

STATE OF NEW YORK
SUPREME COURT COUNTY OF SCHOHARIE

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

Plaintiff,

DECISION & ORDER

Index No.: 2022-3

-against-

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

(Supreme Court, Schoharie County, Motion Term)

APPEARANCES: Robert M. Link, Esq.
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 Attorneys for Plaintiff
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 Charles Wallshein, Esq.
 Charles Wallshein Esq. PLLC
 Attorneys for Defendants
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HON. JAMES H. FERREIRA, Acting Justice:

Plaintiff owns real property located at 208 Bassler Road, Middleburgh, New York, which is comprised of two parcels identified as Lot 3 and Lot 4 (hereinafter the property or 208 Bassler). There is a residence located on Lot 3. Plaintiff obtained the property pursuant to a referee's deed dated April 28, 2017 following the issuance of a Judgment of Foreclosure. Defendants are former owners of the property and, according to plaintiff, are currently occupying the residence located on Lot 3. Defendants Fred Dufek, Jr., and Robin Dufek (hereinafter Fred and Robin) own a parcel,

identified as Lot 12, that is adjacent to both Lot 3 and Lot 4. Plaintiff alleges in the complaint that Lot 12 includes a driveway that serves as the only ingress and egress between Bassler Road and Lot 3, where the residence at 208 Bassler is located.

Plaintiff commenced this action in January 2022, seeking injunctive and declaratory relief, the granting of an easement by necessity and/or implication, or in the alternative a temporary easement, and an award of damages and attorney's fees. In the complaint, plaintiff alleges that defendants are wrongfully interfering with plaintiff's use and enjoyment of its property and access to its property by, among other things, using "fences, signage threatening violence, cameras, and locks" (Complaint ¶ 10). Plaintiff specifically alleges that its agent visited the property on several occasions and observed that "the premises do not have road access to conduct the eviction and removal of the personal possessions from the premises. In particular, a locked and chained metal gate with signs . . . is blocking and preventing road access" (*id.* ¶ 11). Plaintiff alleges that it has been unable to enforce a Warrant of Eviction obtained by plaintiff in a holdover proceeding commenced in the Town of Middleburgh Justice Court and seeks an injunction enjoining defendants' wrongful interference with its property.

Plaintiff further alleges in the complaint that it is the owner of an easement appurtenant on Lot 12 that benefits 208 Bassler Road, as described in a 1997 Deed. Plaintiff alleges that it is also entitled to an easement by necessity on Lot 12, created by operation of law when Lot 3 was transferred to plaintiff in the foreclosure action, allowing ingress and egress from Bassler Road to the residence on Lot 3. Plaintiff additionally alleges that it is entitled to an easement by implication on Lot 12 because, at the time title to the parcels was unified, "an apparently permanent and obvious servitude was imposed on one part of [the] estate in favor of another" such that the burden on the property remains after severance of title (Complaint ¶ 23). Plaintiff asserts that an easement on Lot

12 will not substantially interfere with the property rights of its owners and, if an easement is not granted, the residence on Lot 3 “will be entirely landlocked with no ingress or egress” (*id.* ¶ 27).

Issue was joined by the service of an answer by defendants which generally denied the allegations in the complaint and raised several affirmative defenses. Plaintiff now moves for, among other things, an order granting it summary judgment on its complaint, as well as a preliminary injunction. Defendants oppose the motion and plaintiff has submitted a reply.

Summary judgment is a drastic remedy which should only be granted where there are no doubts as to the existence of a triable issue of fact (see *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Black v Kohl’s Dept. Stores, Inc.*, 80 AD3d 958, 959 [3d Dept 2011]). “[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Baird v Gormley*, 116 AD3d 1121, 1122 [3d Dept 2014]). If the proponent’s burden is met, “the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Town of Kirkwood v Ritter*, 80 AD3d 944, 945-946 [3d Dept 2011]).

