will be shot."

12. Counsel's affirmation baselessly imposes an "impossibility" standard on the Schoharie County Sheriff's Department. The Appellate Division imposes no such requirement. See, e.g., *Monte v. Di Marco*, 192 A.D.2d 1111 (4d Dept. 1993) ("continuation of the use, especially with respect to the sewer line, was *reasonably necessary* to their beneficial enjoyment of their property"). [Emphasis added].

13. Even if this Court holds that counsel's hearsay testimony is somehow sufficient to defeat summary judgment, counsel has presented no basis to deny injunctive relief, i.e., facilitating the eviction as the parties litigate the permanence of an egress through Lot 12.

14. It is generally accepted that injunctive relief merely requires a “likelihood of success; conclusive proof is not required.” See, *Terrell v. Terrell*, 279 A.D.2d 301, 303 (1st Dept. 2001). “[T]he mere fact that there indeed may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction” See, e.g., *Egan v. New York Care Plus Ins. Co.*, 266 A.D.2d 600, 601 (3d Dept. 1999).

15. Moreover, “*even when facts are in dispute*, the nisi prius court can find that a plaintiff has a likelihood of success on the merits, from the evidence presented, though such evidence may not be ‘conclusive’.” See, e.g., *Sau Thi Ma v. Xuan T. Lien*, 198 A.D.2d 186, 187 (1st Dept. 1993).

16. Additionally, in *Egan v. New York Care Plus Ins. Co. Inc.*, the Third Department explained that a “likelihood of success on the merits “does not compel a demonstration that success on the merits is practically a certitude.” The Appellate Division also states “the mere fact that there indeed may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction. *Id.* See also, CPLR 6312[c].

17. Defendants admit through their silence that an easement is a property interest which equity can protect by injunction. See, e.g., *Collins v. Arancio*, 72 A.D.2d 759 (2d Dept. 1979); See also, *Feuer v. Brenning*, 279 AD. 1033 (2d Dept. 1953), *affd.* 304 N.Y. 881 (1953).

18. It is uncontroverted that Defendants’ wrongful interference with Plaintiff’s property, unless and until enjoined and restrained by order of this court, will cause grave and irreparable injury to Plaintiff. Plaintiff will be barred from accessing the Subject Premises and not be able to enforce the Judgment of Foreclosure and Sale and the Warrant of Eviction.

19. By contrast, the Defendants have not even alleged (and could not allege) any prejudice caused by granting driveway access in Lot 12 to facilitate an eviction. To reemphasize,

the Defendants are completely silent in Opposition and even counsel's hearsay affirmation fails to allege prejudice.

20. Furthermore, counsel's argument that Plaintiff failed to "set forth the facts and circumstances that create the unity of ownership in the dominant estate's chain of title" is similarly misguided. See, e.g., Wallshein Affirmation at ¶10.

21. Defendants, FRED DUFEK, JR., ROBIN DUFEK, LAURIE DUFEK, TROY DUFEK, are the former owners of 208 Bassler Road, Middleburgh, New York, and former owners pursuant to a Deed dated September 7, 1995, from Edward G. Smith and Lynda G. Smith to Fred Dufek, Jr. and Robin Dufek, his wife, recorded November 21, 1995 in Liber 588, Page 31, and a Deed dated July 5, 2012, from Fred Dufek, Jr. and Robin Dufek, husband and wife, to Troy Dufek and Laurie Dufek, husband and wife, recorded July 20, 2021 in Liber 937, Page 237. The Deed was annexed to Plaintiff's motion.

22. Defendants FRED DUFEK, JR., ROBIN DUFEK, are also owners of the neighboring parcel, which adjacent to the Subject Premises and Bassler Road, and is commonly identified as Lot 12 ("Lot 12"), pursuant to a Deed dated December 20, 2006, and recorded March 12, 2007 in Document Number 467235, Book 831, Page 287. The Lot 12 Deed was also annexed to Plaintiff's motion.

23. Plaintiff currently owns Lots 3 and 4 because of the Referee's Deed recorded in connection with Schoharie County Supreme Court Index Number: 2015-573.

24. Neither the validity nor the substance of the land records annexed to Plaintiff's motion are challenged in counsel's Opposition.

25. Defendants also fail to challenge that Lot 12 includes a driveway along the outer edge that Defendants use as the exclusive route to Lot 3 from Bassler Road.

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