In support of its motion, plaintiff has submitted the affidavit of Sgt J. McCoy, a Deputy Sheriff employed by the Schoharie County Sheriff’s Office. Therein, Sgt McCoy states that his office received a Warrant of Eviction for 208 Bassler. Defendants were listed on the Warrant, which was signed by a Town of Middleburgh Justice and dated September 26, 2018. He states:

“From research I have conducted at the County Tax Office the property appears to be land locked. For practical purposes there is a single point of access from Bassler Road to 208 Bassler Road which would allow vehicular travel (ie a moving truck). This entry point is blocked by a gate with numerous signs on it stating ‘no trespassing’ ‘Property under video surveillance’ amongst others. In front of the gate approximately 10 to 15 feet is a metal chain which appears to be an attempt to further prevent vehicular access which also displays signage stating ‘no trespassing.’ The Road frontage along Bassler Road in the property adjoining 208 Bassler [R]oad has been posted for trespass and a large portion of it is fenced. To access 208 Bassler Road to perform the eviction the private property of another person would have to be crossed. The property has been posted and personal property of its owner would have to be damaged in order to access the only possible roadway to the property to carry out the eviction. Extensive attempts were made at service of the warrant which was only able to be affixed when a gate was left open on a single occasion. Without a Court Order directing otherwise at the present time I am unable to carry out the eviction due to a lack of legal access to the property” (McCoy Affidavit in Support of Motion, at 1-2).

Plaintiff has also submitted the affidavit of Daniel J. Card, an associate broker at A-1 REO Services, LLC, plaintiff’s property manager. Therein, Mr. Card states that he has visited the subject premises on many occasions and has “observed that the premises do not have road access to conduct the eviction and removal of the personal possessions from the premises” (Card Affidavit in Support of Motion ¶ 2). He states that the only driveway into the premises is through Lot 12, and defendants have installed a locked and chained metal gate to prevent road access. He states that a photograph that he took of the Lot 12 entrance from Bassler Road is attached to his affidavit. Mr. Card further states:

“Lot 3 cannot be access 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” (id. ¶ 4).

He states that a photograph that he took of the premises at Bassler Road and Lot 4 is attached to his affidavit. Mr. Card states that, based upon the foregoing, plaintiff seeks access to Lot 12 to conduct the eviction.

Plaintiff has also submitted a number of exhibits in support of its motion, along with an attorney affirmation. Plaintiff's evidence demonstrates that Fred and Robin obtained title to 208 Bassler by deed dated September 7, 1995 from Edward G. Smith and Lynda G. Smith (see Affirmation in Support of Motion, Exhibit D). Fred and Robin thereafter transferred title to 208 Bassler to defendants Troy Dufek and Laurie Dufek (hereinafter Troy and Laurie) by deed dated July 5, 2012 (see id., Exhibit E). As noted above, plaintiff obtained title to 208 Bassler by referee's deed dated April 28, 2017 (see id., Exhibit C). In addition, Fred and Robin obtained title to Lot 12 by deed dated December 20, 2006 from the co-administrators of the Estate of Eugenia Grace Smith (see id., Exhibit F).

As an initial matter, defendants argue that plaintiff's motion is defective and should not be considered because plaintiff failed to include with its motion a statement of material facts as required by Uniform Trial Court Rule 202.8-g (b). The Court, upon due consideration, declines to deny plaintiff's motion on this ground. The undisputed material facts and those which the parties dispute are clear from the papers submitted. Moreover, the requirement that a party moving for summary judgment submit a statement of material facts is a relatively new requirement and, in an affirmation in reply, plaintiff's counsel acknowledges that he overlooked the rule and states that he "regrets [his] unintentional noncompliance" (Reply Affirmation ¶ 29). Counsel has submitted a statement of material facts with plaintiff's reply and requests that it be given nunc pro tunc effect. Counsel also points to the merits of plaintiff's motion as a reason to correct this irregularity. Based upon the foregoing, the Court, upon good cause shown and in the interests of justice, exercises its discretion to waive the requirements set forth in Uniform Trial Court Rule 202.8-g (see 22 NYCRR 202.1 [b]). In order to avoid any prejudice to defendants, the Court will not consider the statement of material

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